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WHITE ON CORPORATIONS

CONTAINING

THE LAWS AS AMENDED TO JANUARY 1, 1915,

CONCERNING

Business, Railroad, Ferry, Navigation, Stage Coach, Tramway, Pipe Line, Gas, Electric Light, Water-Works, Telegraph, Telephone, Turnpike, Plank-Road and Bridge Corporations and Joint-Stock Associations; Tax Laws, Code Provisions, etc.; affecting the foregoing Classes of Corporations,

TOGETHER WITH

DECISIONS, COMMENTARIES, FORMS AND PRECEDENTS

BY

HON. FRANK WHITE, M.A.

OF THE NEW YORK BAR,

Lecturer on Corporations at the Albany Law School;
Former Deputy Attorney-General of the State of New York;
Former Corporation Examiner, Office of the Secretary of State, etc.

EIGHTH EDITION

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the Author's Daughter,

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PREFACE TO EIGHTH EDITION.

Since the publication of the preceding edition of this book more than five years have elapsed. During this period of time, many important corporation statutes have been enacted and a vast number of cases have been decided by the courts interpreting the corporation laws and passing upon the various phases of corporate activities, all of which have rendered imperative the rewriting of the book.

Time, study and research have been given unsparingly to make this a practical treatise upon the incorporation, organization and management of corporations under the laws of the State of New York, while the statutes respecting the particular classes of corporations covered by the volume are also printed in their entirety. Many important problems which have never been the subject of judicial determination are discussed; apparently conflicting opinions have been analyzed, and nearly one hundred new forms of procedure have been added, many of the latter being the result of specialized practice in corporate matters. Especial care has been taken in the preparation of both the general index and the index to forms, and it is suggested that the index be consulted if in any instance references to the forms of procedure are not found under the particular section of the law to which they relate.

In conclusion the author again desires to express his sincere appreciation of the generous consideration accorded his books by the bench and bar.

FRANK WHITE.

32 Liberty Street, New York City.

March 3, 1915.

PREFACE TO SEVENTH EDITION.

There has been for at least two years a demand for a new edition of this work, but it was deemed advisable to defer such publication until the enactment of the impending consolidation of the general laws, which was effected during the legislative session of 1909, with the exception of the Railroad Law and the Public Service Commissions Law, which remain, respectively, as they were prior to January 1, 1909. It is gratifying to note in this connection that the labors of Messrs. Adolph J. Rodenbeck, Adelbert Moot, William B. Hornblower and John G. Milburn, the Commissioners of Statutory Consolidation, have received the cordial approval of the bar. The author takes what he hopes may be regarded as pardonable pride in the fact that at the invitation of the commissioners he was permitted to participate in some part of the work relative to the corporations laws.

An apology might possibly be due respecting the comparatively tardy appearance of this edition were it not for the fact that for the accomplishment of the best results, and in order to attain as nearly as possible accuracy and completeness, much time consuming research and deliberation have been necessary. The author's aim has been to produce a work that would merit a continuance of the generous support accorded him for the past fifteen years by the legal profession of this and other States. With this end in view he has exercised the utmost care. No other course seems justifiable in the preparation of a book of this character, particularly if one is to escape the serious errors of certain other books apparently prepared with much haste, which omit matters of extreme importance, contain statutes and references to statutes made obsolete by the Consolidated Laws, decisions reversed and superseded, and forms which ignore changes necessitated by the legislative enactments of 1909.

In the following pages it will be found that a large measure of attention has been paid to the case law, and that decisions of the courts have been grouped, analyzed, and explained under topical headings in a manner that includes all the advantages of a treatise,

with the additional convenience of having the text of the statutes printed in connection therewith for immediate reference. The severance of the text of the laws from the cases, especially in a volume devoted to one State, involves many disadvantages too obvious for enumeration. Every case decided by the courts has a direct bearing upon the construction of some particular provision of the statute law. The doctrine enunciated in the case and the discussion thereof pertain to certain sections of the law. It, therefore, seems awkward and undesirable to separate the cases and the statutory provisions so widely as to make an examination of either a matter of independent investigation.

The large extent to which the forms published in the earlier editions have been used by the profession and accepted by public officials, charged with the duty of filing corporation papers, has induced the amplification of that feature of this work by the preparation of many new ones, covering a wide range of subjects; however, there has been no desire to insert anything that could not be utilized in a practical way. They comprise a larger number of practical and reliable forms than are to be found in any other book upon the same subject.

The index has been very materially enlarged with numerous additional references whereby the large body of statute law and citations of cases are made more easily accessible and the general usefulness of the book enhanced.

In the preparation of this volume there has been no thought of pecuniary gain on the part of the author. His has been rather a labor of love. The extent of the book and the expense of producing it would preclude any other consideration. Any possible pecuniary reward that may come to him must necessarily be meagre and disproportionate to the unrelenting toil devoted to the task for many months, during most of which his daily activities did not cease until after midnight hours. The approval of the judges, lawyers, and public officials in the past has constituted the most satisfactory compensation, and will continue to be regarded as a goal worthy of achievement.

The author desires to express his appreciation for valuable aid rendered by Richard C. Harrison, Esq., and Godfrey Goldmark, Esq., talented members of the New York bar.

FRANK WHITE.

December 4, 1909, Mutual Life buildings, New York city.

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GENERAL CORPORATION LAW

Amended, May 24, 1923, ch. 732.

Laws of 1909, Chapter 28, Entitled: "An Act Relating to Corporations Generally, Constituting Chapter Twenty-three of the Consolidated Laws," as Amended to the Commencement of the Legislative Session of 1915.

CHAPTER 23 OF THE CONSOLIDATED LAWS

General Corporation Law

ARTICLE 1. Short title; classification; definitions (§§ 1–3).
2. General provisions (§§ 4–44).
3. Change of name (§§ 60–65).
4. Sale of corporate real property (§§ 70–76).
5. Judicial supervision of corporation and of the officers and members thereof (§§ 90–92).
*SECTION 6. Action for sequestration, action for dissolution and action to enforce individual liability of officers and members of corporation (§§ 100–115).
7. Action to annul corporation (§§ 130–136).
8. Action to dissolve moneyed corporation (§§ 150–161).
9. Proceedings for voluntary dissolution of corporation (§§ 170–195).
10. Dissolution of stock corporation without judicial proceedings (§§ 220, 221).
10-a. Provisions applicable to temporary and permanent receivers of corporations (§§ 226, 227).
11. Powers, duties and liabilities of receivers of corporation (§§ 230–278).
12. Provisions applicable to two or more of the foregoing proceedings or actions (§§ 300–316).
13. Alteration and repeal of charter of corporation (§§ 320, 321).
14. Laws repealed; construction; when to take effect (§§ 330–332).

ARTICLE 1

Short Title; Classification; Definitions

SECTION 1. Short title.
2. Classification of corporations.
3. Definitions.

§ 1. Short title. This chapter shall be known as the "General Corporation Law."

Neither the General Corporation Law nor the Stock Corporation Law contains the provisions for the formation of corporations. The General Corporation Law embodies the general provisions which are applicable to corpora-

* So in original.

tions of every kind organized under the laws of the State of New York, whether stock or non-stock corporations, unless specific exceptions are made. The commissioners of statutory revision found in each of the numerous laws for the creation and regulation of different classes of corporations many provisions common to all, which, being almost identical in phraseology, served to make the statutes of which they were component parts cumbersome and unwieldy without apparently serving any good purpose. To illustrate: Each act authorizing the organization of new corporations provided the same method of filing and recording certificates, an unvarying reproduction of the general powers contained in the Revised Statutes, and other matters in the line of uniform corporate legislation. Pursuant to the plan of the revisers, these provisions, so frequently re-enacted in different corporation acts and applicable to all corporations, except as stated, were consolidated and grouped into one general act, entitled the General Corporation Law, the full text of which appears on these pages. The Stock Corporation Law, comprising the provisions common to stock corporations only, is the result of the same method of generalization, so that in the several laws authorizing the formation of various kinds of corporations having capital stock, to wit: The Railroad Law, the Banking Law, the Insurance Law, the Transportation Corporations Law (telegraph, gas and electric light, waterworks, pipe-line, navigation, etc., corporations) and the Business Corporations Law, only those matters have been inserted which are peculiar to the particular class provided for, all other provisions applicable to corporations formed under either of said laws being found in the General Corporation Law and the Stock Corporation Law. The plan thus adopted was adhered to by the commissioners of statutory consolidation in 1909.

The provisions of the General Corporation Law and the Stock Corporation Law are also applicable to corporations heretofore organized under either of the general laws for the formation of corporations which were repealed in 1890 and 1892, as well as to corporations organized under special acts.

Consolidators' General Note.

Various matters from the Code of Civil Procedure and independent statutes have been added to the General Corporation Law for the purpose of bringing together so far as possible the provisions relating generally to corporations. Most of the added matter is in the nature of actions and proceedings relating to corporations. The provisions in the Code of Civil Procedure relating to changing the name of a corporation and the sale of corporate real property have been inserted as well as the various articles of the Code of Civil Procedure relating to the judicial supervision of corporations and officers and members thereof and actions for sequestration, for dissolution, for annulment and proceedings for voluntary dissolution.

The provisions in the Stock Corporation Law relating to the voluntary dissolution of a stock corporation have been consolidated in this chapter as well as those relating to the dissolution of moneyed corporations which are now in the form of an independent statute.

There has been added to the law as a separate article the provisions relating to the powers, duties and liabilities of receivers of corporations.

This material was formerly scattered along the road of legislation from 1829 down to the present time. The provisions of the Revised Statutes were found in two separate chapters, one relating to receivers appointed in proceedings for the voluntary dissolution of a corporation and the other relating to trustees of insolvent debtors. These were made applicable by the re-

pealing act of 1880, Ch. 245. From 1829 down to the time of the adoption of the Code of Civil Procedure, and after the adoption of the Code of Civil Procedure, various independent statutes were enacted upon the subject of insolvent corporations and receivers. All the statutory provisions applicable to the powers, duties and liabilities of receivers as found in this legislation have been consolidated in one article and by a suitable reference have been made applicable to actions and proceedings as now provided by law. The following independent acts have thus been disposed of: L. 1880, ch. 537; L. 1883, ch. 378; L. 1884, ch. 285; L. 1898, ch. 522; L. 1898, ch. 534; L. 1904, ch. 754. L. 1852, ch. 71 has been treated in the Insurance Law. L. 1886, ch. 271 was repealed by L. 1892, ch. 687, and L. 1886, ch. 310 has been repealed herein as unconstitutional pursuant to the authority of People v. O'Brien, 111 N. Y. 1.

§ 2. Classification of corporations. A corporation shall be either,

1. A municipal corporation,
2. A stock corporation, or
3. A non-stock corporation.

A stock corporation shall be either

1. A moneyed corporation,
2. A railroad or other transportation corporation, or
3. A business corporation.

A non-stock corporation shall be either,

1. A religious corporation,
2. A membership corporation, or
3. Any corporation other than a stock corporation.

A reference in a general law to a class of corporations described in accordance with this classification shall include all corporations theretofore formed belonging to such class.

Formerly § 2, as added by L. 1892, ch. 687.

Consolidators' General Note.

The proposed amendments to this section relating to classification of corporations are made necessary in order to conform its provisions to the present classification of corporations. This section, when enacted, was intended to indicate the classification into which all corporations were to be divided. The revisers, however, did not adhere to the classification as laid down, and as new general laws were enacted, the original classification was in great part abandoned. Thus, there is no "mixed corporation" known to our laws, and all matter relating to such a class of corporations has been omitted. The words "railroad or other" relating to transportation corporations have been inserted so as to make the application of the language plainer. This will make unnecessary further sub-classifications of either "moneyed" or "transportation" corporations.

The words "Any corporation other than a stock corporation" have been inserted as descriptive of all non-stock corporations authorized by laws other

than the Religious and Membership corporation laws. This classification of non-stock corporations corresponds to the actual classification now in use. It will include corporations organized under the proposed "Education Law," under the Health Law, and all other general or special laws.

The different chapters of the general laws relating to the organization and regulation of corporations for purposes peculiar to themselves sufficiently define and describe such corporations. Therefore, an enumeration of all the corporations organized for all kinds of purposes under all existing laws, as was attempted in the section, is unnecessary and only tends to confuse. The number and variety of such corporations has greatly increased since the section was enacted, and will probably further increase in the future and make constant amendment of the section necessary.

In fact the section has been open to much criticism for some years.

The paragraph providing that membership corporations shall include benevolent orders has been omitted for the reason that benevolent orders are now governed by a separate chapter of the general laws, and fire and soldiers' monument corporations are expressly provided for in the Membership Corporations Law. This paragraph, therefore, is obsolete and unnecessary, as the nature of such corporations are sufficiently described in the laws referred to.

§ 3. Definitions. 1. A "municipal corporation" includes a county, town, school district, village and city and any other territorial division of the state established by law with powers of local government.

2. A "stock corporation" is a corporation having a capital stock divided into shares, and which is authorized by law to distribute to the holders thereof dividends or shares of the surplus profits of the corporation. A corporation is not a stock corporation because of having issued certificates called certificates of stock, but which are in fact merely certificates of membership, and which is not authorized by law to distribute to its members any dividends or share of profits arising from the operations of the corporation.

3. The term "non-stock corporation" includes every corporation other than a stock corporation.

4. A "moneyed corporation" is a corporation formed under or subject to the banking or the insurance law.

5. A "domestic corporation" is a corporation incorporated by or under the laws of the state or colony of New York. Every corporation which is not a domestic corporation is a foreign corporation, except as provided by the code of civil procedure for the purpose of construing such code.

6. The term "directors," when used in relation to corporations, shall include trustees or other persons, by whatever name known, duly appointed or designated to manage the affairs of the corporation.

7. The term "certificate of incorporation" shall include articles of association or any other written instruments required by law to be filed, to effect the incorporation of a corporation, including a certified copy of an original certificate of incorporation filed for such purpose in pursuance of law.

8. The term "member of a corporation" shall include every person having a right to vote at a meeting of the corporation for the election of directors, other than a person having a right to vote only upon a proxy.

9. The term "office of a corporation" means its principal office within the state, or principal place of business within the state if it has no principal office therein.

10. The term "business of a corporation," when used with reference to a non-stock corporation, includes the operations for the conduct of which it is incorporated.

11. The term "corporate law" or "laws," when used in any law forming a part of the consolidation of the general laws of the state of which this chapter is a part, means the general statutes of this state relating to corporations included in such consolidation.

12. The existence of an easement in real property acquired or reserved by a municipal corporation, a railroad corporation or other transportation corporation, shall not be deemed an encumbrance upon such real property under any law relating to investments in mortgages upon real property by corporations, trustees, executors, administrators, guardians or other persons holding trust funds, but the effect of such an easement upon the real property which it affects, shall be taken into consideration in determining the value thereof.

Thus am'd by L. 1914, ch. 128, by which subd. 12 was added to the section.

Formerly L. 1890, ch. 563, § 2, as am'd by L. 1892, ch. 687; L. 1895, ch. 672.

A building and loan association incorporated under L. 1851, ch. 122 (now article 7 of the Banking Law), having capital stock divided into shares, is a stock corporation within the meaning of this section. Leighton v. Leighton Lea Assn., 62 Misc. 73 (1909); Buker v. Steele, 43 N. Y. Supp. 346 (1896).

A railroad corporation formed by the consolidation of foreign and domestic companies is a domestic corporation and provisions of law relating to domestic corporations are applicable to the new corporation. Sage v. Lake Shore & Mich. So. Ry. Co., 70 N. Y. 220 (1877); Matter of Cooley, 186 N. Y. 220 (1906), revsg. on other grounds 113 A. D. 388.

Paragraph 6, in relation to directors and trustees, appears to be merely a definition of terms, and to make the word "directors," when used in these

laws, applicable to corporations in which the members of the managing board are termed trustees, governors, trustees, etc.

Under the definition in paragraph 2, a railroad corporation is, of course, a stock corporation. Oelbermann v. N. Y. & Northern R. R. Co., 77 Hun 332 (1894).

Moneyed Corporations.

Mutual insurance companies have been held, for certain purposes, to be moneyed corporations. Peo. ex rel. Mutual Life Ins. Co. v. Bd. of Supervisors, etc., 16 N. Y. 424 (1857).

Every association organized under an act to authorize the business of banking is a moneyed corporation. Tallmadge v. Pell, 7 N. Y. 328 (1852).

Principal Office.

Laws of 1895, ch. 672, amending this section, eliminated from paragraph 9, a provision which read as follows: "The office of a stock corporation shall be in the county, town or city in which its business is principally carried on."

Under the foregoing section the terms "principal office" and "principal place of business" are synonymous when used in respect to corporations organized under the laws of this State. Peo. ex rel. Knickerbocker Press v. Barker, 87 Hun 341, affd., 147 N. Y. 715 (1895).

A corporation is deemed a resident of the county where its principal business office is located. Conroe v. Nat'l Pro. Ins. Co., 10 How. Pr. 405 (1855); Rossie Iron Works v. Westbrook, 36 St. Rep. 555 (1891).

There is a dictum in a tax case to the effect that the statement of the location of its principal office or place of business is a condition precedent to the organization of a business corporation, and, should it appear that the location of its principal office was willfully misstated in the certificate, or in case the corporation should change its principal place of business, without effecting a legal change of residence, for the purpose of evading taxation, it might present a case under the foregoing section for the attention of the Attorney-General. Peo. ex rel. Knickerbocker Press v. Barker, 87 Hun 341 (1895), affd. on op. below, 147 N. Y. 715. At the time this proceeding was instituted section 3 of the General Corporation Law provided that "the office of a stock corporation shall be in the county, town or city in which its business is principally carried on," which provision has been eliminated from said statute by the amendment of 1895, chapter 672.

The designation, in the certificate of incorporation, of the location of the principal office is conclusive as to the taxation of the personal property of a corporation. Union Steamboat Co. v. Buffalo, 82 N. Y. 351 (1880); Western Transp. Co. v. Schen, 19 N. Y. 408 (1859); Oswego Starch Factory v. Dolloway, 21 N. Y. 449 (1860). In the Union Steamboat Co. case, supra, the business of the corporation was the transportation of freight and passengers on the great lakes, all the other business of the company being conducted at the city of Buffalo, except the annual meetings, which were held in Rockland county, and it was urged, therefore, that the purpose for which the principal office of the plaintiff was located in the county of Rockland was to avoid taxation. The court held that to be immaterial, that it had nothing to do with the motive, and could deal only with the fact, and that if such an evil existed, another authority must provide for its correction.

Residence of Corporation.

Under the Code, § 984, a foreign railroad corporation is deemed to have a residence in any county through which it operates its road. Polley v. Lehigh Val. R. R. Co., 138 A. D. 636 (1910), affd. 200 N. Y. 585. This is also true of a domestic railroad corporation. Poland v. United Traction Co., 88 A. D. 281 (1903), affd. 177 N. Y. 557.

On motion for change of venue, a corporation is a resident of the county where it has its principal office. Finch School v. Finch, 144 A. D. 687 (1911).

The Charter.

The charter of a corporation formed under general laws is the statute under which it was organized. Upon filing the certificate of incorporation it comes into existence with power to do only that which is expressly or impliedly authorized by the statute. Peo. v. Ballard, 134 N. Y. 269 (1892). Compare Matter of White, 118 A. D. 869 (1907).

National Banks, when Domestic Corporations.

A corporation created by act of Congress, if it is located in the State of New York alone, is a domestic corporation, but it derives its powers and faculties from the sovereign creating it, and from no other source, and it is subjected to whatever limitations and disabilities grow out of the laws of the United States. McLanahan v. Mott, 73 Hun 131 (1893).

A national bank is to be deemed a citizen of the State in which it is located. Matter of Tuttle v. Iron Nat. Bk., 170 N. Y. 9 (1902); Peo. ex rel. Lorge v. Con. Nat. Bk., 105 A. D. 409 (1905).

The Code of Civ. Pro., § 3343, subd. 18, for the purpose of construing the same provides as follows: A "domestic corporation," is a corporation created by or under the laws of the State; or located in the State, and created by or under the laws of the United States, or by or pursuant to the laws in force in the colony of New York before the 19th day of April, in the year 1775. Every other corporation is a "foreign corporation."

Application of Corporate Laws.

For general provisions applicable to all stock corporations, see the Stock Corporation Law.

For provisions specially applicable to business corporations, and for the formation thereof, see the Business Corporations Law.

For provisions respecting the formation of, and specially applicable to, ferry corporations, stage-coach corporations, tramway corporations, pipe-line corporations, gas and electric light corporations, waterworks corporations, telegraph and telephone corporations, navigation corporations, turnpike, plank-road and bridge corporations, see the Transportation Corporations Law, and the Public Service Commissions Law, post.

For provisions respecting the formation of, and specially applicable to, railroad corporations, see the Railroad Law and the Public Service Commissions Law, post.

The provisions regulating municipal corporations are not within the scope of this work, which is devoted to what are usually termed private or stock corporations, with this exception, however, that the Banking Law and the Insurance Law are not within the purview of this volume, nor does it contain the laws specially applicable to non-stock corporations, namely: Membership and religious corporations and benevolent orders.

ARTICLE 2

General Provisions

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10. Limitation of powers; provisions of certificate.
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42. When notice of lapse of time unnecessary.
43. As to acts of directors.
44. Political contributions prohibited; penalty.

Am'd.

§ 4. Qualifications of incorporators. A certificate of incorporation must be executed by natural persons, who must be of full age, and at least two-thirds of them must be citizens of the

United States and one of them a resident of this state. This section shall not apply to a corporation formed by the reincorporation or consolidation of existing corporations, or to the reorganization of a corporation upon the sale of the property and franchises of a previously existing corporation or otherwise.

Formerly § 4, added by L. 1892, ch. 687, as am'd by L. 1895, ch. 672.

Prior to the amendment of 1895, chap. 672, at least a majority of the persons who sign a certificate of incorporation were required to be residents of this State. Now one resident is sufficient. Several of the former statutes also provided that all the incorporators be citizens of the United States.

The terms of the foregoing section preclude corporations, co-partnerships and minors from acting as incorporators. It also prevents the formation of corporations by persons acting in a representative capacity.

An incorporator has no power, in his capacity as notary public, to take the acknowledgment of another incorporator to the certificate of incorporation, and an acknowledgment so taken is a nullity. Peo. ex rel. Erie R. R. Co. v. Bd. of R. R. Comrs., 105 A. D. 273 (1905).

Incorporators cannot delegate the power to agree upon the terms of incorporation. In re N. Y., L. & W. R. R. Co., 35 Hun 220, affd., 99 N. Y. 12 (1885).

Promoters of a corporation may, before incorporation, agree as to the management thereof. King v. Barnes, 109 N. Y. 267 (1888). But see Flaherty v. Cary, 62 A. D. 116, affd., 174 N. Y. 550 (1903).

After accepting the benefits under a plan adopted by its promoters, the corporation becomes subject to the terms of the plan. Rogers v. N. Y. & Texas Land Co., 134 N. Y. 197 (1892).

Each member of a firm, engaged under the firm name in organizing a corporation, is liable for the misrepresentations and concealments of the others, committed in promoting the enterprise. Walker v. Anglo-Am. M. & T. Co., 72 Hun 334 (1893).

The formation of a corporation by a firm, financially embarrassed, and only two years before assignments for the benefit of creditors by the members of the firm, does not, in itself, afford any evidence of an intent to defraud the firm creditors, there being no evidence showing a connection between these two acts. First Nat. Bk. v. Wood, 86 Hun 491 (1895), affd., 157 N. Y. 690.

Persons engaged in organizing a corporation, who induce others to subscribe for stock, by issuing statements, are liable for damages if they make material misrepresentations, or conceal material facts, to the injury of those whom they induce to subscribe, and this liability extends to all who are induced by their agents to subscribe for shares. Walker v. Anglo-Am. M. & T. Co., 72 Hun 334 (1893); Brewster v. Hatch, 122 N. Y. 349 (1890); Morgan v. Skiddy, 62 N. Y. 319 (1875); Getty v. Devlin, 54 N. Y. 403 (1873); 70 N. Y. 504 (1877).

A purchaser of shares from a stockholder in an existing corporation has no interest in the application of the money paid therefor, but it is different with one who agrees to subscribe for shares in a corporation to be created. Walker v. Anglo-Am. M. & T. Co., 72 Hun 334 (1893).

Married Women May be Incorporators.

Married women who are qualified as to age and citizenship, as well as single women, may act as incorporators. Peo. v. Webster, 10 Wendell 554 (1833). Another ruling in this case to the effect that when a married woman

sues, or is sued, her husband must be joined with her, has been superseded by L. 1884, ch. 381 (now Domestic Relations Law, § 51). The full text of said section is as follows:

§ 51. **Powers of married woman.**—A married woman has all the rights in respect to property, real or personal, and the acquisition, use, enjoyment and disposition thereof, and to make contracts in respect thereto with any person, including her husband, and to carry on any business, trade or occupation, and to exercise all powers and enjoy all rights in respect thereto and in respect to her contracts, and be liable on such contracts, as if she were unmarried; but a husband and wife cannot contract to alter or dissolve the marriage or to relieve the husband from his liability to support his wife. All sums that may be recovered in actions or special proceedings by a married woman to recover damages to her person, estate or character shall be the separate property of the wife. Judgment for or against a married woman, may be rendered and enforced, in a court of record, or not of record, as if she was single. A married woman may confess a judgment specified in section one thousand two hundred and seventy-three of the code of civil procedure. Formerly L. 1884, ch. 381, as re-enacted and am'd by Domestic Relations Law of 1896, ch. 272, § 21; re-enacted by L. 1909, ch. 19, § 51.

Since ch. 381, L. 1884 (now Domestic Relations Law, § 51) was enacted all disabilities of a married woman to make valid contracts are removed, and she may now make contracts and bind herself in the same way as a femme sole. Where such a contract is made she is no longer to be considered as acting as the agent of her husband. O'Connell v. Shera, 66 A. D. 467 (1901).

Promoters.

See also, "Power of Promoter to Bind Corporation" and "Liability of Promoters," under section 2 of the Business Corporations Law.

It is well settled that promoters can make no contract for the corporation; that it comes into existence unfettered by any contract obligation, and can become bound by their agreement only through the subsequent acts of its board of directors or officers, within the apparent scope of their duties, ratifying, accepting or adopting it. Bond v. Atlantic Terra Cotta Co. 137 A. D. 671 (1910), citing Munson v. Syracuse, Geneva & Corning R. R. Co. 103 N. Y. 58 (1886); Oakes v. Cattaraugus Water Co. 143 N. Y. 430 (1894); Dillon v. Coml. Cable Co. 87 Hun, 444 (1895); Martin v. Remington-Martin Co. 95 A. D. 18 (1904); Rogers v. N. Y. & Texas Land Co. 134 N. Y. 197 (1892).

If a corporate organization intended to be formed is created according to the requirements of the statute, and the objects contemplated by it are lawful, there is no principle of public policy which forbids competent parties from entering into an agreement to form it, and provide for its future management and control, if conducted according to the rules of law respecting such a subject. King v. Barnes, 109 N. Y. 267, 289 (1888).

It is not competent for a corporation, by adopting or ratifying an agreement made with promoters or otherwise, to provide for the management of the corporate affairs in a manner different from that prescribed by the statute under which the corporation was organized. Bond v. Atlantic Terra Cotta Co. 137 A. D. 671 (1910).

In discussing agreements of promoters, Judge Andrews has said: "I can see no objection on the score of public policy, to an agreement between the parties about to form a corporation, agreeing upon the general plan upon

which it is to be organized and conducted, so long as nothing is provided for inconsistent with the provisions of the statute, or immoral in itself. An agreement providing for the details of management made in advance, might not be binding upon the directors of the corporation when organized, but such an agreement is not illegal." Lorillard v. Clyde 86 N. Y. 384, 389 (1881).

Promoters of a corporation have no statutory authority to enter into preliminary contracts binding the corporation when it shall come into existence. Such contracts may bind the individuals who make them. If adopted by the corporation, and they are within the corporate powers, and are not otherwise subject to objection, they may become the contracts of the corporation and enforcible as such. Munson v. Syracuse, Geneva & Corning R. R. Co., 103 N. Y. 58, 76 (1886). Promoters are in no sense identical with the corporation, nor do they represent it in any relation of agency, and their contracts could only bind the corporation so far as they should be subsequently adopted by it as their successors. The corporation is at liberty to refuse to sanction them, and if its sanction is obtained by the act or co-operation of directors who have a private interest, the corporation may resist an action for specific performance, at least in the case where it has not accepted the consideration and taken the benefit. Id.

A corporation is not bound by an agreement made between its promoters prior to its organization unless it ratifies such agreement; therefore, an increase in the capital stock for the legitimate corporate purposes will not be enjoined, at the suit of promoter, who claims that under an agreement with another promoter prior to the organization of the corporation he was to have a one-sixth interest therein, and that the proposed increase will defeat such agreement. Martin v. Remington-Martin Co. 95 A. D. 18 (1904).

Where two persons enter into a contract, relative to a corporation to be organized by them, for the purchase and sale of shares of stock at the book value as shown on the accounts of the corporation, and thereafter one of the parties causes the good will value to be reduced on the books to a mere nominal sum, a court of equity, in a suit against such party and the corporation, will not interfere with the management of the books, especially when no provision was made as to the method of keeping the books and the corporation was not a party to the agreement. Ducklieb v. Harris, 209 N. Y. 211 (1913), revsg. 155 A. D. 83.

Where a mortgage was given to promoters, without the knowledge of subscribers and stockholders, to enable such promoters to reap secret profits, and subscribers to stock to the extent of $67,000 were privy to the fraud and other subscribers to the extent of $48,000 relied upon fraudulent representations or were defrauded by concealments as to such mortgage and it was assigned for value without knowledge on the part of the assignees that it was subject to any defenses; held that an equitable result may be obtained by ascertaining who were defrauded and directing that they have their remedy through the plaintiff corporation; that the mortgage be cancelled unless the damages of those defrauded be paid, in which latter case the moneys should be held by the plaintiff as trustee for distribution to the persons defrauded. Hyde Park Terrace Co. v. Jackson Bros. Realty Co. 161 A. D. 699 (1914).

False representation that stock is fully paid and nonassessable will support an action for fraud against a promoter. Van Slochem v. Villard, 207 N. Y. 587 (1913), affg. 154 A. D. 161.

Where the owners of the assets of a company agreed to organize a corporation to carry on the business and to transfer the assets to such corporation in payment for its corporate stock and bonds which were to be dis-

tributed among them in specified amounts and part of which were to be by them transferred to the corporation to enable it to raise money; and where, in violation of such agreement, some of the parties received more than their shares of the stock and bonds and none were transferred to the corporation, the corporation cannot maintain an action against those who received more than the amounts to which they were entitled, the right of action, if any, being in the parties to the agreement who were injured by the breach of its terms. Flanagan v. Lyon, 54 Misc. 372 (1907).

Stock issued in payment for services rendered by a promoter in bringing a corporation into existence can not be regarded as having been paid for. Herbert v. Duryea, 34 A. D. 478 (1898), affd. 164 N. Y. 595, 596; Stevens v. Episcopal Ch. History Co., 140 A. D. 570, 582 (1910); Lamphere v. Lang, 157 A. D. 306 (1913).

Where a promoter and others agreed to form a corporation, elect certain officers at fixed salaries and issue stock in certain proportions, equity will not compel specific performance, but an action at law for damages for breach of contract will lie. Perrin v. Smith, 135 A. D. 127 (1909).

Statements in the prospectus of a promoter that officers of a proposed corporation are to receive no salary do not preclude directors of the corporation subsequently created from paying salaries to its officers. Metzger v. Knox, 77 Misc. 271 (1912).

Where the agent and organizer of a syndicate to purchase certain properties sells property of his own to the new corporation without knowledge of the other subscribers, the agreement is voidable because an agent to buy may not purchase of himself. Upon tender of the stock received under the agreement a recovery may be had of the moneys paid even though some part thereof had already been expended in the purchase of other properties. Heckscher v. Edenborn, 207 N. Y. 210 (1911), revsg. 137 A. D. 899.

Where a promoter of a corporation falsely misrepresented the price for for which real estate could be acquired, and received from the corporation stock which was not covered by any actual payment but which represented merely the proceeds of his misrepresentation, there was, as between him and the corporation no consideration for his stock and it was properly cancelled as void, either in his hands or in the hands of one claiming under him. Travis v. Travis, 140 A. D. 191 (1910), citing Duncomb v. N. Y., H. & N. R. R. Co. 84 N. Y. 190 (1881); Redhead v. Parkway Driving Club, 148 N. Y. 471 (1896).

Where minority stockholders seek to impress with a trust, funds received by a promoter for property sold by him to the corporation at an enchanced price as a result of the fraud of promoters, the trial court having disposed of the charge of fraud and conspiracy and the basis of recovery being the tracing of such trust funds to the promoter, it is the duty of plaintiffs to prove that such promoter still has the money in his possession. Ebling v. Nekarda, 148 A. D. 193 (1911). The action being derivative the decree should provide for payment to the corporation, not to plaintiffs personally. Id.

Where a person has been induced to purchase stock by false and fraudulent representations of material facts contained in a prospectus, he may rescind the purchase and recover back the purchase price from the corporation, and he is also entitled to recover from the individual directors who knowingly issued or sanctioned the circulation of such false prospectus any damage that he sustained in consequence of the fraud. Lehman-Charley v. Bartlett, 135 A. D. 674 (1909), affd. 202 N. Y. 524. Such individual directors and the corporation may be joined as defendants in one action. Id.

Directors, who are also the promoters, knowing that attempts are being made to induce the public to subscribe to the stock of the corporation, or to purchase its securities, cannot wilfully shut their eyes to the acts of other officers or agents of the corporation as to methods used to procure money from the public. They cannot authorize the issue of circulars and other appeals to the public to secure subscriptions and not be responsible for false and fraudulent statements by which investments in its securities are procured. Rives v. Bartlett, 156 A. D. 552 (1913).

The promoter of a corporation, whether he be a director or not, who knowingly issues or sanctions the circulation of a false prospectus containing untrue statements of material facts tending to mislead and to induce purchases of its stock or other securities is responsible to those who are injured thereby, and where there are a number of such promoters all of them are liable in damages for the fraud of an agent employed by them to effect the sale of the corporate securities without reference to their own moral guilt or innocence. Downey v. Finucane, 205 N. Y. 251 (1912), affg. 146 A. D. 209.

The fraudulent intent of the author and publisher of a prospectus may be inferred from the falsity of the statements therein contained. Where a prospectus is circulated, as an inducement to take stock in a corporation, the language is to be interpreted by the effect it would produce upon an ordinary mind; and, in estimating the probability of subscribers being misled, the court may take into consideration not only the facts stated therein but also the facts suppressed. Downey v. Finucane, 205 N. Y. 251 (1912), affg. 146 A. D. 209.

Corporation Formed Pursuant to Terms of Will.

Where a testator directed the creation by his testamentary trustees of a corporation to which they should transfer part of his residuary estate, such corporation, when formed as directed by the testator, must be created and its affairs conducted as required by statute and not according to the terms of the testamentary trust so far as they are in conflict with the statutes. Boyle v. Boyle & Co., Inc., 136 A. D. 367 (1910); aff'd 200 N. Y. 597. Where part of the residuary estate is conveyed to such corporation by the trustees in exchange for its capital stock, such property ceases to be subject to the provisions of the trust estate, the stock received in return being substituted therefor. Id.

Where a testator in his will provided that a corporation be formed to carry on his business, named the directors and directed that the stock be held by his executors, and that the corporate acts should be approved by his widow or by a majority of those named in the will to serve as directors, the executors hold such stock subject to the necessity of having their acts approved by the persons thus designated. Elger v. Boyle, 69 Misc. 273 (1910).

§ 5. Filing and recording certificates of incorporation. 1. Every certificate of incorporation and every amended or supplemental certificate, and every certificate which alters the provisions of any certificate of incorporation or any amended or supplemental certificate hereafter executed, shall be in the English language, and except as otherwise provided by law, shall be filed in the office of the Secretary of State, and shall be by him duly recorded and indexed in books specially provided therefor, and a certified copy of

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such certificate or amended or supplemental certificate with a certificate of the Secretary of State of such filing and record, or a duplicate original of such certificate or amended or supplemental certificate shall be filed and similarly recorded and indexed in the office of the clerk of the county in which the office of the corporation is to be located, or, if it be a non-stock corporation, and such county be not determined upon at the time of executing the certificate of incorporation, in such county clerk's office as the judge approving the certificate shall direct. Nothing herein contained, however, shall be deemed to prohibit a corporation from having and using a corporate name or title in a language other than the English language if the same be in English letters or characters. All taxes required by law to be paid before or upon incorporation and the fees for filing and recording such certificate must be paid before filing. No corporation shall exercise any corporate powers or privileges until such taxes and fees have been paid.

2. Whenever under any law now or heretofore in force the certificate of incorporation of any corporation other than a stock corporation was or is required to be filed in more than one public office, a certified copy of such certificate so filed in any one of such public offices may be filed in such other office with the like effect as if the original had been duly filed therein, provided, however, that no rights accrued prior to the filing of such copy shall be impaired or affected thereby, provided also, that such filing of a copy shall not cause a duplication or similarity of corporate names in violation of the next succeeding section.

Formerly § 3, L. 1890, ch. 563, as am'd. by L. 1892, ch. 687; L. 1895, ch. 672; L. 1902, ch. 285; L. 1913, ch. 479.

The amendment of 1913 inserted in subd. 1 the second sentence reading: "Nothing herein contained," etc.

By an amendment of 1895, ch. 672, the provision was inserted requiring certificates to be in the English language. The words, "including the corporate name or title," were inserted by L. 1902, ch. 285.

Under the above section an original certificate must be filed in the office of the Secretary of State, and either a certified copy thereof or a duplicate original in the office of the county clerk.

Consolidators' General Note.

This section relates to filing of certificates in the office of the secretary of state by corporations generally, and it also contains exceptions. Thus, except in the case "of a religious, cemetery, moneyed, municipal or fire department corporation." The wording of the exception has been changed in the proposed section to "except as otherwise provided by law." This change is necessary because the exceptions referred to are incorrect.

(a) In the case of religious corporations it is provided by the Religious Corporations Law (L. 1895, ch. 723, § 3), that in some cases the certificate should be filed in the office of the Secretary of State, and so the exception of this class of corporations is too broad.

(b) In the case of cemetery corporations it is now provided by the Membership Corporations Law (L. 1895, ch. 559, § 41) that the certificates of such corporations should be filed in the office of the Secretary of State. This exception, therefore, is erroneous.

(c) In the case of moneyed corporations the Insurance Law (L. 1892, ch. 690, § 263) provides that the certificates of town and county co-operative insurance companies shall be filed in the office of the Secretary of State. The exception of moneyed corporations is, therefore, not entirely correct.

(d) As to the exception of fire department corporations, it is sufficient to say that there are none such now provided for. Fire companies are included in the Membership Corporations Law (L. 1895, ch. 559), and they do not belong in the exception.

(e) There are also district dental societies whose certificates must be filed with the secretary of the State Dental Society (Public Health Law, L. 1893, ch. 661, § 162) and library corporations which may be chartered by the Regents. (University Law, L. 1892, ch. 378, § 27.) So to make the exception accurate it would have to include these and there may be others.

All these peculiar provisions and exceptions are, however, provided for by the phrase "except as otherwise provided by law," and it will be less confusing if the specific exceptions are not set forth in full. Under the section as proposed, it will not have to be amended every time the legislature creates an exception to the general law providing for the filing of certificates in the office of the Secretary of State.

For form of petition for writ of mandamus to compel Secretary of State to file certificate of incorporation, see Form No. 467.

For form of order to show cause in mandamus proceedings, see Form No. 468.

For other forms in mandamus proceedings, see Forms Nos. 469–471.

Acknowledgment.

One who is himself an incorporator may not take the acknowledgments of other incorporators. Peo. ex rel. Erie R. R. v. Railroad Comrs., 105 A. D. 273 (1905).

The acknowledgment may be taken before any officer authorized to take the acknowledgment or proof of the execution of a deed of real property to entitle it to be recorded in a county clerk's office, and shall be made and certified in the same manner as such acknowledgment or proof of such deed. Gen. Construction L. § 11.

The Secretary of State does not require a county clerk's certificate authenticating the act of a notary public or other officer taking an acknowledgment within the State of the execution of a corporation certificate to be filed in his office but where an acknowledgment is taken in one county and the duplicate original certificate is to be filed in the office of the clerk of another county, it is necessary to obtain a certificate of the clerk of the county in which the acknowledgment is taken authenticating the act of the officer taking such acknowledgment. Real Property L. § 310.

For various statutes relative to acknowledgments and affidavits, see the General Construction Law, post.

A notary public, who is a stockholder, director, officer or employee of a corporation may take the acknowledgment of any party to a written in-

strument executed to or by such corporation, or administer an oath to any other stockholder, director, officer, employee or agent of such corporation; but a notary public shall not take the acknowledgment of an instrument by or to a corporation of which he is a stockholder, director, officer or employee, if such notary be a party executing such instrument either individually or as representative of such corporation. Executive Law, section 105-a, added by L. 1913, ch. 334, as am'd by L. 1914, ch. 410. For full text of said section, see Gen. Const. Law, post.

Where a certificate of incorporation is to be filed in a county other than the one in which the acknowledgment of the incorporators was taken a certicate of the county clerk authenticating the act of the notary public must be attached. Opinion of Atty. Genl. (1911), p. 26.

An incorporator who acknowledges a certificate cannot make proof, as a subscribing witness, of the execution of the certificate by other incorporators who did not acknowledge the execution of the instrument, where such incorporator did not, in addition to signing the certificate as a party, also sign it as a subscribing witness. Peo. ex. rel. Long Island R. R. Co. v. Railroad Comrs. 75 A. D. 106 (1902).

The Attorney-General has held that the Secretary of State is not authorized to file a certificate of incorporation where the execution of the certificate by the incorporators is proved by a subscribing witness, and not by acknowledgment. He says that the corporation may be formed (using the statutory language) "by making, signing, acknowledging and filing the certificate;" that the acknowledgment is not required for the purpose of perfecting the instrument so that it may be recorded in the Secretary of State's office, but is necessary for the creation of the corporation. Opinion of Atty. Genl. (1911), Vol. 2, p. 651. In view of this opinion, the Secretary of State would probably reject a certificate of incorporation, the execution of which was proved by a subscribing witness; however, in a case decided in 1889 (Riker v. Cornwell, 113 N. Y. 115, 124), and prior to the enactment of sections 10 and 11 of the General Construction Law, referred to in the Attorney General's opinion, it was held that proof of the execution of a certificate by a subscribing witness was a sufficient compliance with the provisions of a statute, which provided that those desiring to form a corporation, "may make, sign and acknowledge before any officer authorized to take the acknowledgment of deeds in the State, and file in the office of the Secretary of State," etc. The Attorney General apparently has given no force or effect to the provisions of section 10 of the General Construction Law, which, although vague and ambiguous, seemingly are intended to mean that the term acknowledgment, when used with reference to the execution of instruments, other than deeds, include proof by subscribing witness. For text of the two above mentioned sections, see the General Construction Law, post.

Organization Tax; Filing and Recording Fees.

The act relative to the tax payable to the State Treasurer for the privilege of organization and for increasing the capital stock of corporations, the statutes prescribing the fees payable to the office of the Secretary of State and to county clerks, and tables respecting the same appear on pages 287–290.

Right to File.

In case the Secretary of State refuses to file a certificate the remedy is by mandamus. Peo. ex rel. N. Y. Phonograph Co. v. Rice, 128 N. Y. 591 (1891), affg. 57 Hun 486; Peo. ex rel. Eichemeyer-Field Co. v. Rice, 66 Hun 130 (1892), affd., 138 N. Y. 614; id., 51 St. Rep. 93.

The Secretary of State has a right to pass upon the form of the certificate, and as to whether or not it is entitled to be filed, subject to review in a proper proceeding. He is not required to file a certificate unauthorized by the act. The right to file a certificate, by which a body politic and corporate is to be ipso facto created, only exists in behalf of those who bring themselves within the terms of the act. Peo. ex rel. Blossom v. Nelson, 46 N. Y. 477 (1871); Peo. ex rel. Davenport v. Rice, 68 Hun 24 (1893); id., 22 N. Y. Supp. 631; id., 52 St. Rep. 50 (1893).

A motion for a mandamus to compel the Secretary of State to file a certificate can only be made in the third judicial district, or in a county adjoining thereto. Mason v. Willers, 7 Hun 23 (1876); Peo. ex rel. Cagger v. Supervisors, 2 Abb. N. S. 78. See also 68 Hun 24 (1893).

A mandamus will not issue to compel the filing of a certificate containing a clause which contravenes the provisions of the statute. Peo. ex rel. Barney v. Whalen, 56 Misc. 278 (1907), affd., 119 A. D. 749, and 189 N. Y. 560.

The Secretary of State will not be compelled to file the certificate of incorporation of a company to be formed as a social organization when its purposes are in reality those of a business corporation. Peo. ex rel. Davenport v. Rice, supra.

To restrain the Secretary of State or county clerk from filing a certificate, the proceedings should be by injunction. An injunction against the Secretary of State can only be granted by the Supreme Court at a term held in the third judicial department. Code of Civil Pro. § 605, post; Matter of Comstock, 25 St. Rep. 611 (1889).

Where a peremptory mandamus is applied for, which by its terms acts as a restraint upon State officers engaged in, or about to perform a statutory duty, and it is to be used as an injunction, the limitation upon the granting of such an injunction by section 605 of the Code of Civil Procedure applies; that is, it "shall not be granted, except by the Supreme Court at a term thereof, sitting in the department in which the officer or board is located, or the duty required to be performed." Peo. ex rel. Derby v. Rice, 129 N. Y. 461 (1891). But see Peo. ex rel. Platt v. Rice, 144 N. Y. 249, 261 (1894).

Effect of Filing.

A corporation de jure does not exist until the certificate of incorporation is filed in accordance with law. Childs v. Smith, 46 N. Y. 34; id., 38 How. Pr. 328 (1869).

Words and phrases in a statute, conferring upon a corporation its franchises and special privileges, which are ambiguous or admit of different meanings must receive that construction which is most favorable to the public. Peo. v. Broadway R. R. Co. of Bklyn., 126 N. Y. 29 (1901).

It would seem that the filing of the certificate in the office of the Secretary of State is sufficient to effect incorporation; and an omission to file the duplicate in the office of the county clerk would not vitiate the incorporation so as to render the members partners as between themselves. Raisbeck v. Oesterricher, 4 Abb. N. C. 444 (1878). See, also, Meriden Tool Co. v. Morgan, 1 Abb. N. C. 125, note (1875); Western Transportation Co. v. Scheu, 19 N. Y. 408 (1859); Oswego Starch Factory v. Dolloway, 21 N. Y. 449; Union Steamboat Co. v. City of Buffalo, 82 N. Y. 351 (1880); Jessup v. Carnegie, 80 N. Y. 441 (1880); Eaton v. Aspinwall, 19 N. Y. 121 (1859), affg. 3 Abb. Pr. 417; see also Card v. Moore, 68 A. D. 327 (1902), and cases therein cited; affd., 173 N. Y. 598.

The right to be a corporation is a distinct, independent franchise, complete within itself, having no necessary connection with other distinct franchises, which are the subjects of legislative grants, and which may or may not be given to corporations once created, as well as to natural persons, as to the Legislature may seem advisable. Southern Pac. R. Co. v. Orton, 32 Fed. 457 (1879).

Copartnership Liability upon Failure to File Certificate.

Where parties ineffectually attempt to create a corporation and they assume to enter into contracts they are deemed to be engaged in a joint venture and become individually liable upon principles applicable to a copartnership. Worthington v. Griesser, 77 A. D. 203, 208 (1902), citing King v. Barnes, 109 N. Y. 267; Wilcox v. Pratt, 125 N. Y. 688.

The mere execution and acknowledgment of a certificate of incorporation does not create a corporation de facto, and, if the subscribers to such certificate, before the filing thereof, transact business in the name of the corporation they doubtless thereby become liable as copartners. Stevens v. Episcopal Church History Co., 140 A. D. 570, 578 (1910).

Parties assuming to act in a corporate capacity without being incorporated are liable as partners to those with whom they contract. Fuller v. Rowe, 57 N. Y. 23 (1874).

Where the term of corporate existence had expired and the stockholders agreed to continue the business in the corporate name, by one of their number as manager, and to furnish money to carry on the business in proportion to the amount of stock held by each in the corporation, they became liable as partners to third persons and for all the debts contracted by such agent in carrying on the business on the ground that he had the power as partner to bind the others. Nat'l Union Bk. v. Landon, 45 N. Y. 410 (1871).

Where, after the term of existence of a corporation had expired, its general agent continued the business and contracted debts in the corporate name, and the stockholders, six months after the expiration of the charter, received dividends as from the earnings of the corporation, without notice that they were not so paid, and without knowledge of the expiration of the charter, such stockholders are not liable as copartners. Central City Sav. Bk. v. Walker, 66 N. Y. 424 (1876).

De Facto Corporations.

Where a corporation, organized under an unconstitutional act, assumed and exercised corporate powers thereunder, it became a corporation de facto, if not de jure, and it required the judgment of a competent court or an express act of the Legislature to terminate its existence. Coxe v. State of New York, 144 N. Y. 396 (1895).

Subscriptions to the stock of a de facto corporation are binding upon incorporators. Dorris v. French, 4 Hun 292 (1875); Eaton v. Aspinwall, 19 N. Y. 119 (1859); Dewitt v. Hastings, 69 N. Y. 518; L. O. R. R. Co. v. Munson, 16 N. Y. 451 (1857). See, also, Buffalo, etc., R. Co. v. Gifford, 87 N. Y. 294 (1882); Dorris v. Sweeny, 64 Barb. 636; id., 60 N. Y. 463 (1875).

A corporation de facto may legally do every act which the same entity could do were it a de jure corporation; and as to all the world except the paramount authority under which it acts, and from which it receives its charter, it occupies the same position as though in all respects valid; and,

even as against the State, except in direct proceedings to arrest its usurpation of power, its acts are to be treated as efficacious. Lamming v. Galusha, 81 Hun 247, affd., 151 N. Y. 648 (1897). The validity of a corporation cannot be impeached by third persons by showing aliunde the certificate of incorporation that certain requisites of the statute have not been complied with. Id.

Beween a corporation de facto and its officers a relation exists which will be recognized as effectual to enable them through such relation to justify the exercise of their functions in the management of its business, and for that purpose it is, as to third persons, no less effectual than a corporation de jure. Lamming v. Galusha, 81 Hun 247, affd., 151 N. Y. 648 (1897).

Partners agreed to do business as a corporation, obeying a part of the statutory requirements of incorporation, but omitting certain essentials, intending to stop short of the creation of a corporation; such action did not create a de facto corporation as between themselves. Card v. Moore, 68 A. D. 327 (1902), affd., 173 N. Y. 598.

The principle, that acts in the nature of corporate proceedings under color of organization may constitute a corporation de facto, is not applicable as between the parties to the proceedings, who have knowledge of the defects. Childs v. Smith, 55 Barb. 45, 38 How. Pr. 328; reviewed, 46 N. Y. 34 (1871).

The mere execution of a certificate of incorporation, which is not filed so as to become a public record, does not create a corporation de facto. Such a corporation is created only where there has been an attempt in good faith to comply with the statutory requirements, and a certificate has actually been filed in at least one of the specified offices, followed by user. Stevens v. Episcopal Church History Co., 140 A. D. 570 (1910). Such matters may be inquired into collaterally by any person whose interests are affected thereby. Id., and, also, cases cited.

Where there is no actual user of corporate powers, and the sole act consisted in filing a certificate of incorporation with a county clerk in New Jersey, but not with the secretary of state, a de facto corporation does not exist in that state and the parties to a contract made in such a case are liable as partners. Perrine v. Levin, 68 Misc. 327 (1910), citing Stout v. Zulick, 48 N. J. 601.

In order to establish the existence of a de facto corporation it is necessary to show not only that there is a law under which the corporation might be organized and an attempt to organize it, but also that corporate powers were thereafter exercised. Von Lengerke v. City of N. Y., 150 A. D. 98 (1912), citing M. E. Union Ch. v. Pickett, 19 N. Y. 482; Emery v. De Peyster, 77 A. D. 65; Van Buren v. Reformed Ch. of Gansevoort, 62 Barb. 495.

It being within the power of the legislature to prescribe the formalities necessary for the formation of a corporation, it can legalize a corporation, the formation of which was defective through failure to comply with the requirements of the law under which its incorporation was attempted. Smith v. Havens Relief Fund Soc., 44 Misc. 594 (1904).

Where the incorporators did not sign a certificate of incorporation at the end thereof, but did sign it above the attestation clause, and their acknowledgment of the execution thereof was duly attested and such certificate was filed as required by law, there was at least a de facto corporation. A stockholder cannot question the legal existence of such a corporation in order to escape liability to creditors upon stock not fully paid. Lyell Ave. Lumber Co. v. Lighthouse, 137 A. D. 422 (1910); 151 A. D. 902, affd., 208 N. Y. 628

Denial of Corporate Existence; Estoppel.

A person who subscribed to the capital stock of a corporation, cannot dispute the validity of the incorporation. Phoenix Warehousing Co. v. Badger, 67 N. Y. 294 (1876); Buf. & Allegany R. Co. v. Carey, 26 N. Y. 75 (1862). The same principle applies in respect to a subscriber to an increase of the capital stock. Veeder v. Mudgett, 95 N. Y. 295, 310 (1884).

One who contracts with an acting corporation cannot defend himself against a claim on such contract, in a suit by the corporation, by alleging the irregularity of its organization. Chubb v. Upton, 95 U. S. 665; Eagle Sav. & Loan Co. v. Samuels, 43 A. D. 386 (1899).

When a person has received the property of a corporation through a contract made with it in its corporate name, and there is also extrinsic proof of the user by it of corporate powers, he is estopped from disputing its incorporation in an action brought to compel an accounting for such property. Com'l Bk. of Keokuk v. Pfeiffer, 108 N. Y. 242, 254 (1888).

A stockholder of a corporation is estopped from denying the legal existence of the corporation; therefore, a defect in the proceedings to organize the corporation is no defense to the stockholder when sued to enforce his individual liability. Aspinwall v. Sacchi, 57 N. Y. 331, 338 (1874); Eaton v. Aspinwall, 19 N. Y. 119 (1859).

A plaintiff may not raise any question as to the corporate character of a company where he was a member of that body and had contracted with it in its corporate character. Whitford v. Laidler, 94 N. Y. 145, 151 (1883).

Where two parties enter into a contract, one of whom assumes to be and contracts as a corporation, it is estopped from denying its corporate existence. U. S. Vinegar Co. v. Schlegel, 143 N. Y. 537, 543 (1894).

Certificates of Moneyed Corporations.

Corporations organized under the Banking Law are required to file duplicate certificates of incorporation, one in the office of the clerk of the county where located, or the principal office of the corporation is to be situated, and the other in the office of the Superintendent of Banks. See Banking Law.

Corporations organized under the Insurance Law are required to file their certificates of incorporation in the office of the Superintendent of Insurance only, except in the case of town and county co-operative insurance corporations, which must file them in the office of the town or county clerk and in the office of the Secretary of State. See Insurance Law.

Am'd.

§ 6. **Corporate names.** 1. No certificate of incorporation of a proposed corporation having the same name as a corporation authorized to do business under the laws of this state, or a name so nearly resembling it as to be calculated to deceive, shall be filed or recorded in any office for the purpose of effecting its incorporation, or of authorizing it to do business in this state; nor shall any corporation except a religious, charitable or benevolent corporation be authorized to do business in this state unless its name has such word or words, abbreviation, affix or prefix, therein or thereto, as will clearly indicate that it is a corporation as distinguished from a natural person, firm or copartnership; or unless

such corporation uses with its corporate name, in this state, such an affix or prefix. A corporation formed by the reincorporation, reorganization or consolidation of other corporations or upon the sale of the property or franchises of a corporation, or a corporation acquiring or becoming possessed of all the estate, property, rights, privileges and franchises of any other corporation or corporations by merger, may have the same name as the corporation or one of the corporations to whose franchises it has succeeded. No corporation shall be hereafter organized under the laws of this state with the word "trust," "bank," "banking," "insurance," "assurance," "indemnity," "guarantee," "guaranty," "title," "casualty," "surety," "fidelity," "savings," "investment," "loan" or "benefit" as part of its name, except a corporation formed under the banking law or the insurance law.

2. No corporation, society or association, whether now existing or hereafter organized under or by virtue of the laws of this state, shall ever employ the words "Lucretia Mott" to designate, describe or name any hospital, infirmary or dispensary, or any part thereof, or any similar institution.

Formerly § 4, L. 1890, ch. 563, as am'd by L. 1892, ch. 687, § 6; L. 1895, ch. 672; L. 1900, ch. 704; L. 1902, ch. 9; L. 1907, ch. 115.

Further amended by L. 1911, ch. 638; L. 1912, ch. 2; L. 1913, ch. 24.

For provisions relative to change of corporate name, see §§ 60–65, post.

The amendment of 1911 inserted the requirement that the name, except in the case of a religious, charitable or benevolent corporation, must indicate that it is a corporation. The amendment of 1912 added the clause in regard to names of corporations upon merger. The amendment of 1913 extended the list of prohibited words so as to include the words "casualty," "surety," and "fidelity."

Change Made by Statute.

Formerly a domestic corporation could be formed with a name resembling that of a foreign corporation, and a foreign corporation was permitted to obtain a certificate of authority to do business within the State, even though its name conflicted with that of another foreign corporation previously authorized to do business in the State, but the amendment of 1902, ch. 9, broadens the prohibition so as to prevent both of such infringements upon the name of any foreign corporation that had theretofore received a certificate of authority.

Name Must Indicate that it is a Corporate Name.

The attorney-general has held (opinion of Jan. 8, 1912, Vol. 2, p. 10) that the use of the word "Company" in a corporate name, when not immediately preceded by the conjunction "and" is a compliance with this section, as amended by Chapter 638, Laws of 1911, which provides that there shall be an affix or prefix to clearly indicate a corporate name as distinguished from

that of a natural person, firm or copartnership; but this opinion has been superseded by a decision upon an application of the "American Cigar Lighter Company" for leave to change its name to "Electric Cigar Lighter Company." The application was denied upon the ground that the proposed name had not, as a part thereof, some word, abbreviation, affix or prefix thereto, which would clearly indicate the name of a corporation. Matter of American Cigar Lighter Co., 77 Misc. 643 (1912).

Unless the name begins with the word "Corporation," as for instance, "Corporation of John Smith," or terminates with the word "Corporation," it should end with the word "Incorporated" or the abbreviation "Inc."

Use of the Word "Limited" Indicates a Corporation.

Use of the word "Limited," affixed as the last word of the name of a corporation, constitutes a compliance with the amended section, requiring a word to clearly indicate a corporation; therefore, the corporate name "Metallurgique, Limited" satisfies the requirements of the statute. Opinion of Atty. Genl., Feb. 7, 1912, Vol. 2, p. 65.

Foreign Corporations Must Comply.

Foreign corporations must comply with the amended statute upon applying for authority to do business here, and submit in their application such form of affix or prefix as they are willing to use when doing business in this state. Opinion of Atty. Genl., Jan. 8, 1912, Vol. 2, p. 10.

"Co-operative;" Use of Term Restricted.

No corporation organized after May 9, 1913, under any general law other than Article 3 of the Business Corporations Law, is permitted to use the term "co-operative" or any other derivative of the term "co-operate" as part of its corporate name. See section 38, article 3, of the Business Corporations Law, added by L. 1913, ch. 454, in effect May 9, 1913.

Lloyds synonymous with Insurance.

The word "Lloyds" has by use become synonymous with "insurance;" hence, the filing of a certificate incorporating a business corporation as "Lloyds, New York, Incorporated," may be refused. In re Barker, 135 A. D. 16 (1909).

Name Indicating Connection with National Guard Prohibited.

The Military Law (L. 1909, ch. 41), § 241, as amended by L. 1912, ch. 69, among other things, provides as follows: "No body of men shall be granted a certificate of incorporation under any corporate name which shall mislead, or tend to mislead, any person into believing that such corporation is connected with or attached to the National Guard of this State in any capacity or way whatsoever." Said section also provides a method of annulling any corporation so organized, and provides further that any person violating such prohibition shall be deemed guilty of a misdemeanor.

Dissolved Corporation; Use of Name of.

Where an existing corporation has assumed the payment of bonds issued by a dissolved corporation, a corporation thereafter organized with the same name as the dissolved corporation and which has issued bonds that might be mistaken for those of the dissolved corporation, such new corporation will be restrained from using said name. Met. Tel. & Tel. Co. v. Met. Tel. & Teleg. Co., 156 A. D. 577 (1913).

Names of Foreign Corporations.

A foreign corporation may sue to prevent the use of its name by a domestic corporation, although it has failed to comply with the provisions of Gen. Corpn. L., § 15. U. S. Light & Heating Co. of Maine v. U. S. Light & Heating Co. of N. Y., 181 Fed. 182 (1910).

Where an employee of a foreign corporation forms a domestic corporation with the same name for the purpose of diverting and disarranging the former's business a suit in equity for an injunction will lie in the Federal courts. Failure to obtain a license to do business in New York will not prevent the maintenance of the suit. U. S. Light & Heating Co. of Maine v. U. S. Light & Heating Co. of N. Y., 181 Fed. 182 (1910).

University or College.

Provisions restricting the use by corporations of the name "university" or "college" are contained in the Education Law, § 66 (L. 1909, ch. 21, as am'd by L. 1910, ch. 140), as follows: "No individual, association or corporation not holding university or college degree-conferring powers by special charter from the Legislature of this state or from the regents, shall confer any degrees, or shall transact business under or in any way assume the name university or college, till it shall have received from the regents, under their seal, written permission to use such name, and no such permission shall be granted by the regents, except on favorable report after personal inspection of the institution by an officer of the university. * * * Violation of this section shall be a misdemeanor. * * *" This provision was formerly in section 33 of the University Law (L. 1892, ch. 378).

The provisions of the Education Law, section 66, do not apply to a corporation organized under the Business Corporations Law which is not to engage in any educational pursuits, therefore, the corporate titles "College Inn" and "University Drug Shop" are permissible. Opinion of Atty. Genl., Mar. 24, 1911.

Discretion of Secretary of State.

The Secretary of State must decide in the first instance whether the proposed name is, or is not, within the statutory prohibition. State v. McGrath, 5 S. W. Rep. 29; Peo. ex rel. Columbia Chem. Co. v. O'Brien, 101 A. D. 296 (1905).

Corporate Name, Using Abbreviation.

A corporation must use its corporate name in the transaction of its business and a contract, signed with a fragment of its entire corporate name, is not well executed; and a check, drawn to a payee designated by a like fragment of the corporate name, is insufficient to form the basis of a recovery in an action by the corporation against the drawer. Scarsdale Pubg. Co. v. Carter, 63 Misc. 271 (1909).

Names Claimed to be Infringed.

The "Stephen Merritt Company" infringes the name "Stephen Merritt Burial and Cremation Company," and the fact that the "Stephen Merritt Company" incorporated under a charter which emphasized the business of dealing in real estate does not cure the defect. Stephen Merritt Burial & Cremation Co. v. Stephen Merritt Co., 155 A. D. 565 (1913).

Use of the name "Lock City Canning Company" is an infringement of the name "Lockport Canning Company" and will be enjoined. Lockport Canning Co. v. Pusateri, 79 Misc. 293 (1913).

A corporation has no exclusive right to use of the name of a city in its title, provided another corporation does not use it in the same verbal connection or so as to leave the business indistinguishable. Corning Glass Works v. Corning Cut Glass Co., 197 N. Y. 173 (1910). The name "Corning Cut Glass Company" does not infringe the name "Corning Glass Works," the companies not being in competition. Id.

A corporation organized under the name of "The Society of the War of 1812," is entitled to an injunction restraining use of the name, "The Society of the War of 1812 in the State of New York." Society of the War of 1812 v. Society of the War of 1812, etc., 46 A. D. 568 (1900).

A religious corporation entitled "The New Thought Church" cannot enjoy an exclusive right to the use of any of such words, as they are neither peculiar, distinctive nor descriptive, but are all generic in character and of common use. New Thought Church v. Chapin, 159 A. D. 723 (1913).

The name "Buffalo Commercial Bank" does not infringe upon "Bank of Commerce in Buffalo." In re Bank of Attica, 35 St. Rep. 708, 12 N. Y. Supp. 648 (1891).

The name "The Columbian Chemical Company" is an infringement of the name "Columbia Chemical Company." Peo. ex rel. Columbia Chemical Co. v. O'Brien, 101 A. D. 296 (1905).

"The S. Howes Co.," engaged in manufacturing grain cleaners, is entitled to enjoin "The Howes Grain Cleaner Co." from using the name "Howes." The S. Howes Co. v. Howes Grain Cleaner Co., 24 Misc. 83, and cases therein cited; s. c., 19 A. D. 625 (1897).

The use of the trade-mark, "The Little Antique Shop," is an infringement upon the name, "The Little Shop." Crawford v. Laus, 29 Misc. 248 (1899).

The name "The Tuerk Water Meter Company" is an infringement of the name "The Tuerk Water Motor Company." Tuerk Hydraulic Power Co. v. Tuerk, 92 Hun 65 (1895).

The Salvation Army of the United States which publishes a paper called the "War Cry" cannot maintain an action against the American Salvation Army to restrain it from using its name and from publishing a paper under the name of "The American Salvation Army War Cry." The Salvation Army in the U. S. v. American S. A., 62 Misc. 360 (1909).

A corporation which has for years used the corporate title "Roy Watch Case Co." is entitled to enjoin a rival and lately constituted corporation from employing the name "Camm-Roy Watch Case Co." Roy Watch Case Co. v. Camm-Roy Watch Case Co., 28 Misc. 45.

Where a foreign corporation does business within the State without complying with the statutes, and a domestic corporation, subsequently organized, innocently adopts the same name the latter will not be restrained from using it. American Tartar Co. v. American Tartar Co., 57 A. D. 411 (1901); 9 Ann. Cas. 363.

At the suit of "The Legal Aid Society," a benevolent association, the court temporarily restrained the "Co-operative Legal Aid Society," a business concern. Legal Aid Soc. v. Co-operative Legal Aid Soc., 41 Misc. 127 (1903).

Names of Individuals.

Where a person, who has conducted a business under his own name, transferred the business and the good will thereof to a corporation organized with his individual name as its corporate title, he is deemed to have given to the corporation the right to use his name, and he cannot thereafter maintain an action under the Civil Rights Law, section 51, to recover a penalty for the use of his name. White v. White, 160 A. D. 709 (1914).

One Ray V. Pierce, a physician, sold his business of manufacturing medicine to the World's Dispensary Medical Association. Thereafter one Robert J. Pierce began manufacturing medicines and used the name "Dr. Pierce's Remedies" and a facsimile "R. J. Pierce." Held, that although a man has the right to use his own name in his business, he does not have the right to deceive through artifice or fraud. World's Dispensary Medical Assn. v. Pierce, 203 N. Y. 419 (1911).

The law protects the right of a man to use his own name in his own business, even if such use injures another who has established a prior business of the same kind and gained a reputation which goes with the name. Chas. S. Higgins Company v. Higgins Soap Company, 144 N. Y. 462 (1895), revsg. 71 Hun 101; De Long v. De Long Hook & Eye Co., 7 A. D. 33; Meneely v. Meneely, 62 N. Y. 427 (1875).

A corporation cannot acquire the name of one of its incorporators, and make use of it to deceive the public, on the ground that such is the true name of one of its incorporators. De Long v. De Long Hook & Eye Co., 89 Hun 399 (1895).

Where an individual sells his business, including the good will, to a corporation, with the sole right to use his name, the corporation will be entitled to an injunction restraining such individual from receiving mail addressed to his name which relates to goods sold by the corporation. Dr. David Kennedy Corpn. v. Kennedy, 36 A. D. 599 (1899), affd., 165 N. Y. 353.

The right of one to use his own name in his own business is very different from the lending or giving of his name to a corporation with a view of making it similar to that employed by other persons in the same kind of business. De Long v. De Long Hook & Eye Co., 10 Misc. 577 (1895). See also Hall Safe & Lock Co. v. Herring-Hall-Marvin Safe Co., 143 Fed. 231 (1906).

Corporate Name as Property Right.

Upon a sale of the good will and assets of a copartnership, in an action brought by the executrix of a deceased partner against a surviving partner for an accounting, sale and distribution of the firm property, the right to continue the use of the firm name is a firm asset which does not inure to the benefit of the surviving partner alone, but is subject to sale with the other firm property without condition, restriction or limitation upon the purchaser. At such sale, the purchaser, whether the surviving partner or otherwise, acquires the right to continue the business under the firm name upon complying with the provisions of sections 20 and 21 of the Partnership Law. Slater v. Slater, 175 N. Y. 143 (1903), mdfg. 78 A. D. 449.

A corporation has an absolute legal right to reincorporate under the corporate name adopted by it under its original incorporation though it resembles that of an existing corporation. Peo. ex rel. U. S. Grand Lodge of Order of Brith Abraham v. Payne, 161 N. Y. 229 (1900), affg. 43 A. D. 621.

The right to the exclusive use of a name will be protected upon the same principle that persons are protected in the use of trade-marks. State v. McGrath, 5 S. W. Rep. 29.

It is unnecessary to determine that there is intent to do wrong. The right to protection of name is based upon the proprietary right acquired by the use thereof. American Grocer v. The Grocer, 25 Hun 398. See, also, Commercial Union Assur. Co. v. Smith, 18 St. Rep. 151 (1888), 2 N. Y. Supp. 296; Matter of U. S. Mer. R. & Col. Assn., 22 St. Rep. 494, 115 N. Y. 176 (1889); Railway Age v. Garnett, 17 Weekly Dig. 250; Farmers' Loan & Trust Co. v. Farmers' Loan & Trust Co. of Kansas, 21 Abb. N. C. 104 (1888); Hygeia

Water Ice Co. v. N. Y. Hygeia Ice Co., 19 N. Y. Supp. 602, 47 St. Rep. 71, affd., 140 N. Y. 94 (1893); Employers' Liability Assurance Corporation v. Employers' Liability Ins. Co., 61 Hun 552 (1890); In re Bank of Attica, 12 N. Y. Supp. 648, 35 St. Rep. 708 (1891); Amoskeag Mfg. Co. v. Garner, 54 How. Pr. 297.

When the term of existence of a corporation has expired by limitation, the same corporate name may be used by a new corporation, unless such name has been continued in use by a co-partnership succeeding the defunct corporation and having a property interest in the name. Ed.

Where a co-partnership has filed a certificate pursuant to section 440 of the Penal Law setting forth its intention to do business under the name of American Watchman's Clock Company and thereafter carried on business under that name, a corporation will not be permitted to assume the same name. Pettes v. Am. Watchman's Clock Co., 89 A. D. 345 (1903), and cases cited.

Remedy for Infringement.

The "Salvation Army of the United States" which publishes a paper called the "War Cry" may enjoin the "American Salvation Army" from using such name and from publishing a paper under the title of "The American Salvation Army War Cry." Salvation Army in the U. S. v. Am. Salvation Army, 135 A. D. 268 (1909); same v. same, 141 A. D. 931 (1910); appeal withdrawn, 200 N. Y. 555.

The right to injunctive relief against the unfair and misleading use of a corporate name extends to other than business corporations. Benevolent, etc., Order of Elks v. Improved Benevolent, etc., Order of Elks, etc., 205 N. Y. 459 (1912); Salvation Army in the U. S. v. Am. Salvation Army, 135 A. D. 268 (1909); same v. same, 141 A. D. 931 (1910), appeal withdrawn, 200 N. Y. 555; Society of War of 1812 v. Society of the War of 1812 in N. Y. State, 46 A. D. 568 (1900).

Where a certificate is filed with the same name as that of an existing corporation or where the name so nearly resembles that of an existing corporation as to be calculated to deceive the remedy to the aggrieved corporation is by suit in equity not by writ of certiorari against the Secretary of State. Peo. ex rel. Columbia Chemical Co. v. O'Brien, 101 A. D. 296 (1905).

A corporation cannot, in legal proceedings, be properly designated by two names, and cannot, except as authorized by law, change its name, either directly or by user, nor can the public give it a name other than that of its creation, by which it can be recognized in judicial proceedings. Matter of United States Mortgage Co., 83 Hun 572.

In re Crown Bank, 44 Chancery Division 634 (Great Britain), held, that the name of a corporation may be considered in construing the objects stated in its memorandum of association (i. e., certificate of incorporation).

§ 7. Amended and supplemental certificates. If in the original or amended certificate of incorporation of any corporation, or if in a supplemental certificate of any corporation any informality exist, or if any such certificate contain any matter not authorized by law to be stated therein, or if the proof or acknowledgment thereof shall be defective, the corporators or directors of the corporation may make and file an amended certificate

correcting such informality or defect or striking out such unauthorized matter; and the certificate amended shall be deemed to be amended accordingly as of the date such amended certificate was filed, and upon the filing of such an amended certificate of incorporation, the corporation shall then for all purposes be deemed to be a corporation from the time of filing the original certificate.

The supreme court may, upon due cause shown, and proof made, and upon notice to the attorney-general, and to such other persons as the court may direct, and upon such terms and conditions as it may impose, amend any certificate of incorporation which fails to express the true object and purpose of the corporation, so as to truly set forth such object and purpose.

When an amended or supplemental certificate is filed, an entry shall be made upon the margin of the index and record of the original certificate of the date and place of record of every such amended certificate.

The amendment of a certificate under this section shall be without prejudice to any pending action or proceeding, or to any rights previously accrued.

Formerly L. 1890, ch. 563, § 5, as am'd by L. 1892, ch. 687, § 7.

For forms of papers under the foregoing section, see post, Forms Nos. 323–327.

For provisions authorizing alteration or extension of purposes or powers see Stock Corp. Law, § 18.

Scope of Section.

If an amended certificate is to be filed under this section without notice to the attorney-general, such amendment must be limited to the correction of informalities, defects or the striking out of unauthorized matter; but, when an application is made to the court, upon notice to the attorney-general and to such other persons as the court may direct, then, the court may order that the certificate may be amended in respect of its objects and purposes. Matter of Creditor's Audit & Adjustment Assn., 72 Misc. 461 (1911).

Where the certificate of incorporation states the corporate objects to be the purchase and sale and general dealing in real and personal property, an application to amend the certificate pursuant to the above section by adding to the objects the carrying on of a "general moving, trucking and storage warehouse business" must be denied as not within the purview of this section which applies where the failure in stating the true objects arises from faulty terminology or phraseology in the certificate. The application should be made under Stock Corporation Law, § 18. Matter of Sprocssig Storage Warehouse Co., N. Y., County, Special Term, Greenbaum, J., N. Y., Law Journal, November 13, 1912.

Where a certificate of incorporation stated that the proposed corporation shall begin business with a capital of $500,000, it was sought to change such

statement by an amended certificate under the Gen. Corpn. Law, § 7, by inserting the sum $500 on the claim that the amount stated in the original certificate was a clerical error. It was held that such amendment was not permissible under said section but must be made under the Stock Corpn. Law, § 18. Opinion of Atty. Genl., Jan. 11, 1911.

Under chapter 135, Laws of 1870, now repealed, it was held that the act was intended to enable corporations to remedy patent omissions, that is, the omission of things which are required to be stated, and which, being omitted, make the certificate imperfect upon its face. Matter of N. Y., L. E. & W. R. R. Co., 25 Hun 556 (1881). Section 7 above, however, is much broader and more liberal in its terms, and seems to permit the correction of the specified irregularities, whether they are patent upon the face of the certificate or not.

This section does not authorize a railroad corporation to file an amended certificate of incorporation, which, while purporting to have been filed for the purpose of correcting an informality and defect in the original certificate, consisting of an omission to particularly state, define and describe a portion of the route of said road as well as the terminus, was intended to effect a change in the proposed route and terminus. Matter of Riverhead, Quogue & Southampton R. R. Co., 36 A. D. 514.

Defects in the articles of association of a proposed railway corporation prepared under the Rapid Transit Act of 1875 cannot be corrected under the foregoing section. In re N. Y. Cable R. Co., 109 N. Y. 32 (1888).

§ 8. Lost or destroyed certificates. If either of the certificates of incorporation shall be lost or destroyed after filing, a certified copy of the other certificate may be filed in the place of the one so lost or destroyed and as of the date of its original filing, and such certified copy shall have the same force and effect as the original certificate had when filed.

Formerly L 1890, ch. 563, § 6, as am'd by L. 1892, ch. 687, § 8.

Where the certificate filed in the county clerk's office is lost, it is competent to prove by oral evidence that a certificate was in fact filed. N. Y. Car Oil Co. v. Richmond, 6 Bosw. 213 (1860).

§ 9. Certificate and other papers as evidence; evidence of consolidation. 1. The certificate of incorporation of any corporation duly filed shall be presumptive evidence of its incorporation, and any amended certificate or other paper duly filed or recorded relating to the incorporation of any corporation or its existence or management, and containing facts required or authorized by law to be stated therein, shall be presumptive evidence of the existence of such facts.

2. Whenever, by the laws of any other state or territory, or the dominion of Canada, a copy of the certificate of organization or incorporation or any other certificate, certified or exemplified by any officer or officers in such state or territory or dominion, is or

shall be prima facie evidence of the due formation, creation, existence, organization or capacity of any corporation or joint-stock company, created, organized or located in such state, territory or dominion, or claiming so to be, such certificate or certificates, duly exemplified, or a duly exemplified copy thereof, shall be received in all actions and proceedings in this state, in or before all courts and officers, with the same force and effect in all respects as prima facie evidence as aforesaid, as in such other state, territory or dominion.

3. Where two or more corporations have been or shall hereafter be consolidated and merged into a new corporation, a certificate of the secretary of state under his official seal concisely stating the names of the respective corporations consolidated, the dates of the filing of the certificates respectively of the incorporation of such corporations in his office, the object for which they were formed, including the nature and locality of their business as set forth in their respective incorporation papers on file in his office, the date of the filing of the consolidation agreement and other proceedings in his office, the name of the new corporation formed by such consolidation and merger, the term of its corporate existence, the place where its principal office is situated and the amount of its capital stock, shall be presumptive and prima facie evidence in all actions and special proceedings for all purposes of the incorporation of the corporations so consolidated, the incorporation of the new corporation by such consolidation and merger from the date of filing of said consolidation agreement and proceedings, and of the other facts so certified by him.

Subd. 1 was formerly L. 1890, ch. 563, § 7, as am'd by L. 1892, ch. 687, § 9; L. 1895, ch. 672. Subd. 2 was formerly L. 1877, ch. 311. Subd. 3 was formerly L. 1899, ch. 201.

The only changes made to this section by the amendment of 1895 were insertion of the words "or recorded" and "or authorized" in the fourth and sixth lines, respectively.

Certified Copies.

This section is in addition to, and does not repeal or supersede section 933 of the Code, which provides that a duly certified copy of a paper filed in a public office is evidence as though the original were produced. The full text of said section is as follows, to wit:

A copy of a paper, filed, kept, entered, or recorded, pursuant to law, in a public office of the State, the officer having charge of which has pursuant to law, an official seal; or with the clerk of a court of the State; or with the clerk or secretary of either house of the Legislature, or of any other public body or public board, created by authority of a law of the State, and having,

pursuant to law, a seal; or a transcript from a record, kept, pursuant to law, in such a public office, or by such a clerk or secretary, is evidence, as if the original was produced. But to entitle it to be used in evidence, it must be certified by the clerk of the court, under his hand and the seal of the court; or by the officer having the custody of the original; or his deputy or clerk, appointed pursuant to law, under his official seal and the hand of the person certifying, or by the presiding officer, secretary, or clerk of the public body or board, appointed, pursuant to law, under his hand, and, except where it is certified by the clerk or secretary of either house of the Legislature, under the official seal of the body or board. Code Civ. Pro. § 933.

A certified copy is proof, prima facie, of the genuineness of the signatures thereto attached in an action against a subscriber for the amount of stock purporting to be subscribed by him. Matter of N. Y., L. & W. R. R. Co., 35 Hun 220, affd., 99 N. Y. 12 (1885).

The provision of section 933 of the Code, authorizing the receipt in evidence of certified copies of papers filed, kept or recorded pursuant to law in a public office, does not make such a copy competent evidence, unless the original if produced would be competent. Donohue v. Whitney, 133 N. Y. 179 (1892).

Proof of Incorporation.

All that a corporation is called upon to prove, to establish its existence, is its charter, and user under it. Jones v. Dana, 24 Barb. 395 (1855); Utica Ins. Co. v. Tilman, 1 Wend. 555 (1828).

The fact of incorporation cannot be proved by parol testimony. Nicoll v. Clark, 13 Misc. 128 (1895).

An objection that there was a failure to prove the incorporation of a company of another State, because the certificate of its Secretary of State, under the great seal, was not exemplified, as required by section 906 of United States Revised Statutes, is without force, and the certificate was accepted as prima facie evidence. U. S. Vinegar Co. v. Foehrenbach, 74 Hun 435 (1893), affd., 148 N. Y. 58.

§ 10. Limitation of powers; provisions of certificate. 1. No corporation shall possess or exercise any corporate powers not given by law, or not necessary to the exercise of the powers so given.

2. The certificate of incorporation of any corporation may contain any provision for the regulation of the business and the conduct of the affairs of the corporation, and any limitation upon its powers, or upon the powers of its directors and stockholders, which does not exempt them from the performance of any obligation or the performance of any duty imposed by law.

Formerly L. 1890, ch. 563, § 9, as am'd by L. 1892, ch. 687, § 10; L. 1895, ch. 672.

The amendment of 1895, which took effect May 14, changed the head note of this section and added the last sentence, which embraces provisions that were duplicated in former section 2 of the Business Corporations Law, but were omitted from that law in 1909 in order to avoid such duplication.

For forms of clauses for the regulation of the business and the affairs of a corporation, and limitations upon the powers of directors and stockholders, see Forms Nos. 9–29, 262–277, 287–289, 291–294, 312, 313. *See also, Index to Forms.*

Certificate of Incorporation; Validity of Provisions Therein as Distinguished from Provisions in By-Laws.

See also, "Restraints Upon Sales of Stock," infra.

The distinction between authority to make a by-law and that to embody the agreement of the incorporators in the certificate of incorporation is marked. To uphold a by-law inconsistent with the statutory provision regulating the affairs of a corporation would allow a majority to invade the rights of a minority and to impose limitations on a stockholder to which he never gave assent, while to uphold the provisions of the certificate of incorporation is merely to compel a party to live up to his agreement. Ripin v. U. S. Woven Label Co., 205 N. Y. 442 (1912).

A provision in a certificate of incorporation that the number of directors shall not be changed except by the unanimous consent of all the stockholders is a valid limitation on the power of the corporation and its stockholders. Such limitation is authorized by this section and is not in conflict with section 26 of the Stock Corporation Law. Ripin v. U. S. Woven Label Co., 205 N. Y. 442, 445 (1912). Unless such limitation tended to exempt the corporation or its directors or stockholders from the performance of any obligation or the performance of any duty imposed upon it by law, or was inconsistent with public policy, it was expressly authorized by this section. Clearly, there is no duty or obligation imposed upon a corporation or its members to increase the number of directors. This provision is in conflict with the statute regulating an increase or reduction of directors, but unless it was intended by this section to permit the incorporators at the time of the organization of a corporation to prescribe regulations for the conduct of its affairs and limitations on the powers of the corporation and its stockholders different from those prescribed by the statute, the privilege granted to the incorporators would be of little or no efficacy. The privilege must be exercised only in one direction. It must limit, not increase, the powers of the corporation or those of its directors or stockholders. Id.

The purpose of this provision of the statute was to enable persons desirous of transferring their business to or of investing their capital in a corporation to protect the interests of all parties, so that in case of dissensions the minority may not be subjected to the chance of oppression by the majority, and also in order that the respective rights and powers of the parties might be limited in respects that did not affect the public. Ripin v. U. S. Woven Label Co., 205 N. Y. 442 (1912).

A provision in the certificate of incorporation and in the certificates of preferred stock that such stock shall receive dividends at a specified rate before any dividends shall be paid on the common stock, that such dividends shall be cumulative and in case of non-payment shall bear interest at a fixed rate from the date when payable, constitutes a valid contract which is binding upon all the stockholders. Roberts v. Roberts-Wicks Co., 184 N. Y. 257 (1906).

When it is intended to place a restriction upon the power of the stockholders to increase or reduce the number of directors, a provision to that effect should be inserted in the certificate of incorporation. Bond v. Atlantic Terra Cotta Co., 137 A. D. 671, 681 (1910), followed, 151 A. D. 938 (1912). Such a restriction is not binding upon subsequent owners of stock when made by agreement of stockholders outside the certificate of incorporation. Id.

When all the authorized stock of a corporation is not at once subscribed for and issued, the subscribers to whom stock is issued have no right, in the absence of bad faith, to participate pro tanto in subsequent issues of such unissued authorized stock. Russell v. Am. Gas & Elec. Co., 152 A. D. 136 (1912). However, when the certificate of incorporation contains a clause providing that whenever there are any unissued shares either of the original stock or of any increase thereof that each stockholder shall be entitled to subscribe pro rata for any subsequent issue of such authorized stock, this constitutes an enforcible contract and is a provision authorized by the General Corporation Law, sec. 10. This view is thoroughly sustained by the reasoning in the authorities above cited in construing the provisions of this section.

The certificate of incorporation may classify the stock into common and preferred, and may provide that the preferred stockholders shall be deprived of voting power, upon questions relating to the management, in consideration of the preferences over the common stock which is given them. Such a provision is but an arrangement between two classes of stockholders, which does not concern the public, and does not violate any rule of the common law or any rule of public policy. Peo. ex rel. Browne v. Koenig, 118 N. Y. Supp. 136 (App. Div. July, 1909).

A clause in a certificate of incorporation which provides that no share of stock shall be transferable by any shareholder who is indebted to the corporation, is not effective against a person who purchases a certificate of stock without knowledge of the existence of this clause or of any existing lien in favor of the corporation. Lyman v. State Bank of Randolph, 81 A. D. 367 (1903), affd., 179 N. Y. 577.

The right of a stockholder to vote and to transfer his stock can be limited, if at all, only by an express statutory provision, or by a provision in the certificate of incorporation. Kinnan v. Sullivan County Club, 26 A. D. 213 (1898).

Unauthorized Provision in Certificate of Incorporation.

A certificate of incorporation drawn under the Business Corporations Law which contains a provision that the stockholders, both present and future, will sell and deliver to the corporation all milk produced upon their farms is not a lawful provision regulating the business or relating to the conduct or affairs of the corporation. Opinion of Atty. Genl. (1911), Vol. 2, p. 600.

Voting Power of Stockholders; Regulation of, in Certificate of Incorporation.

There being no statute to the contrary, a certificate of incorporation which classifies stock into common and preferred, may provide that the preferred stockholders shall be deprived of voting power, because such a provision is but an agreement between the stockholders which does not concern the public and does not violate any rule of the common law or of public policy. Peo. ex rel. Browne v. Koenig, 133 A. D. 756 (1909), citing with approval, State ex rel. Frank v. Swanger, 190 Mo. 561.

A provision in a certificate of incorporation that stockholders shall be entitled to one vote irrespective of the number of shares of stock which they own, is legal. Opinion of Atty. Genl. (1910), p. 406, citing Peo. ex rel. Browne v. Koenig, 133 A. D. 756.

This section does not authorize provisions in a certificate of incorporation which (a) assume to give holders of certificates of indebtedness the right to determine the question whether any of the property of the corporation shall

be sold, exchanged, mortgaged, leased or otherwise disposed of or encumbered, and the terms and conditions upon which such transactions shall be effected, and takes the same away from the stockholders and (b) provides that the question whether the business of the corporation shall be discontinued, its affairs liquidated and its assets converted into cash and distributed according to law shall be determined by the holders of certificates of indebtedness, and also deprives the stockholders of the right to vote thereon. Opinion of Atty. Genl. (1912), Vol. 2, p. 238.

Discussion of Non-Voting Clauses in Certificate of Incorporation and Effect Thereof.

See the above topical heading under section 23 of the General Corporation Law.

Interpretation of Corporate Powers.

When either of two constructions of a statute conferring corporate powers be possible the interpretation must be adopted which is most favorable to the State. Coosaw Mining Co. v. South Carolina, 144 U. S. 550, 561 (1891); Minor v. Erie R. R. Co., 171 N. Y. 573 (1902).

A provision in a certificate of incorporation, that the directors may, with the consent of holders of two-thirds of the capital stock, sell, assign, transfer or otherwise dispose of the whole property of the corporation, not including franchises, to any person or corporation, domestic or foreign, is not authorized by law, nor can it be justified as a provision regulating the business relating to the conduct of the affairs of the corporation. It is contrary to section 33 (now 16) of the Stock Corp. Law, which provides that the transfer of an entire property to a foreign corporation requires the consent of 95 per centum, and such transfer to domestic corporations can only be made if the transferee is engaged in a business of the same general character. Peo. ex rel. Barney v. Whalen, 119 A. D. 749, affd., 189 N. Y. 560 (1907).

A corporation possesses not only powers specifically granted in terms by its charter, but also such powers as shall be necessary to the exercise of the powers so enumerated and given. Peo. ex rel. Tiffany v. Campbell, 144 N. Y. 166 (1894). It has not, however, implied powers which are merely convenient or useful and not essential to its business. Id.

What a corporation may or may not do is to be determined by the reasonable intendments of its charter as well as its clear expressions of authority. Brooklyn Heights R. R. Co. v. City of Brooklyn, 152 N. Y. 244 (1897).

Corporations cannot resort to ingenious and original methods of action with the freedom of individuals. They are confined to those expressly authorized by statute and such as are incidental thereto and necessary to carry them into effect. Schwab v. E. G. Potter Co., 194 N. Y. 409 (1909), affg. 129 A. D. 36.

Whenever privileges, granted by the Legislature to a corporation, come under review in the courts, they are to be strictly construed against the corporation; nothing passes but what is granted in clear and explicit terms. Peo. ex rel. Third Ave. R. R. Co. v. Newton, 112 N. Y. 396 (1889).

Unless restrained by law, every corporation has the incidental power to make any contract necessary to advance the objects for which it was created. Legrand v. Manhattan Mer. Assn., 80 N. Y. 638 (1880).

A corporation, in order to attain its legitimate objects, may deal precisely as an individual may, who seeks to accomplish the same ends. Barry v. Merchants' Exchange Co., 1 Sandf. Chan. 289 (1844); Safford v. Wycoff, 4 Hill 422 (1843); Koehler & Co. v. Reinheimer, 26 A. D. 1 (1898).

The purposes stated in the certificate of incorporation and the statutory powers determine the status of a corporation; the fact that it is exercising only a portion of its powers does not affect the question. Matter of White, 118 A. D. 869 (1907).

Restraints Upon Sales of Stock.

There is a marked difference between a restraint upon alienating the shares of stock of a corporation, contained in the certificate of incorporation which must receive the assent of all the primary shareholders and by which all persons holding derivative interests must be bound, and a like restraint imposed by the directors in the form of a by-law which may or may not come to the knowledge of the shareholders, and which, if known, may be disapproved of by them. Bank of Attica v. Manufacturers & Traders' Bk., 20 N. Y. 501 (1859).

Unless there is a provision in the certificate of incorporation or in the by-laws that stock is transferable only on the books of the company, such provision in the certificate of stock itself does not have the effect of limiting the unconditional right of transferring them. Union Bk. v. U. S. Exc. Bk., 143 A. D. 128 (1911).

A provision in the certificate of incorporation or by-laws that a stockholder shall not sell his stock without first giving the corporation and the other stockholders an opportunity to purchase the same is not against public policy. Moses v. Soule, 63 Misc. 203 (1909).

A provision in a certificate of incorporation that "shares of stock shall not be transferable without the consent in writing of a majority of the board of directors and the granting of such consent shall rest wholly within the personal discretion of said board of directors," is invalid and against public policy. Opinion of Atty. Genl. (1910), p. 404.

Ultra Vires and Examples.

Contracts of corporations are ultra vires when they involve adventures outside of and not within the scope of powers given by their charter. Jemison et al. v. C. S. Bank, 122 N. Y. 135 (1890).

Where the act or contract of a corporation is not within the scope of its powers to perform under any circumstances, the doctrine of estoppel cannot be invoked to make it good. Brisay v. Star Co., 13 Misc. 349 (1895).

A corporation has no power to indorse a note for the accommodation of the maker. A. D. Farmer & Son Type Founding Co. v. Humboldt Pub. Co., 27 Misc. 314 (1899). But where one corporation indorses the note of another of which it owns the entire capital stock the indorsement is a guaranty based upon a valuable consideration and valid. In re New York Wheel Works, 141 Fed. 430 (1905).

Domestic corporations cannot bind the corporate property by accommodation indorsements, unless organized for the purposes of guaranty and indemnity. Fox v. Rural Home Co., Ltd., 90 Hun 365, aff'd., 157 N. Y. 684 (1899).

The purchase by a manufacturing corporation of the exclusive right to sell the product of another corporation is ultra vires, as the business proposed to be carried on is entirely foreign to the scope of a corporation organized solely for manufacturing purposes. Powell v. Murry, 3 A. D. 273 (1896).

A manufacturing corporation has no power to indorse accommodation notes. Nat. Park Bk. v. G. A. M. W. & S., 116 N. Y. 281 (1889), distinguished in Hess v. Sloane, 66 A. D. 522, aff'd., 173 N. Y. 616 (1903), see also Koehler

& Co. v. Reinheimer, 26 A. D. 1 (1898); Oppenheimer v. Simon Reigel Cigar Co., 90 N. Y. Supp. 355 (1904).

As to right of telegraph companies to make pooling contracts, see Benedict v. West. Un. Tel. Co., 9 Abb. N. C. 214 (1878).

A foreign corporation organized for manufacturing purposes, and which has dealt chiefly in real estate, will be compelled specifically to perform a written contract to sell real estate which was made in the name of the corporation, signed by the president and secretary, and sealed with the corporate seal, when the vendee has paid a deposit thereon which was accepted and retained by the corporate officers. Davidson v. Cannabis Mfg. Co., 113 A. D. 664 (1906), appeal dismissed, 187 N. Y. 576.

Intra Vires, Acts Sustained as Such.

Where a manufacturing corporation has succeeded a partnership acquiring with other assets a tract of land on which work was in progress for the erection of a plant and homes for employees, continuing of such improvements is not ultra vires. Steinway v. Steinway & Sons, 17 Misc. 43 (1896). In such case not only the erection of dwelling-houses for renting and sale to operatives and the regulation of streets, construction of sewers and supply of water, but also moderate contributions toward the establishment of a church, school, free library and free baths, are within the corporate authority. Id.

A guaranty of rent by a brewing corporation to the owner of premises upon which its beer is sold is not a contract ultra vires, and is valid. Holm v. Claus Lipsius Brewing Co., 21 A. D. 204 (1897).

Ultra Vires as a Legal Defense.

The plea of ultra vires, where a prima facie case has been established, is an affirmative defense, and must be pleaded and proven in order to be available to a corporation. Karsch v. Pottier & Stymus Mfg. & Imp. Co., 82 A. D. 230 (1903); Hess v. Sloane, 66 A. D. 522 (1901), affd., 173 N. Y. 616; Bacon v. Montauk Brew. Co., 130 A. D. 737, 742 (1909).

The defense of ultra vires, being an affirmative one, is not available unless pleaded. Hess v. W. & J. Sloane, 66 A. D. 522 (1901); Keating v. Am. Brewing Co., 62 A. D. 501 (1901). The defense of ultra vires is not looked upon with favor. Id.

Plea of ultra vires should not, as a general rule, prevail, whether interposed for or against a corporation, when it would not advance justice, but would accomplish a legal wrong. Whitney-Arms Co. v. Barlow, 63 N. Y. 62 (1875); Rider Life Raft Co. v. Roach, 97 N. Y. 378 (1884); H. Remington & Son Pulp & Paper Co. v. Caswell, 126 A. D. 142 (1908).

A corporation cannot avail itself of the defense of ultra vires, when the contract has been in good faith fully performed by the other party, and the corporation has had the benefit of performance. Linkauf v. Lombard, 137 N. Y. 417 (1893); Whitney-Arms Co. v. Barlow, 63 N. Y. 62 (1875); Watts-Campbell Co. v. Yuengling, 51 Hun 302 (1889); Usher v. N. Y. C. & H. R. R. R. Co., 76 A. D. 422, affd., 179 N. Y. 544 (1904); Bowers v. Ocean A. & G. Corp., 110 A. D. 691 (1906); Doubleday, Page Co. v. Shumaker, 60 Misc. 227 (1908).

Upon disaffirmance by a corporation of an act which is ultra vires the corporation must restore the other party to his former condition as far as possible upon the disaffirmance of a void contract, and return all property that it has received as a consideration for that contract, or its value. Pullman P. C. Co. v. Central Trans. Co., 171 U. S. 139 (1897); Central Trans. Co. v. Pullman P. C. Co., 139 U. S. 60 (1890).

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One dealing with a corporation is chargeable with notice of its powers and the purposes for which it was formed, and is bound to know the extent of the power and authority of its agents or officers. A corporation necessarily carries its charter wherever it goes, for that is the law of its existence. Jemison v. Citizens' Savings Bk., 122 N. Y. 140 (1890); Alexander v. Cauldwell, 83 N. Y. 480 (1881), see, also, Patterson v. Robinson et al., 116 N. Y. 193 (1889), distg. 113 A. D. 200 (1906); Wilson v. Kings Co. El. R. R. Co., 114 N. Y. 491 (1889); Martin v. N. F. P. Co., 122 N. Y. 165 (1890); Wahlig v. S. P. M. Co., 25 St. Rep. 864 (1889).

When a contract becomes executed by one party the other party is estopped from asserting its own wrong and cannot be excused from payment upon the plea that the contract was ultra vires. Vought v. Eastern Bldg. & Loan Assn., 172 N. Y. 508 (1902).

The defense of ultra vires will not defeat an action brought by a lessor corporation to recover past-due rent under the terms of a lease, not malum in se or expressly prohibited by law, but not within the express or implied powers of the lessor. Bath Gas Light Co. v. Claffy, 151 N. Y. 25 (1896).

A holding of real estate which, even if ultra vires, has not been attacked by the sovereign or by a creditor, cannot be questioned by a stockholder who has assented to the acquisition. Burden v. Burden, 159 N. Y. 287, affg. 8 A. D. 160 (1899).

In an action upon contract the contention that the contract is void and non-enforceable by the law of the State where made will not prevail where the foreign law does not appear by the record; but courts will determine the case according to the law of this State, or, in the absence of controlling authority, as justice may require, having regard to all interests. Bath Gas Lt. Co. v. Claffy, 151 N. Y. 25, affg. 74 Hun 638 (1896).

The defense of ultra vires is not available unless pleaded. Griesa v. Mass. Benefit Assn., 39 St. Rep. 1, affd., 133 N. Y. 619 (1892).

An instructive note on ultra vires as a defense may be found in 13 Ann. Cases 264 (1903).

Doctrine of Ultra Vires; its Application.

The doctrine of ultra vires, in its application has two phases: (1) where the public is concerned; (2) where the question is between the corporate body and its stockholders, or between it and its stockholders and third parties dealing with it and through it with them. When the public is concerned, an assent by the stockholders to the use of unauthorized powers will be of no avail. When it is a question of the stockholder's right to restrain the corporate body within its express or incidental powers, he may, in many cases, be denied on the ground of his ratification of corporate action, either by express assent or his intelligent though tacit consent thereto. Remington & Son Pulp & Paper Co. v. Caswell, 126 A. D. 142 (1908); Kent v. Quicksilver Mining Co., 78 N. Y. 159 (1879).

Estoppel after Acceptance of Benefits of Ultra Vires Contract.

Where the objection to corporate acts is that they are ultra vires without being either mala prohibita or mala in se, a stockholder cannot maintain an equitable action in his own behalf, based on such objection, where he himself, with knowledge of the character of the acts, has acquired and accepted pecuniary benefits thereunder, and irrespective of the fact that said stockholder did not receive such pecuniary benefits until after the commencement of the action. Wormser v. Met. St. Ry. Co., 184 N. Y. 83 (1906).

A corporation has no power to contract for payment of the rent for another corporation in consideration of a cancellation of the latter's lease, such a power not being incidental to those expressly conferred on a business corporation. Morris v. Wiener Co., 65 Misc. 18 (1909). In an action on such contract the defense of ultra vires is available, the doctrine of estoppel in ultra vires being based upon the rule that, where the contract has been executed, the corporation is presumed to have received the benefit and should not be permitted to escape the burden, but where the benefit has inured to another the rule does not apply. Id.

The acceptance of a substantial benefit, which would be unavailable to the stockholder except as a result of ultra vires acts, precludes him from assailing those acts. He is at liberty to deny the validity of a contract, which is neither prohibited by law nor evil in itself, where, with knowledge of the character of the acts, he has accepted pecuniary benefits thereunder. Wormser v. Met. St. Ry. Co., 184 N. Y. 83 (1906); Treadwell v. United Verde Copper Co., 134 A. D. 394 (1909).

Business and Monied Corporations; Distinctions as to Ultra Vires Acts.

The courts, in considering the effect of ultra vires acts, recognize the distinction between business corporations and those whose purposes are largely fiduciary. Gause v. Commonwealth Trust Co., 196 N. Y. 134 (1909).

The power of a corporation to perform a particular act is dependent to a considerable extent upon the facts and circumstances existing at the time when it is proposed to perform the act. Gause v. Commonwealth Trust Co., 196 N. Y. 134 (1909).

Presumption of Legality.

Illegality is never presumed, and acts done by a corporation which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter. Nelson v. Eaton, 26 N. Y. 127 (1863); Kent v. Quicksilver Mining Co., 78 N. Y. 159, 183 (1879); Demings v. Supreme Lodge, K. of P., 131 N. Y. 522, 527 (1892); Gaul v. Keil & Arthe Co., 199 N. Y. 472, 477 (1910); U. S. Vinegar Co. v. Schlegel, 143 N. Y. 537, 543 (1894); Pringle v. Woolworth, 90 N. Y. 510 (1882); U. S. v. Dandridge, 12 Wheat. 79.

When a corporate contract is not on its face necessarily beyond the powers of the corporation, it will be presumed to be valid, in the absence of proof to the contrary. Jacobs v. Monaton Realty Inv. Corpn., 212 N. Y. 48, 56 (1914), citing Gaul v. Kiel & Arthe Co., 199 N. Y. 472.

Accommodation Notes and Indorsements.

A corporation has no power to make or indorse accommodation notes. Nat. Park Bk. v. German-Am. Mutual Warehousing & S. Co., 116 N. Y. 281 (1889); Jacobus v. Jamestown Mantel Co., 149 A. D. 356 (1912); Fox v. Rural Home Co., Ltd., 90 Hun, 365, and many cases there cited, affd., 157 N. Y. 684 (1899); A. D. Farmer & Son Type-Founding Co. v. Humboldt Pubg. Co., 27 Misc. 314 (1899). Such a power is not incidental to the powers expressly conferred on corporations organized under statutes authorizing the formation of banking, insurance or business corporations. 116 N. Y. 281, 287, and 90 Hun, 365, supra. Accommodation indorsements may be made only by guaranty and indemnity companies and they cannot do so unless they receive a valuable consideration for the service. 90 Hun, 365, supra.

A corporation has no power to make or indorse notes for the accommodation of others. Jacobus v. Jamestown Mantel Co., 211 N. Y. 154, 160 (1914).

The rule that a corporation can neither make nor indorse commercial paper for accommodation, even though it be paid therefor, is not applicable where the corporation assumes an obligation of another for the purpose of protecting its own interests where its property rights or interests might be affected. Bacon v. Montauk Brewing Co., 130 A. D. 737, 742 (1909).

Even if proof of the execution of a promissory note by the president and treasurer were sufficient to bind the corporation on a note made for its benefit, such rule does not prevail if the note was in fact accommodation paper, and the plaintiff knew of this defect. Nat. Bk. of Newport v. H. P. Snyder Mfg. Co., 107 A. D. 95 (1905).

A business corporation, as an incident to its business, has power to indorse a note or loan its credit for the accommodation of a debtor where such power is exercised so as to enable it to realize the amount of an indebtedness, and the defense of ultra vires is not available under such circumstances. Hess v. W. & J. Sloane, 66 A. D. 522 (1901).

A business corporation having the general power to bind itself by promissory notes and contracts of indorsement, a plaintiff is entitled to recover, if he is a holder of the notes for value and without notice that they were indorsed for the accommodation of the makers and not in the usual course of business. Nat. Park Bk. v. German-Am. Mutual Warehousing & Security Co., 116 N. Y. 281, 292 (1889).

When it is established in an action against a corporation as a maker of a note that such note was made for the accommodation of another, the holder's right to recover depends upon whether he was aware of the vice in the note. Nat'l Bk. of Newport v. H. P. Snyder Mfg. Co., 117 A. D. 370.

Power to Guarantee.

A trading corporation has power to guarantee the lease of a customer for the purpose of increasing its business. Hall v. Ochs, 34 A. D. 103 (1898); Koehler & Co. v. Reinheimer, 26 A. D. 1 (1898); Holm v. Claus Lipsius Brewing Co., 21 A. D. 204 (1897).

A corporation having power to purchase and sell the stock of another corporation, has power, when selling such stock, to guarantee the payment of dividends thereon, and if it assumes to execute such a guaranty it is estopped from denying its power to do so when the guaranty is sought to be enforced against it. Mason v. Standard Distilling & Distributing Co., 85 A. D. 520 (1903), citing Arnot v. Erie R. R. Co., 5 Hun 608, affd., 67 N. Y. 315; Whitney Arms Co. v. Barlow, 63 N. Y. 62.

Incidental and Implied Powers.

A corporation possesses not only the powers specifically conferred upon it by its charter, but also such as are necessarily incident to, or may be fairly implied from those powers, including all that are essential to the declared object of its existence. Vil. of Carthage v. Frederick, 122 N. Y. 268 (1890).

The unexpressed and incidental powers possessed by a corporation are not limited to such as are absolutely or indispensably necessary to enable it to exercise the powers specifically granted, and whatever incidental powers are reasonably necessary to enable it to perform its corporate functions are implied from the powers expressly granted; but powers merely convenient or useful are not implied if they are not essential, having in view the nature and object of the incorporation. Peo. ex rel. Tiffany & Co. v. Campbell, 144 N. Y. 166, 172 (1894); Gause v. Commonwealth Trust Co., 196 N. Y. 134 (1909).

The powers of corporations are those enumerated in the statutes under which they are incorporated, also in the general statutes, in the certificate of incorporation, and like instruments executed pursuant to the statutes, and they also possess such powers as flow from or are incidental and necessary to the exercise of the enumerated powers. Nat. Park Bk. v. German-Am. Mutual Warehousing & Security Co., 116 N. Y. 281, 292 (1889).

A corporation dealing in manufactured goods, and needing them for sale, may, as a proper incident to its business, extend financial aid to a manufacturer to enable him to furnish the goods. Holmes, Booth & Haydens v. Willard, 125 N. Y. 75 (1890).

The public are interested in restraining corporations, to the enjoyment of the precise franchise granted, and the exercise of the powers expressly conferred, and the incidental powers essential to the express power. Shareholders are also interested in keeping the governing board within the limits of the delegated power with which it is clothed. A corporation can make no contracts and do no acts except such as are authorized by its charter either expressly or incidental to its existence. Corporations necessarily depend, both for their powers and the mode of exercising them, upon the construction of the statute which gives them life and being. First Nat. Bk. v. Ocean Nat. Bk., 60 N. Y. 278, 294 (1875).

Corporations have no power except those conferred by statute, either directly or indirectly. Whatever is done by a corporation without authority is done in violation of law, for all action, not authorized directly or indirectly, is prohibited by the foregoing section. Schwab v. E. G. Potter Co., 194 N. Y. 409 (1909), affg. 129 A. D. 36.

In the absence of fraud or bad faith, courts have nothing to do with the internal management of business corporations, provided they keep within their corporate powers. Schwab v. E. G. Potter Co., 194 N. Y. 409 (1909), affg. 129 A. D. 36.

Partnership, Corporations not Permitted to Enter Into.

There is no authority, express or implied, which permits a corporation to enter into a partnership, either with another corporation or with individuals. On the contrary it is a violation of law for a corporation to do so. In a corporation no stockholder or member thereof can bind the legal, artificial entity. In a partnership each member may bind the firm. If a corporation engages in a partnership relation the management of the corporation by its regularly appointed officers would be interfered with and it would be involved in new responsibilities and contracts through agents over whom it would have no control. The partner in assuming to manage and conduct the business of the corporation would bind it by his acts, but in so doing he would not act as an officer or agent of the corporation by any lawful authority received from it, but as a principal in a firm in which all are equals. It is the settled policy of this State that corporations are to be managed by the board of directors and its duly authorized officers who are the servants of the corporation and must act in its name and behalf. Whittenton Mills v. Upton, 10 Gray, (Mass.) 582, 596 (1858); Allen & Sons v. Woonsocket Co., 11 R. I. 288 (1876); People v. North River Sugar Refining Co., 121 N. Y. 582 (1890); New York & S. Canal Co. v. Fulton Bank, 7 Wend. 412 (1831); Clearwater v. Meredith, 1 Wallace, 25, 29 (1863).

Rule in United States Supreme Court.

The rule of the United States Supreme Court upon ultra vires contracts is, that a contract, which is unlawful and void because beyond the scope of

corporate powers, does not, by being carried into execution, become lawful and valid, and that the remedy of the party aggrieved is to disaffirm the contract and sue on a quantum meruit, for the value of what the defendant has actually received. Louisiana v. Wood, 102 U. S. 294 (1880); Parkersburgh v. Brown, 106 U. S. 487, 503 (1882); Champman v. Douglas County, 107 U. S. 348, 360 (1882); Salt Lake City v. Hollister, 118 U. S. 256, 263 (1885); Penn. R. R. Co. v. St. Louis, etc., R. R. Co., 118 U. S. 290.

A corporation can only have an existence under the express law of the State by which it is created, and can exercise no power which is not granted by the charter under which it exists, or by some other legislative act. Oregon R. R. Co. v. Oregonian R. R. Co., 130 U. S. 1 (1888).

§ 11. Grant of general powers. Every corporation as such has power, though not specified in the law under which it is incorporated:

1. To have succession for the period specified in its certificate of incorporation or by law, and perpetually when no period is specified.

2. To have a common seal, and alter the same at pleasure.

3. To acquire by grant, gift, purchase, devise or bequest, to hold and to dispose of such property as the purposes of the corporation shall require, subject to such limitations as may be prescribed by law.

4. To appoint such officers and agents as its business shall require, and to fix their compensation, and

5. To make by-laws, not inconsistent with any existing law, for the management of its property, the regulation of its affairs, and the transfer of its stock, if it has any, and the calling of meetings of its members. Such by-laws may also fix the amount of stock, which must be represented at meetings of the stockholders in order to constitute a quorum, unless otherwise provided by law. By-laws duly adopted at a meeting of the members of the corporation shall control the action of its directors. No by-law adopted by the board of directors regulating the election of directors or officers shall be valid unless published for at least once a week for two successive weeks in a newspaper in the county where the election is to be held, and at least thirty days before such election. Subdivisions four and five of this section shall not apply to municipal corporations.

Formerly L. 1890, ch. 563, § 8, as am'd by L. 1892, ch. 687, § 11; L. 1895, ch. 672.

For form of by-laws, see post, Form No. 206.

In 1895 the words "and the calling of meetings of its members" were inserted in the first sentence of subdivision 5, and also the words "adopted by the board of directors" in the last sentence but one.

Corporate Existence.

1. The term of existence may be extended. See § 37, post.

It would seem that the filing of the certificate of incorporation in the office of the Secretary of State is sufficient to effect incorporation and an omission to file the duplicate in the office of the county clerk would not vitiate the incorporation. Raisbeck v. Oesterricher, 4 Abb. N. C. 444 (1878); compare Card v. Moore, 68 A. D. 327 (1902), affd., 173 N. Y. 598.

The regularity of corporate existence cannot be collaterally attacked. Smith v. Havens Relief Fund Society, 118 A. D. 678 (1907), affd., 190 N. Y. 557.

Corporate Seal.

When the corporate seal has been affixed to an instrument it is prima facie proof that it was attached by the proper authority, and imposes upon the party objecting thereto the duty of showing that the seal was affixed surreptitiously or improperly. Quackenboss v. Globe & Rutgers Fire Ins. Co., 177 N. Y. 71 (1903); Logan v. Fidelity-Phenix Fire Ins. Co., 161 A. D. 404 (1914).

The presence of a corporate seal is prima facie proof that it was affixed pursuant to proper authority, but such proof may be rebutted. Gause v. Commonwealth Trust Co., 196 N. Y. 134 (1909).

Where the corporate seal appears to be affixed to an instrument and the signatures of the proper officers are proved, the courts are to presume that the officers did not exceed their authority and the seal itself is prima facie evidence that it was affixed by proper authority. Trustees of Canandarqua Academy v. McKechnie, 90 N. Y. 618, 629 (1882).

As a general rule, evidence that a contract, purporting to have been made on behalf of a corporation, was signed by the president and secretary and bears the corporate seal, is sufficient prima facie to authorize its admission in evidence, yet where it appears that the seal was affixed, not by the authority of the board of directors, but at the request of the president, and that after execution the contract was kept in a safe to which only the secretary and treasurer had access, the general rule does not apply and further proof must be given to show that the president was authorized by the directors to direct that the seal be affixed. Quackenboss v. Globe & Rutgers Fire Ins. Co., 77 A. D. 168 (1902).

A corporation, like an individual, may adopt any seal that is convenient for the particular occasion. The only limitation of the rule is, that the seal adopted must be affixed as the seal of the corporation. Rusling v. Union Pipe & Const. Co., 5 A. D. 448 (1896).

It is well settled that where several parties execute a paper, reciting that it is executed under their seals, it is sufficiently sealed if only one seal is affixed, because all the parties may adopt the same seal as their own. Van Alstyne v. Van Slyck, 10 Barb. 383. This rule applies, although one of the parties to the deed be a corporation. Rusling v. Union Pipe & Const. Co., 5 A. D. 448 (1896).

2. The corporate seal is not always necessary in order to bind the corporation. It is of great value as showing the acts of the corporation. Leinkauf v. Calman, 110 N. Y. 50 (1888); Whitford v. Laidler, 94 N. Y. 145 (1883).

The corporate seal is not necessary to the validity of its contracts. Valente v. Int. Milling Co., 119 A. D. 127 (1907).

The unexplained presence of a corporate seal upon promissory notes of a corporation does not affect their apparent character and require them to be regarded as sealed instruments. Weeks v. Esler, 143 N. Y. 374, reviewed in Chase Nat. Bk. v. Faurot, 149 N. Y. 532 (1896).

The presence of the corporate seal on a document is prima facie proof that it was executed by proper authority. Quackenboss v. Globe & R. F. Ins. Co., 177 N. Y. 71 (1904), revsg. 77 A. D. 168; Gause v. Commonwealth Trust Co., 124 A. D. 438 (1908).

See General Construction Law, § 45, post, for statutory provision concerning corporate seal where one has not been adopted.

Power to Hold Property.

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A maximum limit of property that may be held by a non-stock corporation is prescribed in the next succeeding section. No such limit is prescribed for stock corporations.

A corporation cannot take and hold property by devise or bequest beyond the maximum permitted by its charter, or the statute under which it is organized. McGraw v. Cornell Univ., 111 N. Y. 66 (1888).

For limitations as to right to acquire real property see next section; also State Constitution, art. 8, §§ 1, 3, post.

A corporation although created only for a term of years, may purchase and hold lands in fee. Nicoll v. N. Y. & Erie R. R. Co., 12 N. Y. 121 (1854); Peo. v. O'Brien, 111 N. Y. 1, 38 (1888).

Where a corporation is authorized, under certain circumstances, to hold and convey real property, it will be presumed, in the absence of proof to the contrary, that real property conveyed by it was held and conveyed in pursuance of its powers. Farmers' Loan & Trust Co. v. Curtis, 7 N. Y. 466 (1852).

When property or rights have been acquired or become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted. Albany R. R. Co. v. Brownell, 24 N. Y. 345; Peo. v. O'Brien, 111 N. Y. 1; id., 111 N. Y. 52 (1888); Lord v. Equitable Life Assur. Soc., 194 N. Y. 212 (1909), affg. 109 A. D. 252 and 47 Misc. 187.

A corporation may take title to all kinds of property, even the stock of another corporation, in the payment of a debt. H. & G. Man. Co. v. H. & W. Metal Co., 38 St. Rep. 157, 127 N. Y. 252 (1891).

Though corporate existence may be limited it does not result in inability to acquire unlimited property rights. Matter of Consolidated Gas Co., 56 Misc. 49, affd., 124 A. D. 401 (1908).

A lease executed by a corporation for a longer period than its corporate life is not invalid nor will it cease upon the termination of such corporate life. Tate v. Neary, 52 A. D. 78 (1900).

4. See § 34, post, and Stock Corp. L., §§ 25, 30 and 31.

By-Laws.

Directors may make necessary by-laws, subject, however, to the by-laws duly adopted by the members of the corporation. See § 34, post. The by-laws should fix the time and place of the election of directors. See Stock Corp. Law, §§ 25 and 29, post. The by-laws may prescribe powers and duty of officers. See Stock Corp. Law, § 30, post. The by-laws should prescribe the manner of appointing inspectors of election (Stock Corp. Law, § 31, post), and they should prescribe the manner of transferring stock. Id., § 50, post. By-laws may be adopted at special elections. See Gen. Corp. Law, § 30, post.

A by-law forbidding a change in the number of directors except by a vote of 90 per cent. of the stockholders is invalid. Katz v. H. & H. Mfg. Co., 109 A. D. 49 (1905), affd., 183 N. Y. 578.

A by-law must be reasonable, and adapted to the purposes of the corporation,

or it is void. Peo. v. Medical Soc., 24 Barb. 570 (1857); see also Matthews v. Associated Press, 136 N. Y. 333 (1892); Compton v. The Chelsea, 128 N. Y. 537 (1891); Kent v. Quicksilver Mining Co., 78 N. Y. 159 (1879).

The term "existing law" as used in subd. 5, regulating the power to make by-laws refers not only to statutes but to decisions of the court. Raub v. Gerken, 127 A. D. 42 (1908).

Directors have no power to pass a by-law under which they may assume to exercise the power of removing a fellow director, the power must be derived from the statute, the certificate of incorporation or by-laws adopted by the stockholders. Raub v. Gerken, 127 A. D. 42 (1908).

A by-law, enacted under express authority of an act of the Legislature, and in conformity with the power conferred has the same force as if enacted by the Legislature. Brick Church v. Mayor, etc., of New York, 5 Cow. 538 (1826); McDermott v. Board of Police, 5 Abb. Pr. 422 (1857); Timolat v. Held Co., 17 Misc. 556 (1896).

A provision of the by-laws must be strictly complied with. Matter of Keller, 116 A. D. 58 (1906).

Where the certificate of incorporation of a benevolent society refers to its laws and rules and a member, upon joining it, agrees in writing to conform to them, its by-laws become part of the contract. French v. Society of Select Guardians, 23 Misc. 86 (1898).

By-laws of a corporation are primarily for its own and stockholders' protection; neglect by its officers, therefore, in a single instance to obey a by-law which directs cancellation of all stock certificates surrendered for transfer, before issuing new certificates, is not such negligence as to render the corporation liable to an innocent third party for the value of certificates intended for cancellation, but which were fraudulently pledged to him by the manager of the corporation. Knox v. Eden Musee Co., 148 N. Y. 441 (1896), distg. McNeil v. Tenth Nat. Bk., 46 N. Y. 325, and N. Y. & N. H. R. R. Co. v. Schuyler, 34 N. Y. 30.

A contract by a treasurer in disregard of a by-law restricting the execution of such a contract is not binding on the corporation. Parmelee v. Associated Physicians & Surgeons, 9 Misc. 458. But see cases therein cited (1894).

Where notes were executed by the president and treasurer, who had been accustomed to sign, and the money borrowed was used for the corporation, such notes are valid, although the by-laws provided that all notes should be signed by the secretary. Milbank v. De Riesthal, 82 Hun 537 (1894); Grant v. George C. Treadwell Co., 82 Hun 591; Same v. Same, 1 A. D. 368 (1896).

A by-law which imposes a penalty upon members of a dairy corporation for failure to furnish a certain quality of milk is unreasonable and ultra vires. Monroe Dairy Assn. v. Webb, 40 A. D. 49 (1899).

A minority stockholder is not entitled to have a by-law annulled on the claim that it is unreasonable, when it deals to a large extent with ordinary business and is not void as a whole. Burden v. Burden, 159 N. Y. 287 (1899), affg. 8 A. D. 160.

An action to have a by-law declared illegal is not maintainable when its enforcement will not subject the party to irreparable injury. Thomas v. Musical Mut. Pro. Union, 121 N. Y. 45 (1890).

Under subdivision 5 above, daily publication of the by-law is not intended. Publication once a week for two weeks is sufficient. Wood v. Knapp, 100 N. Y. 109 (1885). It is not necessary that publication should be made on the same day of each week; it is sufficient if made on any day of each week for the requisite number of weeks. Id.

Force of By-Laws.

A by-law, enacted under express authority of an act of the Legislature, and in conformity with the power conferred has the same force as if enacted by the Legislature. Brick Presbyterian Church v. Mayor, etc., of New York, 5 Cow. 538 (1826); McDermott v. Board of Police, 5 Abb. Pr. 422 (1857); Timolat v. Held Co., 17 Misc. 556 (1896).

By-Laws Are Private Regulations.

By-laws of stock corporations are, as to third persons, private regulations, binding as between the corporation and its members or third persons having knowledge of them, but of no force as limitations per se as to third persons of an authority which, except for the by-laws, would be construed as within the apparent scope of the agency. Rathbun v. Snow, 123 N. Y. 349 (1890).

By-Law Regulating Transfer of Stock.

The provision empowering a corporation to make by-laws regulating the transfer of its stock merely authorizes it to prescribe the officer by whom the stock shall be transferred and the mode of its transfer. It does not authorize the imposition upon the stock of a penalty limiting the unconditional right of transferring it. Kinnan v. Sullivan County Club, 26 A. D. 213 (1898).

By-Law Fixing Quorum at Stockholders' Meetings.

The provisions of this section conferring upon a corporation the power to prescribe by its by-laws the amount of stock which must be represented at a meeting of the stockholders to constitute a quorum is expressly limited to cases where it is not otherwise provided by law; therefore, a by-law which requires a majority of the stock to be represented in order to constitute a quorum does not apply to elections of directors, since such elections are regulated by the Stock Corporation Law, section 20 (now section 25), which provides that directors shall be elected by a plurality of the votes of the stockholders voting at the election. Matter of Rapid Transit Ferry Co., 15 A. D. 530 (1897), revsg., in part, 19 Misc. 409.

Inspection of By-Laws.

The granting or refusing of a stockholder's application for an inspection of by-laws rests in the sound discretion of the court in the exercise of its equitable jurisdiction, and the court will deny the same if satisfied that the application is made for an improper purpose or will result in an abuse of the privilege. Matter of Coats, 75 A. D. 567 (1902), citing Matter of Steinway, 159 N. Y. 250 (1899). The by-laws, however, constitute part of the contract between the stockholder and the corporation. Id.; Seymour v. Sturgess, 26 N. Y. 134 (1862); Rathbun v. Snow, 123 N. Y. 343, 349 (1890). It follows, therefore, that an application for inspection of the by-laws rests upon a different footing from an application for an inspection of the books and papers of the corporation. It must be a strong case which will sustain a refusal to grant a stockholder an opportunity to inspect the by-laws and thus inform himself of the terms of the contract into which he has entered. He ought to be permitted to know the extent and terms of his obligation and the tenure upon which he holds his property. Matter of Coats, 75 A. D. 567 (1902).

By-Laws May not Impair Vested Rights.

The right of every corporation to make and change its by-laws, in a manner not inconsistent with law, does not authorize it to so modify them as to impair the obligation of outstanding contracts or impose upon one contracting with it obligations which he never assumed. Rockwell v. Knights Templar & Masonic Mut. Aid Assn., 134 A. D. 736 (1909).

Although a corporation has the power to alter, amend, add to or repeal its by-laws, it is not empowered to make an alteration which would infringe a right already given. A by-law which will disturb a vested right is unreasonable and void. Kent v. Quicksilver Mining Co., 78 N. Y. 159 (1879).

Provisions of By-Law as Notice.

A stockholder is not chargeable with constructive notice of resolutions adopted by the board of directors, or of provisions in the by-laws regulating the mode in which its business shall be transacted. Rudd v. Robinson, 126 N. Y. 113, 120 (1891), citing Pearsall v. Western Union Tel. Co., 124 N. Y. 256 (1891).

A person dealing with corporate officers acting within the apparent scope of their authority, is not affected by secret provisions of the by-laws not brought to his attention. Lyon v. West Side Transfer Co., 132 A. D. 777 (1909).

By-laws of business corporations are, as to third persons, private regulations binding as between the corporation and its members or third persons having knowledge of them, but of no force as limitations as to third persons of an authority, which, except for the by-law, would be construed as within the apparent scope of the agency conferred by the corporation upon its officer. Rathbun v. Snow, 123 N. Y. 343, 349 (1890).

By-Laws Reserving Lien on Shares.

The fact that an unauthorized by-law is printed on the face of shares of stock does not constitute notice to a bona fide purchaser that his purchase will be subject to a lien in behalf of the corporation. Buf. German Ins. Co. v. Third Nat. Bk., 162 N. Y. 163 (1900).

By-Laws as Part of Contract with the Stockholder.

Where one becomes a subscriber to the stock of a corporation and the by-laws provide the manner of payment and how calls for installments shall be made, such by-laws become a part of the contract with the corporation, and one becoming a stockholder after the adoption of such a by-law is entitled to the benefit thereof. Seymour v. Sturgess, 26 N. Y. 134 (1862).

By-Laws Limiting Authority of Corporate Officers.

A by-law, which provides that no contract shall be made "by any officer" unless authorized by the board of directors, does not limit the authority of a managing agent, intrusted with the sale of stock, to make a contract verbally authorized by the corporate officers. Sherman v. Dwight, 138 A. D. 595 (1910); 123 N. Y. Supp. 89.

Officers Chargeable with Notice of By-Laws.

Where a by-law provided that the president, vice-president, secretary and clerks shall respectively hold their offices during the pleasure of the board of directors, and until the appointment of a successor, either permanent or pro tem., and no officer or clerk shall be removed without a concurrence of a majority of the whole board of directors, such officers are chargeable with

notice of the by-law and under its terms are removable at any time. Douglass v. Merchants' Ins. Co., 118 N. Y. 484 (1890).

By-Laws Restricting Sales of Stock.

See "Restraints upon Sales of Stock," under section 10 of this law, ante.

By-Law Providing for Re-Purchase of Shares.

A by-law which makes the capital stock of the corporation dependent upon whether or not a shareholder resigns from the company, and which authorizes the repayment to the shareholder, upon his resignation, of the amount paid for his stock is unauthorized by the Stock Corporation Law, section 28, and is invalid. Picalora v. Gulf Co-operative Co., 68 Misc. 331 (1910).

Amendment of By-Laws; Action to Restrain.

A stockholder, who is also an officer, cannot maintain an action, brought not in behalf of the corporation or of other stockholders similarly situated, but individually, to restrain the holding of a special meeting called for amending the by-laws, where he fails to show that anything proposed to be done at the meeting will be injurious to the corporation, or its stockholders, or to himself individually. Gilleran v. Springfield, L. I., Cem. Soc., 161 A. D. 597 (1914). If such meeting be held and any action be attempted in derogation of plaintiff's legal rights he may take proper legal measures to protect those rights. Id.

Power to Sue.

No provision relative to suits was included in the above section, because contained in the State Constitution, article 8, section 3, as follows: "All corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons."

cf. p. 49 (n.).

A corporation may maintain an action for libel when the publication complained of assails its management or credit inflicting an injury upon its business or profits. Reporter Assn. v. Sun Printing & Pub. Assn., 186 N. Y. 437 (1906).

A business corporation can maintain a libel suit without allegation and proof of special damage only where the language used concerning it is defamatory in itself and injuriously and directly affects its credit and necessarily and directly occasions pecuniary injury. Kemble & Mills v. Kaighn, 131 A. D. 63 (1909).

§ 12. Enlargement of limitations upon the amount of the property of non-stock corporations. If any general or special law heretofore passed, or any certificate of incorporation, shall limit the amount of property a corporation other than a stock corporation may take or hold, such corporation may take and hold property of the value of ten million dollars or less, or the yearly income derived from which shall be one million dollars or less, notwithstanding any such limitations. In computing the value of such property, no increase in value arising otherwise than from improvements made thereon shall be taken into account.

Formerly § 12, added by L. 1892, ch. 687, as am'd by L. 1894, ch. 400; reenacted by L. 1909, ch. 28, as am'd by L. 1909, ch. 276.

Further amended by L. 1911, ch. 581, whereby the maximum of property holdings was increased from six to ten millions, and the amount of yearly income from six hundred thousand dollars to one million dollars.

Non-Stock Corporations.

It would appear from the foregoing Section 12 of the Gen. Corp. Law that a non-stock corporation formed under a general or special law which does not limit the amount of property that it may hold, may by virtue of Section 11 hold and dispose of such property as the purposes of the corporation may require irrespective of amount. Section 12 appears to be applicable only to those cases where some general or special law or certificate of incorporation expressly limits the amount of property to be held; and in such case the corporation by virtue of Section 12 may take and hold property of the value of ten million or less or the yearly income derived from which shall be one million dollars or less, notwithstanding any such express limitations contained in such other general or special law. In other words, if a general or special law or a certificate of incorporation contains a limitation, it is superseded by Section 12 and if the general or special law or certificate of incorporation contains no limitation, Section 12 has no application and the right to take and hold is limited solely by the general provision contained in Gen. Corp. Law, Section 11, that the property must be taken and held for a corporate purpose.

Gen. Corp. Law, Section 12, does not seem to have been judicially interpreted, but the use of the word "if" seems to make it clear that the section is not a limitation in itself, but is intended solely as a general provision modifying all limitations contained in other enactments.

The foregoing limitations do not affect stock corporations. As to what are classified as stock and non-stock corporations, respectively, see §§ 2 and 3, ante.

The amendment of 1909 increased the maximum of holdings from three to six millions and amount of yearly income from five to six hundred thousand dollars.

§ 13. Acquisition of additional real property. When any corporation, except a life insurance corporation, shall have sold or conveyed any part of its real property, the supreme court may, notwithstanding any restriction of a general or special law, authorize it to purchase and hold from time to time other real property, upon satisfactory proof that the value of the property so purchased does not exceed the value of the property so sold and conveyed within the three years next preceding the application.

Formerly L. 1890, ch. 563, § 10, as am'd by L. 1892, ch. 687, § 13; L. 1906, ch. 228.

It seems that this provision is to be read in connection with the preceding section only, and is not intended to apply to stock corporations.

The words "notwithstanding any restriction of a general or special law" were inserted by L. 1892, ch. 687, and the words "except a life insurance corporation" by L. 1906, ch. 228.

As to effect of a conflicting provision in another law, see § 321 of this law.

The words "except a life insurance corporation" were inserted by the amendment of 1906.

§ 14. Acquisition of property without the state. Any domestic corporation transacting business in other states or foreign countries may acquire and dispose of such property as shall be requisite for such corporation in the convenient transaction of its business. Any domestic corporation establishing or maintaining a charitable, philanthropic or educational institution within this state may also carry on its work and establish or maintain one or more branches of such institution or an additional institution or additional institutions in any other state, the District of Columbia or in any part of the territories or dependencies of the United States of America or in any foreign country and for either of said purposes may take by devise or bequest, hold, purchase, mortgage, sell and convey or otherwise dispose of such real and personal property without this state as may be requisite therefor. But nothing in this section contained shall be construed as exempting from taxation property to any additional amount than is now allowed to such corporation under existing laws.

Formerly L. 1890, ch. 563, § 11, as am'd by L. 1892, ch. 687, § 14; L. 1893, ch. 178.

Any corporation acquiring property in other States or foreign countries should consult the statutes of the State or country in which the property is located.

A corporation of this State can exercise no power in another State without the sanction of such State. Runyan v. Lessee of Coster, 14 Peters (U. S.) 122 (1840); Demarest v. Flack, 128 N. Y. 205 (1891); Hickory Farm Oil Co. v. Buffalo, etc., R. R. Co., 2 Ry. & Corp. L. J. 470.

Every power which a corporation exercises in another State depends for its validity upon the laws of the sovereignty in which it is exercised, and a corporation can make no valid contract without the sanction, express or implied, of such sovereignty. Runyan v. Lessee of Coster, 14 Peters (U. S.) 129 (1840); Briscoe v. Southern Kansas Ry. Co., 40 Fed. Rep. 280 (1889).

If such other State does not permit the corporation to acquire or hold real property, it must be expressed in some affirmative way. It cannot be inferred. Cowell v. Springs Co., 100 U. S. 55 (1879); Christian Union v. Yount, 101 U. S. 352 (1879).

The comity between the States raises the presumption that a corporation of one State not forbidden by the law of its being, may acquire property in another State unless it is prohibited from so doing either directly by statute or by public policy deducible from the general course of legislation or from the settled adjudication of its highest court. Cowell v. Springs Co., 100 U. S. 55 (1870); Christian Union v. Yount, 101 U. S. 352 (1879).

Gf., ch. 369, May 21, 1923.

§ 15. Certificate of authority of a foreign corporation. No foreign stock corporation other than a moneyed corporation, shall do business in this state without having first procured from the secretary of state a certificate that it has complied

with all the requirements of law to authorize it to do business in this state, and that the business of the corporation to be carried on in this state is such as may be lawfully carried on by a corporation incorporated under the laws of this state for such or similar business, or if more than one kind of business, by two or more corporations so incorporated for such kinds of business respectively. The secretary of state shall deliver such certificate to every such corporation so complying with the requirements of law. No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state, unless prior to the making of such contract it shall have procured such certificate. This prohibition shall also apply to any assignee of such foreign stock corporation and to any person claiming under such assignee or such foreign stock corporation or under either of them. No certificate of authority shall be granted to any foreign corporation having the same name as an existing domestic corporation, or a name so nearly resembling it as to be calculated to deceive, nor to any foreign corporation, other than a moneyed or insurance corporation, with the word "trust," "bank," "banking," "insurance," "assurance," "indemnity," "guarantee," "guaranty," "savings," "investment," "loan" or "benefit" as a part of its name.

V. pp. 46, 59.

Former § 15, added by L. 1892, ch. 687, as am'd by L. 1901, ch. 96 and ch. 538; L. 1904, ch. 490.

For forms of papers under these provisions, see post, Forms Nos. 435–439.

The clause in the last sentence beginning with the words "nor to any foreign corporation," etc., was added by L. 1904, ch. 490.

The provisions making the procuring of a certificate of authority a prerequisite to the making of an enforceable contract, and extending the inhibition to assignees were added by L. 1901, ch. 538. This amendment does not affect prior assigned claims where such a holding would violate the constitutional prohibition against impairing contracts. McNamara v. Keene, 98 N. Y. Supp. 860 (1906).

Foreign corporations, in addition to procuring the certificate, must also pay a license fee. See § 181 of Tax Law, page 290.

For definitions of "foreign," "stock" and "moneyed" corporations, respectively, see § 3, ante.

See, also, Penal Law, §§ 663 and 666, as enacted by L. 1904, ch. 489, as to use of word "trust."

Corporations formed under Insurance Law and Banking Law are required to obtain similar certificates from the Superintendent of Insurance and Superintendent of Banks, respectively, before commencing business. See Insurance Law and Banking Law.

In relation to the proof to be filed with the Secretary of State in order to obtain the certificate of authority above provided for, see § 16.

For other provisions affecting foreign corporations, see reference to the same in the index under the heading "Foreign Corporations."

The provisions of the foregoing section of the law and of the next succeeding section, do not confer upon the Secretary of State supervisory power over corporations organized in other States and doing business here so as to enable him to enforce a compliance with the terms of those sections. It rests entirely with the corporation itself to elect whether or not it will bring itself under the protection of the laws of this State, so as to make enforceable contracts within the State. The foregoing section provides that no foreign stock corporation, other than a banking or insurance corporation, shall do business in the State without having prior thereto procured from the Secretary of State a certificate of authority, and the next section, entitled "Proof to be filed before granting certificate," provides that, before the granting of such certificate, the corporation applying for the same must file a sworn copy of its charter or certificate of incorporation, and a statement under its corporate seal, setting forth the business or objects of the corporation which it is engaged in carrying on, or which it proposes to carry on, within the State, and a place within the State which is to be its principal place of business, and designating a person upon whom process against the corporation may be served within the State.

In addition to these requirements such corporations must pay a license fee in accordance with section 181 of the Tax Law. See page 290, post.

A corporation formed by consolidation of a domestic and a foreign corporation is a domestic corporation. In re Sage v. L. S. & M. S. Ry. Co., 70 N. Y. 220 (1877); Peo. v. N. Y., Chicago & St. L. R. R. Co., 129 N. Y. 474 (1892).

Rights Conferred by Procuring Certificate.

A foreign corporation that has filed the papers and procured the certificate required by the foregoing section has the same right to transact business here as domestic corporations. Lancaster v. Amsterdam Impmt. Co., 140 N. Y. 576 (1894). Provided the license fee prescribed by the Tax Law is paid within the specified time. Tax Law, § 181, p. 290, post.

When a foreign corporation is recognized by the authorities of the State of its domicile, it is entitled to be recognized here unless it appears that it was formed for purposes illegal or was doing acts prohibited by the laws of this State. U. S. Vinegar Co. v. Schlegel, 143 N. Y. 537 (1894); Demarest v. Flack, 128 N. Y. 205 (1891); Lancaster v. Amsterdam Improvement Co., 140 N. Y. 576 (1894). Where it has filed a certificate of incorporation required by the laws of its State, it is a corporation de facto and questions of irregularity in organization are matters for that State to inquire into. Id.

The right of a foreign corporation to sue in this State is conferred by section 1779 of the Code. O'Reilly, Skelly & Fogarty Co. v. Greene, 18 Misc. 423 (1896).

Power of State to Impose Conditions.

The State has absolute power to exclude a foreign corporation. It may impose such conditions upon permitting the corporation to do business as it may judge expedient; and it may make the grant dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital. Horn Silver Mining Co. v. New York, 143 U. S. 305 (1891); Philadelphia Fire Assn. v. New York, 119 U. S. 110; Pembina Mining Co. v. Pennsylvania, 125 U. S. 181; Norfolk & W. R. R. Co. v. Pennsylvania, 136 U. S. 114; Paul v. Virginia, 8 Wall. (U. S.) 168 (1868); Peo. ex rel. Southern

Cotton Oil Co. v. Wemple, 131 N. Y. 64 (1892); Bank of Augusta v. Earle, 13 Pet. (U. S.) 519; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727 (1885); Christian Union v. Yount, 101 U. S. 352 (1879); Peo. v. Formosa, 131 N. Y. 478; Demarest v. Flack, 128 N. Y. 205 (1891).

Corporations are not citizens within the meaning of the Constitution of the United States, article 4, section 2, clause 1, declaring that "the citizens of each State shall be entitled to all privileges and immunities of citizens, in the several States." They are creatures of local law, and have no absolute right of recognition in other States, but depend for that and for enforcement of their contracts upon the assent of those States, which may be given on such terms as they please. Paul v. Virginia, 8 Wall. (U. S.) 168 (1868). Same rule upheld in Pembina Mining Co. v. Pennsylvania, 125 U. S. 181 (1887): Norfolk & W. R. R. v. Pennsylvania, 136 U. S. 114, and Horn Silver Mining Co. v. New York State, 143 U. S. 305 (1891).

The provisions in the fourteenth amendment to the United States Constitution, section 1, that "no State shall deny to any person within its jurisdiction the equal protection of the laws," do not prohibit a State from requiring for the admission of a foreign corporation such conditions as it chooses. Pembina Mining Co. v. Pennsylvania, 125 U. S. 181 (1887).

The only limitation upon the power of the State to exclude a foreign corporation, or to exact conditions for allowing it to do business or hire offices there, arises where the corporation is in the employ of the Federal government, or where its business is commerce, interstate or foreign. Pembina Mining Co. v. Pennsylvania, supra; Peo. ex rel. Southern Cotton Oil Co. v. Wemple, 131 N. Y. 64 (1892).

A statute granting powers and privileges to corporations must, in the absence of plain indications to the contrary, be held to apply only to domestic corporations. In re Estate of Prime, 136 N. Y. 347 (1893).

Forfeiture of License to do Business.

There seems to be no authority conferred upon the Secretary of State to revoke a certificate issued to a foreign corporation to do business in this State except for failure to designate a person upon whom process may be served; however, it is not necessary that a special act of the Legislature be passed to annul the right of such corporation to do business in this State under certificate issued to it by Secretary of State. Since an action is authorized in behalf of the State to redress violations of our statutes by a foreign corporation having no right to do business within this State except by license from it which it may grant or revoke at will, the court may, on proof of willful, systematic and continuous violations of our laws annul or declare a forfeiture of the right of the corporation to do business here, following and adopting, by analogy, the remedy prescribed in actions against a domestic corporation for violation of its corporate rights or "any provision of law, whereby it has forfeited its charter, or become liable to be dissolved, by the abuse of its powers," as prescribed by the Gen. Corpn. L. § 131. People v. Am. Ice Co., 135 A. D. 180, 184 (1909).

Where a person designated by a foreign corporation has been absent for a period of more than thirty days, the Secretary of State may revoke the certificate of authority of such foreign corporation, as the statute should not be so construed as to permit of evasion by the person designated remaining away for a long period upon the claim that such absence was temporary. The Secretary of State is vested with discretionary power to revoke a license if he deems the provision requiring a new designation to have been violated. Opinion of Atty. Genl. (1908), p. 166.

Corporations Engaged in Interstate Commerce.

Under a statute of the State of Kansas, requiring foreign corporations not only to designate a person to receive process, but also to file a detailed statement of par and market value of the capital stock, of the assets and liabilities, etc., it was held that a State may not, in any form or under any guise, directly burden the prosecution of interstate business, and that such a burden is imposed when a foreign corporation, lawfully engaged in interstate commerce, is required, as a condition of its right to prosecute its business within another State, to make and file a statement setting forth certain facts which such State could not control by legislation; that such a requirement is an invalid restriction and burden and unconstitutional as to foreign corporations engaged in interstate commerce, under the commerce clause of the Federal constitution. Buck Stove & Range Co. v. Vickers, 226 U. S. 205 (1912), approving and following Intern'l Textbook Co. v. Pigg, 217 U. S. 91.

Doing Business Within the State.

A foreign corporation with an office in this State where orders are taken and cash paid on account which is to be refunded in this State if the contract is not accepted, is doing business here, and a provision making contracts subject to acceptance at the home office does not affect the character of a contract so as to change it from a New York contract. Am. Case & Register Co. v. Griswold, 143 A. D. 807 (1911); s. c., 145 A. D. 901, affd., 206 N. Y. 723.

Where a corporation maintains numerous offices throughout the State, and employs numerous superintendents and gives instructions to students at such offices, it is doing business within the State. Internat'l Textbook Co. v. Connelly, 67 Misc. 49 (1910).

The doing of isolated acts of business within a State is not "doing business" within such a prohibition. Cooper Mfg. Co. v. Ferguson, 113 U. S. 727 (1885); National Knitting Co. v. Bronner, 20 Misc. 125 (1897). A foreign corporation engaged in running a steamboat, and which has no place of business, agent or representative in the State, and has made no contract in relation to its business within the State, is not doing business in the State within the meaning of this section. Savage v. Atlanta Home Ins. Co., 55 A. D. 20 (1900).

A foreign corporation having no property or office in this State by entering into a contract of sale of paving stones quarried in another State to be delivered here from time to time over a period of ten months is not doing business here within the meaning of this section, where such sale is the only business ever transacted in this State. Haddam Granite Co. v. Brooklyn Hts. R. R. Co., 131 A. D. 685 (1909).

A foreign corporation having no office in this State and doing no business here other than selling and installing furnaces under contracts proposed in writing from the foreign State, and confirmed in that State after acceptance here, can recover on such contract although it has no certificate of authority under this section. J. L. White Furnace Co. v. C. W. Miller Transfer Co., 131 A. D. 559 (1909).

Where a foreign corporation had no office or place of business in this State the fact that its traveling salesman took orders here, subject to the approval of the corporation at its office in another State, does not place it in the position of "doing business in this State." Tallapoosa Lumber Co. v. Holbert, 5 A. D. 559; Murphy Varnish Co. v. Connell, 10 Misc. 553; National Knitting Co. v. Bronner, 20 Misc. 125 (1897); Novelty Mfg. Co. v. Connell, 88 Hun 254; Vaughn Machine Co. v. Lighthouse, 64 A. D. 138 (1901); Jones v. Keeler.

40 Misc. 221 (1903). Orders so taken for approval at the home office do not constitute a contract in this State even though the corporation has an office here. American Broom & Brush Co. v. Addicks, 19 Misc. 36 (1896); Cummer L. Co. v. Associated Mfrs. Ins. Co., 67 A. D. 151 (1901); N. Y. Terra-Cotta Co. v. Williams, 102 A. D. 1, affd., 184 N. Y. 579 (1906).

The fact that a foreign corporation consigns a portion of its goods to brokers, its agents, and that sales are made in the State from such goods, either directly at a price fixed by the corporation or in fulfillment of orders approved by it, the proceeds being deposited to the credit of the corporation in a bank in this State, and the charges of the brokers being paid by check after the deposit instead of being deducted before the deposit, does not constitute doing business within the State under the Tax Law. Peo. ex rel. Southern Cotton Oil Co. v. Roberts, 25 A. D. 13 (1898).

Soliciting orders through agents is not "doing business" in New York so as to require a certificate. Vio Chemical Co. v. Studholme, 53 Misc. 470 (1907). See also same holding in Bruner v. Kansas Moline Plow Co., 168 Fed. 218 (1909).

Where a foreign corporation consigns goods to persons in this State for sale, and sales are made by the factor in his own name, and the proceeds collected and accounted for by him, such corporation does not do business in this State within the meaning of this provision, and no certificate is necessary to enable it to maintain an action to recover the net proceeds of such goods. Bertha Zinc & Mineral Co. v. Clute, 7 Misc. 123 (1894). See also Brown Seed Co. v. Richardson, 53 Misc. 517 (1907).

A contract between two foreign corporations by a written order mailed within the State and accepted in another State is not a contract made within this State, as it was not completed until the acceptance of the order; therefore, a certificate authorizing the vendor corporation to do business here was not necessary. Shelby Steel Tube Co. v. Burgess Gun Co., 8 A. D. 444 (1896). A cause of action based on default in paying for goods delivered in this State on such contract arises here, and can be maintained under subdivision 3, section 1780 of the Code, which provides that an action may be maintained by one corporation against another "where the cause of action arose within the State." Id.

Merely making a contract in New York, no sales being made or business transacted, does not constitute "doing business" requiring a certificate of authority. Com'l Wood & Cement Co. v. Northampton Portland Cement Co., 41 Misc. 242 (1903).

The State cannot prohibit a foreign corporation from selling within the State merchandise to be manufactured outside the State nor impose burdensome conditions on such sale, for such action would conflict with the commerce clause of the United States Constitution. Hargrave's Mills v. Harden, 25 Misc. 665 (1898).

A foreign corporation which consigns fruit to New York, to be sold by consignee on a profit-sharing basis, is not transacting business in New York so as to require a certificate. Brown Seed Co. v. Richardson, 53 Misc. 517 (1907).

A foreign corporation which merely maintains a salesroom in this State where only samples are kept, all orders being filled by the home office, is not "doing business" in this State. Burrowes v. Caplin, 127 A. D. 317; Fresno Home Packing Co. v. Turle & Skidmore, 60 Misc. 79 (1908). Compare Novelty Tufting Mach. Co. v. Hutkoff, 56 Misc. 522 (1907).

Where a foreign corporation is engaged in "buying and selling accounts, making contracts and purchasing outstandings," it will be presumed to be

a stock corporation in the absence of proof to the contrary. Manufrs. Com'l Co. v. Blitz, 131 A. D. 17 (1909).

Where a New Jersey corporation owning a steamboat and confining its business to running the same and leasing it, had never procured the required certificate and receipt, the mere fact that at one time the boat was run as a ferry between two points in New York harbor will not be construed to be the doing of business within the State so as to bar an action on a fire insurance policy on the boat, since the license fees imposed by such statutes are taxes on business and cannot be imposed on the transportation of persons or property over public waters without interfering with the constitutional right of Congress to regulate commerce. Savage v. Atlanta Home Ins. Co., 55 A. D. 20 (1900).

This section does not prevent a foreign corporation doing business in the State of New York without having procured the necessary certificate, from recovering in a suit brought against it upon a counterclaim growing out of the transaction upon which the plaintiff sued. Alsing Co. v. N. E. Quartz Co., 66 A. D. 473 (1901), affd., 174 N. Y. 536.

A foreign corporation is not doing business in the State by taking out a fire insurance policy in a domestic insurance company on its plant and material through insurance brokers in the State. Cummer Lumber Co. v. Associated Mfrs. Mut. Fire Ins. Co., 67 A. D. 151 (1901), affd., 173 N. Y. 633.

The sale of a single cargo of coal in this State by a foreign corporation through an agent does not constitute "doing business" in the State so as to require a certificate. Ozark Cooperage Co. v. Quaker City Cooperage Co., 98 N. Y. Supp. 113 (1906).

A foreign corporation, the office of which is in another State and which merely has an agent in this State, who maintains an office for his own convenience and does not have exclusive control of the business in the State and keeps no books nor bank account, and makes no contracts for the sale of goods, but reports everything to the home office, and who usually makes sales to parties outside the State, and, while a particular sale was made of coal situated in the State to a resident, is not doing business in the State within the terms of this section. Penn Collieries Co. v. McKeever, 183 N. Y. 98 (1905), affg. 93 A. D. 303. There must be corporate continuity of conduct in respect to doing business. Id.

Doing business means maintaining an office and having capital invested and carrying on a regular business, and the mere furnishing, under a contract with the owner, of materials for a building, by a foreign corporation, was not a doing of business, so as to preclude an action on a contract. N. Y. Architectural Terra Cotta Co. v. Williams, 102 A. D. 1, affd., 184 N. Y. 579 (1906).

A foreign corporation, having an office in this State, which contracts to supply labor and materials and construct elevators in buildings in New York is "doing business" here within the meaning of this section. Portland Co. v. Hall & Grant Construction Co., 121 A. D. 779 (1907). But see 123 id. 495 and 124 id. 937.

A foreign corporation by disposing of its bonds and stock in this State, or by borrowing money on its obligations, is not doing business here within the meaning of this section. Union Trust Co. v. Sickels, 125 A. D. 105 (1908); Same v. Ranber, 125 A. D. 902; Same v. Finucane, 125 A. D. 902.

Payment of License Tax.

The acceptance of a license tax by the State Treasurer, although seemingly implying an authority to do business in this State, would not constitute a waiver by the State of the requirements of sections 15 and 16 of this law,

which make the issuance of a certificate of authority before the making of a contract a prerequisite to the maintaining of an action thereunder. Emmerich Co. v. Sloane, 108 A. D. 330 (1905).

Proof of compliance with this section must be made by the plaintiff, and in that respect it differs from proof of non-compliance with section 181 of the Tax Law which is a matter of defense, and must be pleaded and proved by the defendant. Manufrs. Com'l Co. v. Blitz, 131 A. D. 17 (1909), citing Halsey v. Jewett Dramatic Co., 190 N. Y. 231, revsg. 114 A. D. 420.

Failure of the complaint in an action by a foreign corporation to allege payment of the license fee is not a demurrable defect. O'Reilly, Skelly & Fogarty Co. v. Greene, supra; Halsey v. Jewett Dramatic Co., 190 N. Y. 231, revsg. 114 A. D. 420 (1907).

The provisions of section 181 of the Tax Law constitute a condition subsequent to the right of a foreign corporation to carry on business within the State, and, in an action by such a corporation, non-compliance is a matter of defense to be availed of by answer; but the requirement of section 15 of the General Corporation Law is a condition precedent to the right of a foreign corporation to make enforceable contracts in the State and compliance must be pleaded. Wood & Selick v. Ball, 199 N. Y. 217 (1907), affg. 114 A. D. 743, and explaining Welsbach Co. v. Norwich G. & E. Co., 96 A. D. 52, affd., 180 N. Y. 533; Parmelee Co. v. Haas, 171 N. Y. 579. To same effect as 190 N. Y. 217, supra, see Halsey v. Jewett Dramatic Co., 190 N. Y. 231 (1907), revsg. 114 A. D. 420.

Acts Not Deemed Doing Business Within the State.

A foreign corporation which consigns goods to a commission merchant in New York authorizing him to sell and remit the proceeds is not doing business in this State. It is the commission merchant who is doing such business. Brookford Mills, Inc. v. Baldwin, 154 A. D. 553 (1913).

Where a person conducting a general agency business, and in no way connected with a foreign corporation, takes an order for a soda fountain, sends the order to such corporation in another State and receives a commission, the corporation is not doing business within this State even though the vendee executed in this State for the purchase price notes and a chattel mortgage to secure the same. Acorn Brass Mfg. Co. v. Rutenberg, 147 A. D. 533 (1911); see, also, cases cited.

The maintenance of a transfer agent within the State for the convenience of stockholders and to facilitate sales of stock does not constitute the maintenance of an office for the "transaction of business." Wadsworth v. Equitable Trust Co., 153 A. D. 737 (1912).

The "doing business" which this section contemplates means the corporate business which is intended to be carried on and conducted by the corporation and the selling of its stock to subscribers does not come within the fair intent of that phrase. Southworth v. Morgan, 143 A. D. 648, 652 (1911), revsd. on other grounds, 205 N. Y. 293.

The mere owning and holding of real estate in this State held for investment is not necessarily doing business here. Singer Mfg. Co. v. Granite Water Spring Co., 66 Misc. 595 (1910).

Presumption as to Doing Business.

No presumption arises that a foreign corporation is doing business in the State from the fact that it sues on a contract made here. Alpha Portland Cement Co. v. Schratweiser Fireproof Const. Co., 146 A. D. 571 (1911); Singer Mfg. Co. v. Granite Spring Water Co., 66 Misc. 595 (1910).

A foreign corporation which holds real estate here as an independent

investment may recover on a lease without obtaining a certificate of authority. It is not to be presumed that such corporation is doing business in the State unless it was organized for the immediate purpose of purchasing real estate and leasing the same. Singer Mfg. Co. v. Granite Spring Water Co., 66 Misc. 595 (1910).

Right to Sue without Obtaining a License.

A foreign corporation has a right to sue in the courts of this State on a contract made with a citizen either within or without the State if it is not engaged in business within the State. Eclipse Silk Mfg. Co. v. Hiller, 145 A. D. 568 (1911).

Failure to Obey Statute Not to Create an Advantage.

A foreign corporation which has been sued upon a contract made in this State cannot take advantage of its failure to obey the statute to defeat the action. The statute was not enacted for the benefit of foreign corporations. Gaul v. Keil & Arthe Co., 199 N. Y. 472 (1910).

Contracts against Public Policy.

A contract whereby a foreign corporation, in consideration of an employee's subscription for stock, agreed that if such employee should leave its employ it would repurchase the stock at par, is not necessarily void as contravening public policy, nor is it void at common law. If there be any statute of the state in which defendant was incorporated rendering such contract ultra vires and void, or if it be unenforcible because the defendant has no surplus with which to repurchase the stock, such defenses must be pleaded and proved. Strodl v. Farish-Stafford Co., 145 A. D. 406 (1911). The court cannot take judicial notice of the statute of another state. Id.

Where a person acquires eighty per cent of the stock of a foreign corporation under an agreement to furnish funds to redeem its property from a foreclosure sale; a provision, that after such redemption the secretary and treasurer would resign and the directors would fill the vacancies with nominees of such person, is not against public policy, especially respecting a corporation of another State, the statutes of which are not proven, and when such provision is merely incidental. San Remo Copper M. Co. v. Moneuse, 149 A. D. 26 (1912).

Contracts Not Invalidated by Non-Compliance.

The statute does not render void the contracts made by foreign corporations doing business within the State without a license, but merely excludes such corporations from the State courts; and such contracts being valid, an action may be brought on them in a federal court. Johnson v. N. Y. Breweries Co. Ltd., 178 Fed. 513 (1910); Richmond Cedar Works v. Buckner, 181 Fed. 424 (1910); N. Y. Breweries v. Johnson, 171 Fed. 582 (1909); Groton Bridge Co. v. Am. Bridge Co., 151 Fed. 871 (1907).

An action will not lie against a foreign corporation to recover back a part payment under a contract upon the ground that the corporation has not complied with this section, although doing business in the State. Non-compliance with the requirements of this statute, by a foreign corporation does not have the effect of invalidating contracts made by it in this State. The only infirmity is the disability of such foreign corporation to maintain an action in the courts of this State upon a contract made by it. The contract remains valid in all other respects. Mahar v. Harrington Park Villa Sites, 204 N. Y. 231 (1912), revsg. 146 A. D. 756, and explaining dicta in Wood & Sellick v. Ball, 190 N. Y. 217; see, also, Fritts v. Palmer, 132 U. S. 282.

Pleadings in Actions by and against Foreign Corporations.

Where it is alleged, in an action upon a contract made in this State, that the plaintiff is a foreign corporation there is a presumption that it is a foreign stock corporation, and thus within the prohibition of this section. Portland Co. v. Hall & Grant Const. Co., 123 A. D. 495 (1908); Singer Sewing Mach. Co. v. Foster, 75 Misc. 641 (1912); see, also, South Bay Co. v. Howey, 190 N. Y. 240, 247 (1907), and Singer Mfg. Co. v. Granite Spring Water Co., 66 Misc. 595 (1910).

Where the allegations that plaintiff is a foreign corporation and duly authorized to do business in this State is specifically denied by the answer it will be assumed that it is a stock corporation in the absence of allegation and proof on that point, and a recovery cannot be had without both pleading and proving compliance with §§ 15 and 16. Strout Farm Agency v. Hunter, 85 Misc. 476 (1914).

The complaint of a foreign corporation is not demurrable for failure to allege compliance with this section unless it appears on its face that the corporation was doing business in this State, and that it made the contract sued upon in this State. Frick Co. v. Pultz, 162 A. D. 209 (1914).

Where it appears in a complaint that the plaintiff is a foreign corporation and one which could have been incorporated in this State as a stock corporation for business purposes and could not have been incorporated for such purposes under the membership corporations law, it will be assumed that it is a foreign stock corporation; and also, that it is doing business here when it has a district manager in this State to take charge of its ordinary and usual business. Chicago Crayon Co. v. Slattery, 68 Misc. 148 (1910).

When a foreign corporation sues in the courts of this State and its comcomplaint states a good cause of action it will be presumed to be rightfully in the State and properly in court until the contrary is made to appear. Eclipse Silk Mfg. Co. v. Hiller, 145 A. D. 568 (1911). As to all contracts, except those made in this State, a foreign corporation has the same rights in our courts as a domestic corporation. Id.; see, also, Singer Sewing Mach. Co. v. Foster, 75 Misc.. 641 (1912).

Where a complaint does not allege that the contract was made here or that the corporation was doing business here it is unnecessary to allege that plaintiff had complied with § 15, or, in the alternative, that it was not doing business here. Eclipse Silk Mfg. Co. v. Hiller, 145 A. D. 568 (1911).

In an action by a foreign corporation, if neither the complaint nor the answer alleges that the plaintiff was doing business in this State, or that the goods were sold or delivered therein, a dismissal on the ground that plaintiff was doing business here without a certificate of authority, is error. Stafford Mfg. Co. v. Newman, 75 Misc. 636 (1913).

Compliance with this section is part of the cause of action brought by a foreign corporation and must therefore be alleged in the complaint and proven as part of the plaintiff's case. Warner Instrument Co. v. Sweet, 65 Misc. 57 (1909); Schaier & Co. v. Grigsby, 132 A. D. 854 (1909); Wood & Selick v. Ball, 190 N. Y. 217 (1907).

If a complaint shows that the plaintiff is a foreign stock corporation, other than a moneyed corporation, doing business in this State and that the contract, which is the basis of the action, was made within this State, such complaint is demurrable unless it also alleges compliance with this section. But if the complaint omits to disclose such facts, it must be presumed, until the contrary is shown, that the contract was not made within this State and that the corporation is not doing business here. Acorn Brass Mfg. Co. v. Rutenberg, 147 A. D. 533 (1911), and cases cited.

Where a foreign corporation alleged in its complaint that it was authorized to do business here but failed to prove such authority, the defendant cannot for the first time urge the objection on appeal. Boynton Furnace Co. v. Trohn, 141 A. D. 773 (1910); 126 N. Y. Supp. 695.

Even though a foreign corporation sues upon a contract made in this State, its complaint should not be dismissed where it affirmatively appears that it was not doing business within this State. Acorn Brass Mfg. Co. v. Rutenberg, 147 A. D. 533 (1911), citing Southworth v. Morgan, 143 A. D. 648.

A complaint in an action by a foreign corporation that the plaintiff "was then and still is duly authorized to do business in the State of New York" is sufficient to show a compliance with this section. United Bldg. Material Co. v. Odell, 67 Misc. 584 (1910).

The laws of other States are facts which must be alleged and proved and of which our courts cannot take judicial notice either in their language or their interpretation. In the absence of those facts our courts must presume that the common law of other States is the same as the common law of New York. Southworth v. Morgan, 205 N. Y. 293, 296 (1912); San Remo Copper Mining Co. v. Monense, 149 A. D. 26 (1912); Strodl v. Farish-Stafford Co., 145 A. D. 406 (1911); Lane v. Wheelwright, 69 Hun, 180 (1893); Ruse v. Mut. Benefit Life Ins. Co., 23 N. Y. 516, 522 (1861).

There is no presumption that the statutes of New York have been enacted in another State, and in the absence of proof as to the law of such other State, the courts of this State will presume that the common law of England was in force. Waldron v. Richards, 3 Daly, 288; Abell v. Douglas, 4 Denio 305; Troop v. Hatch, 3 Abb. Pr., 23; Davis v. Garr, 6 N. Y. 124; Merrill v. Tice, 104 U. S. 557.

Examination Before Trial, under Code, 870-872.

A foreign corporation suing in this State is subject to examination before trial. Bluthenthal & Bickhart, Inc. v. Crowley, 138 A. D. 845 (1910).

There is no presumption that a "managing agent" of a foreign corporation doing business here is an officer. The moving papers must show that the person to be examined is an officer or director. Herzig v. Washington Fire Ins. Co., 144 A. D. 174 (1911).

Book of Foreign Corporation; When Evidence. When a Copy Thereof is Evidence. How Copy to be Verified.

For provisions under the foregoing topics, see Code of Civil Procedure, sections 929-931, post.

Cases Superseded by Amendment of 1901.

It has been held that a contract made in this State by a foreign corporation before it obtained a certificate of authority to transact business within the State is enforceable as soon as such certificate is procured. Neuchatel Asphalt Co., Ltd. v. The Mayor, etc., of N. Y., 155 N. Y. 373, affg. 12 Misc. 26; Reedy Elevator Co. v. Am. Grocery Co., 23 Misc. 520 (1898); both cases in effect overruling Providence Steam & Gas Pipe Co. v. Connell, 86 Hun 319. But these have been superseded by the amendment of 1901, chapter 538, in effect September 1, 1901, which provides that the certificate of authority must be procured prior to the making of contracts.

The amendment of 1901 is not applicable to a contract made prior to its enactment, as to hold otherwise would violate the constitutional provisions protecting the obligations of contracts from impairment. McNamara v. Keene, 49 Misc. 452 (1906); Lewis Pubg. Co. v. Lenz, 86 A. D. 451 (1903).

The right to sue must exist at the time the action is initiated. Subsequent compliance with the statute will not suffice. In re Schaffel's Estate, 281 N.Y.S. 957, 156 Misc. 443.

Rights of Assignees of Foreign Corporations.

It has been held that where a foreign corporation has been doing business within the State for more than thirteen months, without having paid the license tax required by section 181 of the Tax Law, it cannot maintain an action in this State, and that its assignee cannot be in a better position than the assignor. Mueller v. William F. Wall Rope Co., 53 N. Y. Supp. 255 (1897); Kinney v. Reid Ice Cream Co., 57 A. D. 206 (1901), in effect overruling Lindheim v. Sitt, 68 N. Y. Supp. 145. These decisions were rendered prior to the enactment of chapter 538 of the Laws of 1901, in effect September 1, amending section 15 in respect to assignees of foreign corporations. This section as amended now expressly provides that the assignee shall have no right of action in this State where the assignor, being a foreign corporation, has failed to comply with the law, thereby conforming the law to the rule laid down in 57 A. D. 206, supra. But see Box Board & L. Co. v. Vincennes Paper Co., 45 Misc. 1 (1904), affd., 98 A. D. 623.

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The assignee of a foreign corporation is in no better position than the corporation itself and cannot sue on a contract made by the corporation in New York before it had obtained a certificate of authority to do business, even though it had paid the license tax required by the Tax Law. Emmerich v. Sloane, 95 N. Y. Supp. 39 (1905), 46 Misc. 513, affd., 108 A. D. 330.

This section it seems only prohibits actions upon contracts made in this State by foreign corporations which have failed to procure the necessary certificate, and has no application to actions upon contracts made by other parties and assigned to such corporations. O'Reilly, Skelly & Fogarty Co. v. Greene, 18 Misc. 423, affg. 17 Misc. 302 (1896).

An assignment for the benefit of creditors, made in this State by an insolvent foreign corporation, valid under the law of its domicile, will be recognized as valid here. Vanderpoel v. Gorman, 140 N. Y. 563 (1894). Such an assignment is not violative of the provision of the Stock Corporation Law, section 66, which prohibits a transfer or assignment by a corporation in contemplation of insolvency; that provision refers solely to domestic corporations. Id.

Contracts Made Prior to December 31, 1892.

A foreign corporation without a certificate of authority may nevertheless sue in New York upon contracts made prior to the enactment of the foregoing section. Atlantic Construction Co. v. Kreusler, 40 A. D. 268; Providence Steam & Gas Pipe Co. v. Connell, 86 Hun 319; O'Reilly, Skelly & Fogarty Co. v. Greene, 18 Misc. 423, affg. 17 Misc. 302 (1896).

Attachments by Foreign Corporations.

The Code of Civil Procedure provides in what cases attachments may be issued, and what is necessary to be shown by plaintiff to entitle him to the attachment, but these provisions are not exclusive, and the Legislature may affix other conditions to the right of invoking such remedy. As a remedy by attachment is a step in an action the provisions of section 15 of the General Corporation Law apply, and the papers upon which a foreign corporation doing business in the State, in relation to a transaction within the State, must show, for the purposes of the attachment, that the corporation has complied with said section 15. Sawyer Lumber Co. v. Bussell, 84 Hun 114 (1895).

Where it does not appear that a foreign corporation is doing business in the State and the action is not upon a contract made within the State compliance with the Gen. Corp. L., § 15, need not be alleged in attachment

papers. Lukens Iron & Steel Co. v. Payne, 13 A. D. 11 (1897), distg. Sawyer L. Co. v. Bussell, supra. See, also, Box Board & L. Co. v. Vincennes Paper Co., 45 Misc. 1 (1904), affd., 98 A. D. 623.

Where a foreign corporation fails to allege in attachment papers that it had obtained a receipt for tax for the privilege of doing business within the State, or whether or not the thirteen months' limit has passed since it commenced to do business, it is a defect, and an averment in an affidavit that the corporation has complied with the requirements of sections 15 and 16 of the General Corp. L., and with all the requirements of law to authorize it to do business in this State, does not remedy the defect. Reedy Elevator Co. v. Am. Grocery Co., 24 Misc. 678 (1898). See, also, 23 Misc. 520.

An assignee of a foreign corporation need not allege compliance by the assignor with the provisions of section 181 of the Tax Law. Box Board & L. Co. v. Vincennes Paper Co., supra.

Attachments against Foreign Corporations.

An attachment against a foreign corporation cannot issue under the Code, §§ 635 and 636, upon an allegation that defendant is a foreign corporation unless the affiant gives the sources of his information and states facts indicating that the averment is made upon personal knowledge. N. Dain's Sons Co. v. McNally Co., 137 A. D. 857 (1910), and cases cited.

An attachment may issue against the New York property of a foreign corporation however solvent it may be. It is powerless to prevent a creditor, or a fictitious claimant even, from obtaining an attachment. Robertson v. Ongley Electric Co., 82 Hun 585 (1894).

Section Applies only to Actions on Contract.

The provisions of this section apply to actions on contract only, and have no application to a judgment creditor's action brought to set aside alleged fraudulent transfers and conveyances. Joseph Schlitz Brewing Co. v. Ester, 86 Hun 22 (1895), affd., 157 N. Y. 714 (1899).

A foreign stock corporation is not prevented by the foregoing section from maintaining an action of replevin, such action being purely ex delicto, and not ex contractu. American Typefounders Co. v. Conner, 6 Misc. 391, 26 N. Y. Supp. 742 (1894).

A foreign corporation, not authorized to transact business within the State, may file a mechanic's lien against the owner of a house in this State in whose construction its goods have been used, where it appears that the goods were delivered by it, within the State, to a domestic corporation, which in turn furnished them to the owner. Matter of Simonds Furnace Co., 30 Misc. 209 (1900); N. Y. Architectural Terra Cotta Co. v. Williams, 102 A. D. 1 (1905), affd., 184 N. Y. 579 (1906).

Contracts Made Elsewhere.

This section only applies to foreign corporations doing business within the State, therefore a foreign corporation may sue in this State on a contract made in another State. Batchelder & Lincoln Co. v. Knopf, 54 A. D. 329 (1900). See also, to same effect, Robinson v. American Linseed Co., 147 Fed. 885 (1906).

The bringing of an action in this State by a foreign corporation is not evidence that the contract upon which the action is based was made in the State of New York. Lukens Iron & Steel Co. v. Payne, 13 A. D. 11 (1897).

Supplementary Proceedings.

Service of an order directing presence in proceedings supplementary to execution is ineffectual if made on the person designated under section 16. It must be served upon an officer pursuant to the Code, § 2452. Matter of Meyer v. Consolidated Ice Co., 196 N. Y. 471 (1909).

Under the provisions of the Code, in reference to supplementary proceedings (§§ 2435, 2452, 2458, 2463), proceedings may be instituted against a foreign corporation having no agent and doing no business in this State, and a receiver of its property in this State may be appointed. Logan v. McCall Pub'g Co., 140 N. Y. 447 (1893), revsg. 6 Misc. 635. The policy of this State does not preclude a creditor of such a corporation from obtaining a preference upon assets here. Id. See, also, Victor v. Richards Co., 26 Civ. Pro. 295 (1897).

The officers of a domestic corporation may be examined in supplementary proceedings. Rabbe v. Astor Trust Co., 61 Misc. 650 (1909).

Lack of Certificate.

A complaint in an action brought by a foreign stock corporation must allege a compliance with this section. Welsbach Co. v. Norwich G. & E. Co., 96 A. D. 52 (1904), affd., 180 N. Y. 533. See, also, Parmele Co. v. Haas, 171 N. Y. 579.

The objection that a foreign corporation, which has brought an action upon the contract made by it in this State, has not procured a certificate of authority, is an affirmative defense, and is not available unless pleaded. W. P. Fuller & Co. v. Schrenk, 58 A. D. 222 (1901), affd., 171 N. Y. 671; O'Reilly, Skelly & Fogarty Co. v. Greene, 18 Misc. 423 (1896); Nicoll v. Clark, 13 Misc. 128 (1895). A denial of knowledge or information sufficient to form a belief as to the truth of the allegation in the complaint that the plaintiff is a foreign corporation is not sufficient. Internat'l Society v. Dennis, 76 A. D. 327 (1902). But see the later cases which hold as follows:

A foreign stock corporation doing business in this State must allege and prove that it had obtained the license prior to the making of the contract upon which the action is brought, and if it fails to do this neither it nor the assignee can maintain any action on such contract. Manufrs. Com'l Co. v. Blitz, 131 A. D. 17 (1909), citing South Bay Co. v. Howey, 190 N. Y. 240; Welsbach Co. v. Norwich Gas & El. Co., 180 N. Y. 533.

The complaint of a foreign corporation seeking to recover for goods sold in this State which fails to allege compliance with section 15 does not state a cause of action. The defense need not be taken by demurrer or answer but is available on motion for nonsuit after the evidence is in. When the complaint alleges that the plaintiff is a foreign corporation, which the answer admits, a nonsuit will not be refused on the ground that the plaintiff was not shown to be a stock corporation when the contention was not made by the corporation at the time. Wood & Selick v. Ball, 114 A. D. 743 (1906), affd., 190 N. Y. 217.

Where the complaint sets forth facts showing that plaintiff is a foreign corporation doing business in the State and that the contract was made in New York, compliance with this section must be pleaded, or a demurrer will be sustained. Welsbach Co. v. Norwich G. & E. Co., 96 A. D. 52 (1904), affd., 180 N. Y. 533. See, also, Parmele v. Haas, 171 N. Y. 579 (1902); Emmerich v. Sloane, 108 A. D. 330 (1905); Ozark Cooperage Co. v. Quaker City Cooperage Co., 112 A. D. 62 (1906).

A negotiable instrument is presumed to have been made where it is dated, and hence a promissory note dated in the city of New York must be deemed to be a contract made in this State. Manufrs. Com'l Co. v. Blitz, 131 A. D. 17 (1909).

Where the payee of a note made in this State is a foreign stock corporation, its assignee suing on the instrument in this State must allege and prove that the payee prior to the delivery of the note had obtained a certificate of authority. Manufrs. Com'l Co. v. Blitz, 131 A. D. 17 (1909).

The penalty imposed upon a foreign corporation for doing business within the State, without first obtaining a certificate of authority, is regulated solely by this section. While the penalty imposed upon such a corporation for a failure to pay the license tax is regulated by section 181 of the Tax Law, which supersedes, if it does not actually repeal, chap. 240, L. of 1895 (now specifically repealed by Tax Law), which provides "No action shall be maintained or recovery had in any of the courts of this State by such foreign corporation doing business in this State without obtaining the certificate of authority prescribed by law, and a receipt for the license fee hereby imposed." Alsing Co. v. N. E. Quartz Co., 66 A. D. 473 (1901), affd., 174 N. Y. 536.

An action by a foreign stock corporation engaged in the business of manufacturing within the State, to recover upon a policy of insurance executed within the State, for a loss occasioned by the destruction of its property within the State by fire, cannot be maintained unless prior to the making of the contract of insurance it had procured the required certificate. South Bay Co. v. Howey, 190 N. Y. 240 (1907), revsg. 113 A. D. 382.

Mechanic's Lien; Filing of, by Foreign Corporation.

A foreign corporation, not having a certificate authorizing it to transact business within the State, may, nevertheless, file a mechanic's lien against the owner of a house located in the State in the construction of which its goods have been used, where it appears that the goods were delivered by it within the State to a domestic corporation which in turn furnished them to the owner. In re Simonds Furnace Co., 30 Misc. 209 (1900).

A foreign corporation delivering, from its plant in another State, materials for the erection of a building in New York under a contract with the owner thereof, is entitled, under the Lien Law, to file a mechanic's lien, without obtaining a certificate of authority under the General Corporation Law, section 15, where, so far as appears the transaction was the only one ever performed within the State. N. Y. Architectual Terra-Cotta Co. v. Williams, 102 A. D. 1 (1905), aff'd 184 N. Y. 579.

Contracts Enforceable in Federal Courts.

Contracts made in New York by a foreign corporation which is doing business here without having complied with the statutory requirements are unenforceable in the State courts, but they are not void. Their validity and enforceability is recognized in the Federal courts. Groton Bridge Mfg. Co. v. American Bridge Co., 151 Fed. 871 (1907).

Exclusive Remedy Elsewhere Bars Action Here.

The statutory liability of stockholders in foreign corporations for corporate debts cannot be enforced except at the domicile of the corporation. Marshall v. Shermann 148 N. Y. 9 (1895), revsg. 84 Hun, 186; explained and discussed in Knickerbocker Trust Co. v. Iselin, 185 N. Y. 54 (1906), see also Coulter Dry Goods Co. v. Rosenbaum, 74 Misc. 579 (1911).

An action to enforce the statutory liability of the stockholders of an insolvent foreign corporation cannot be maintained in the courts of the State of New York when the statutes of the State in which such foreign corporation is located provide a special remedy, which is exclusive of all other remedies, and can only be administered in such State. Where the remedy is of such a character that it can only have effectual operation in one forum, a party interested should not be permitted to enforce it in another place. Cleveland, Lorain & Wheeling Ry. Co. v. Kent, 87 Hun 329 (1895). Statutes relating to procedure have no extra-territorial effect. Id.

Infringement of Name.

Failure to obtain a license does not preclude a foreign corporation from bringing a suit in equity either in the federal courts or the State courts to enjoin the use of its name by a domestic corporation. U. S. Light & Heating Co. of Maine v. U. S. Light & Heating Co. of N. Y., 181 Fed. 182 (1910).

Where a foreign corporation does business in the State without complying with the statutes entitling it to transact business here, and a domestic corporation, subsequently organized, adopts the same name as that used by the foreign corporation without knowledge of the existence of such corporation, it will not be restrained, upon motion for a preliminary injunction made in an action brought against it by the foreign corporation, from using the name adopted by it during the pendency of the action. American Tartar Co. v. American Tartar Co., 57 A. D. 411 (1901).

Statutes of Limitations as a Defense.

A foreign corporation which has complied with the statute by designating a person in this State upon whom service of summons may be made as required by the Code, section 432, subdivision 2 (now re-enacted in the General Corporation Law, section 16), may plead the Statute of Limitations as a defense. Wehrenberg v. New York, N. H. & H. R. R. Co., 124 A. D. 205 (1908); affd. 193 N. Y. 602; Smith v. Western Pacific Ry. Co., 154 A. D. 130 (1912).

Receivers of Foreign Corporations.

A receiver of the property of an insolvent foreign corporation situated in this State may be appointed to preserve the property pendente lite for the protection of the interests of the New York creditors, although the court has no jurisdiction to dissolve a foreign corporation. Horton v. McNally Co., 155 A. D. 322 (1913).

While the courts of this State will, under certain circumstances, appoint a receiver of a foreign corporation when necessary for the protection of the stockholders or creditors, they will not appoint a receiver of a foreign corporation simply because of general allegations of misconduct on the part of the directors or officers thereof. Phillips v. Sonora Copper Co., 90 A. D. 140 (1904).

The title of receivers of a foreign corporation, appointed in another State, is subject to the right of our courts to control the corporate assets in this State for the benefit of domestic creditors. Hammond v. Natl. Life Assn., 58 A. D. 453, 455 (1901); Courtright v. Vreeland, 64 Misc. 46 (1909).

Where a foreign corporation has property within this State and receivers have been appointed by the United States District Court, and no designation has been made by the receivers of a person to receive process, in an action by a resident of this State against such receivers, service may be made upon their managing agent in this State. Jacobs v. Blair, 157 A. D. 601 (1913).

Where after the sale of goods and before delivery by the corporation it went into the hands of receivers who delivered the goods, there could be no recovery on the theory of an implied contract with the receivers for the reasonable value of the goods arising out of receipt and acceptance of the goods. Meyers v. Spangenberg & McLean Co., 65 Misc. 475 (1909).

Contracts entered into within the State by receivers of a foreign corporation are enforceable, even though such corporation did not comply with this section. Meyers v. Spangenberg & McLean Co., 65 Misc. 475 (1909).

In an action to secure the appointment of a receiver of the property of a foreign corporation by a non-resident, the cause of action must have arisen in this State. When the claim is in favor of a creditor against a partnership in New Jersey, the partnership having been taken over by a New Jersey corporation, it arose in that State. Fenkart v. Bodermann, 64 Misc. 140 (1909). See, also, Code, § 1780, subd. 3, post.

Upon the principle of comity a foreign receiver has the right to bring an action in this State to enforce rights recognized by the common or statutory law of a foreign State. This includes the enforcement of assessments legally made by the courts of such foreign State. The liability of stockholders of foreign corporations falls within this rule. Howarth v. Angle, 162 N. Y. 179 (1900); Stone v. Penn Yan, etc., Ry. Co., 197 N. Y. 279 (1910); Shipman v. Treadwell, 208 N. Y. 404 (1913), affg. 150 A. D. 57.

Where a judgment against a foreign corporation, recovered after the appointment of a receiver, is assigned to a surety upon a bond given in attachment against the corporate property in a foreign State, prior to the assignment of the undertaking to the receiver, it is a valid counterclaim in favor of the surety in an action by the receiver upon the undertaking. Courtright v. Vreeland, 64 Misc. 46 (1909).

The courts of this State have power to appoint a receiver of a foreign corporation to preserve assets within their jurisdiction for the protection of domestic creditors. Hall v. Holland House Co., 12 Misc. 55 (1895); Popper v. Supreme Council Order of Chosen Friends, 61 A. D. 405 (1901). And this is true even though a receiver has been appointed in the State of its creation. Phœnix Foundry & M. Co. v. N. R. Const. Co., 6 Civ. Pro. 106 (1884). See, also, Woerishoffer v. Same, Id. 113. As to rights of auxiliary receiver, see Buckley v. Harrison, 10 Misc. 683 (1895).

A receiver of a foreign corporation may enforce in this State the liability of a stockholder incurred under a statute of the foreign State. Wigton v. Kenney, 51 A. D. 215. See, also, Am. Nat. Bank v. Nat. Ben. & C. Co., 70 Fed. 420 (1895).

A foreign corporation may sue in its own name in this State, notwithstanding the appointment of a receiver pendente lite by the United States Circuit Court in another State. Sigua Iron Co. v. Brown, 33 Misc. 50, affd., 171 N. Y. 488 (1902).

The right of a foreign receiver to sue in New York is exhaustively considered in Matter of Waite, 99 N. Y. 433 (1885).

A sequestrator of the property of a foreign corporation may maintain an action in this State to set aside a transfer made by the corporation in fraud of creditors. Barclay v. Quicksilver Mining Co., 6 Lans. 25 (1872).

The courts of New York have no power to appoint a receiver for a foreign corporation itself, but only of its assets in New York State. Reusens v. Man'f'g & Selling Co., 99 A. D. 214 (1904).

Liability of Resident Stockholders of Foreign Corporations.

Where a creditor of a foreign corporation brought an action at law against a single stockholder, residing in this State, to enforce a liability created by

the statutes of such foreign State, which imposed upon the stockholder a liability for the debts of the corporation, in addition to his unpaid subscription, in an amount equal to the stock held by him, it was held that such liability was statutory and not contractual and could only be enforced in the domicile of the corporation, and that if the action was maintainable it could not be instituted at law by a single creditor against a single stockholder, but the proper remedy would be a suit in equity on behalf of all the creditors against all the stockholders. Marshall v. Sherman, 148 N. Y. 9 (1895); see also Stoddard v. Lum, 159 N. Y. 265 (1899).

An action at law, by a single creditor of an insolvent foreign corporation against a single stockholder, to enforce the latter's statutory liability for double the amount of stock at its par value held by him in such corporation, is not maintainable under the laws of this State. Knickerbocker Trust Co. v. Iselin, 185 N. Y. 54 (1906), explaining and discussing 148 N. Y. 9 (supra). The law of this State relieves the owner of full paid stock from further liability and furnishes no remedy primarily by an action by a single creditor against a single stockholder. Coulter Dry Goods Co. v. Rosenbaum, 74 Misc. 579 (1911).

A general assignee of an insolvent corporation of another State, appointed in that State under laws thereof permitting a corporation to make a general assignment for the benefit of its creditors and empowering the assignee to maintain any action which the corporation could have maintained, can maintain in the courts of this State an action in equity against all original stockholders residing here, to enforce their common-law contractual liability to pay the subscription price of their stock, by compelling them to contribute their pro rata shares of the indebtedness of the corporation, after its assets have been exhausted, to the extent of the amounts remaining unpaid upon their stock. Stoddard v. Lum, 159 N. Y. 265 (1899), revsg. 32 A. D. 565.

A receiver, being a quasi trustee and representing the creditors, has the right to enforce the liability of stockholders for debts imposed by the statutes of the State where the corporation has its domicile. In the interest of interstate comity he may bring an action in this State to enforce the liability of a resident stockholder, where it appears that the same liability has been determined as to all the stockholders in the foreign court, and where the remedy involves no departure from our practice and does not conflict with public policy nor work injustice to any of our citizens. Howarth v. Angle, 162 N. Y. 179 (1900); Shipman v. Treadwell, 200 N. Y. 472, 476 (1911).

Shipman v. Treadwell, 200 N. Y. 472 and 208 N. Y. 404, decides, that after a court of competent jurisdiction in a foreign State has determined the liability of all stockholders under a statute providing for double liability, and the receiver has been directed to collect by proper proceedings in this State, the receiver may bring an action in this State to recover of resident stockholders their share to pay the debts of the corporation. The judgment in the foreign court is conclusive as to the assets and liabilities of the foreign corporation and as to the necessity for and amount of the assessment.

The liability of a stockholder of a foreign corporation is to be determined by the laws of the State in which the corporation was formed in so far as such laws do not violate a statute or the settled policy of this State. Southworth v. Morgan, 205 N. Y. 292 (1912). The laws of other States are facts which must be alleged and proved, and of which judicial notice cannot be taken. Id.

Where a West Virginia corporation doing business here was voluntarily dissolved by its stockholders pursuant to the laws of that State, without reserving enough to pay its debts, a creditor here may maintain an action

directly against such stockholders taking with notice as distributees of its assets which constitute a trust fund for payment of its debts, and is not required to first exhaust his remedy against the corporation, because the laws of West Virginia do not provide for such an action, and in that respect are quite different from our laws, which require as a prerequisite a judgment against the corporation and an execution thereon returned unsatisfied. Atlantic Dredging Co. v. Beard, 145 A. D. 342 (1911), affd., 203 N. Y. 584.

The New Jersey statute does not, like the law of this State, authorize a corporation creditor to sue a stockholder, whose stock has been issued by the corporation at less than par, to recover the unpaid balance to satisfy such creditor's debt. Therefore, no such action against a stockholder of a New Jersey corporation lies in the courts of this State. Under the New Jersey law, which is controlling on the New York courts, a cause of action, if any, in such case, belongs to the corporation itself, not to its creditors, and upon the bankruptcy of the corporation passes to its trustee. Manufacturers' Com'l Co. v. Heckscher, 144 A. D. 601 (1911), affd., 203 N. Y. 560; see, also, In re Remington Automobile Co., 153 Fed. 345.

Rights of Resident Stockholders.

An action does not lie in the courts of this State on behalf of a resident stockholder where the plaintiff's corporation has ceased to exist and it and the defendant were both foreign corporations, because the courts of this State will not undertake to administer foreign assets of a defunct foreign corporation any more than it would in the case of a natural person. Howe v. N. Y., N. H. & H. R. R. R. Co., 142 A. D. 451 (1911); see, also, Delavan v. N. Y., N. H. & H. R. R. Co., 154 A. D. 34.

Resident stockholders of a foreign corporation may maintain an action to prevent waste, and to compel restitution for stock or property improperly diverted. Nash v. Hall, 11 Misc. 468 (1895).

An owner and transferee of stock in a foreign corporation may maintain an action to compel the corporation to recognize the transfer, record it on their books, and issue new stock in place of the old; and may, in the same action, obtain the additional relief of enjoining the corporation from a proposed illegal issue of preferred stock. Ernst v. Elmira Municipal Imp. Co., 24 Misc. 583 (1898).

The courts of this State will enjoin a New Jersey corporation with its plant in Pennsylvania and its principal office in New York and all of whose directors are residents of New York from making an illegal issue of stock. Kraft v. Griffin Co., 82 A. D. 29 (1903).

A stockholder's action may be maintained in New York against a director of a New Jersey corporation to recover the amount of dividends declared in violation of the laws of that State. Hutchinson v. Stadler, 85 A. D. 424 (1903); Hutchinson v. Curtiss, 45 Misc. 484 (1904).

In an action by a stockholder of a foreign corporation to set aside a transfer of patent rights alleged to have been made in fraud of stockholders the plaintiff is entitled to inspection of the contracts transferring the patent rights and the resolution of the directors in relation thereto if they are in the State. Snyder v. De Forest Wireless Telegraph Co., 113 A. D. 840 (1906).

A stockholder's liability to creditors, fixed, by a foreign statute creating the corporation, at double the par value of the stock held, is not enforceable in New York since the liability is penal and not contractual. Knickerbocker Trust Co. v. Iselin, 185 N. Y. 54 (1906).

The courts of one State will not enforce the penal laws of other States. Hutchinson v. Stadler, 85 A. D. 424, 430 (1903).

Validity of Election of a Foreign Corporation.
The validity of an election of a foreign corporation will not be determined in this State upon a motion for an injunction, nor does section 1948 of the Code apply to foreign corporations. Washington Lighting Co. v. Dimmick, 41 A. D. 596 (1899).

Residence in this State of Foreign Railroad Corporation.
Under the Code, section 984, a foreign railroad corporation is deemed to have a residence in any county through which it operates its road. Polley v. Lehigh Val. R. R. Co., 138 A. D. 636 (1910), affd., 200 N. Y. 585. This is also true of a domestic railroad corporation. Poland v. United Traction Co., 88 A. D. 281 (1903), affd., 177 N. Y. 557.

§ 16. Proof to be filed before granting certificate. Before granting such certificate the secretary of state shall require every such foreign corporation to file in his office a sworn copy in the English language of its charter or certificate of incorporation and a statement under its corporate seal, and the signature of its president, vice-president or other acting head, particularly setting forth the business or objects of the corporation which it is engaged in carrying on or which it proposes to carry on within the state, and a place within the state which is to be its principal place of business, and designating a person upon whom process against the corporation may be served within the state. The person so designated must have an office or place of business at the place where such corporation is to have its principal place of business within the state and such designation must specify such office or place of business of the said person so designated, and if it is within a city the street and street number if any, or other suitable designation of the particular locality. Such designation shall be accompanied with the written consent of the person designated and shall continue in force until revoked by an instrument in writing designating in like manner some other person upon whom process against the corporation may be served in this state or until the filing in the same office of a written revocation of said consent executed by the person so designated. If the person so designated dies or removes from the place where the corporation has its principal place of business within the state, or files such revocation of his consent, and the corporation does not within thirty days after such death or removal or revocation of consent designate in like manner another person upon whom process against it may be served within the state, the secretary of state may revoke the authority of the corporation to do business within the state, and process against the corporation in an action upon any liability

* Cf., service on domestic corps. Amendment to Stock Corp. L., effective Nov. 1, 1934. Dom. corps. must file a certif. designating Secy. of State as its agent for service of process, and setting forth an address to which Secy. of St. shall mail a copy of process. Filing fee for certif. $2.

As to for. corps.: Fuller & Tucker, Inc. v. Superior Court, 15 Pac. (2d) 660, 289 U.S. 361 (19 Abb. J. 403-4). Silva v. Crombie & Co., (N. Mex.), 44 Pac. (2d) 719.

incurred within this state before such revocation, may, after such death or removal, or revocation of consent, and before another designation is made, be served upon the secretary of state. At the time of such service the plaintiff shall pay to the secretary of state two dollars, to be included in his taxable costs and disbursements, and the secretary of state shall forthwith mail a copy of such notice to such corporation if its address, or the address of any officer thereof, is known to him. The secretary of state may require the execution of any such designation, revocation or consent, to be authenticated as he deems proper and he may refuse to file it without such authentication.

Formerly § 16, added by L. 1892, ch. 687, as am'd by L. 1895, ch. 672; part of subd. 2, § 432, Code Civ. Pro., incorporated by L. 1909, ch. 28.

By L. 1895, ch. 672, the words "in the English language" in the fourth line were inserted.

The Secretary of State has rejected many papers drawn under this section which in his opinion set forth objects not within the scope of the act, but in only one case has his action been contested in the courts. In this case a corporation organized under a special act of the Legislature of New Hampshire was authorized to carry on the business of a safe deposit and trust company, and to deal in money and securities. It desired authority to carry on in this State a portion of the business for which it was organized, and presented for filing papers in which the business to be carried on here was stated to be the purchase and sale of the stock, bonds and other written evidences of indebtedness of public corporations, to wit, stock, bonds and other written evidences of indebtedness of States, cities, villages, towns and other political subdivisions. The Secretary of State refused to file the papers or to issue a certificate for the reason that it being a banking corporation, invested with banking powers, could not do business by authority from the office of the Secretary of State. The corporation applied for a writ of mandamus to compel the filing of the papers. The writ was denied. Decided March 18, 1893, in Supreme Court, Special Term, Third Department; Herrick, Justice. No appeal was taken. People ex rel. E. H. Rollins & Sons v. Rice.

A foreign corporation applied to the Secretary of State for a certificate of authority to carry on the business of acting as trustee, and also to guarantee contracts. The certificate was refused. In this case the Attorney-General, in an opinion dated April 30, 1897, held. that where a company proposed to act in the capacity of a trustee the business came within the provisions of subdivision 4 of section 156 of the Banking Law, and that the guarantee feature was a purpose provided for by subdivision 4, section 70 of the Insurance Law; therefore. the purposes set forth were those of a moneyed corporation, and not within the scope of sections 15 and 16 of this law.

Exemplified Copy of Designation as Evidence.

An exemplified copy of a designation of a person upon whom to make service filed by a foreign corporation as provided in section 16 of the General Corporation Law, accompanied with a certificate that it has not been revoked, is presumptive evidence of the execution thereof, and conclusive evidence of the authority of the officer executing it. Code Civ. Pro. § 931a, added by L. 1909, ch. 65.

Provisions of the Code of Civil Procedure, relative to Service of Summons upon Foreign Corporations.

Personal service of the summons upon a defendant, being a foreign corporation, must be made by delivering a copy thereof, within the state, as follows:

1. To the president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary; or, if the corporation lacks either of those officers, to the officer performing corresponding functions, under another name.

2. To a person designated for the purpose as provided in section sixteen of the general corporation law.

3. If such a designation is not in force, or if neither the person designated, nor an officer specified in subdivision first of this section, can be found with due diligence, and the corporation has property within the state, or the cause of action arose therein; to the cashier, a director, or a managing agent of the corporation, within the state.

4. If the person designated as provided in section sixteen of the general corporation law dies or removes from the place where the corporation has its principal place of business within the state and the corporation does not within thirty days after such death or removal designate in like manner another person upon whom process against it may be served within the state, process against the corporation in an action upon any liability incurred within this state or if the corporation has property within the state may after such death, removal or revocation and before another designation is made be served upon the secretary of state.

Code Civ. Pro. § 432, as am'd by L. 1903, ch. 311; L. 1909, ch. 65.

The provisions of this article, relating to the mode of service of a summons, apply likewise to the service of any process or other paper, whereby a special proceeding is commenced in a court, or before an officer, except a proceeding to punish for contempt, and except where special provisions for the service thereof is otherwise made by law.

Code Civ. Pro. § 433.

Proof of service, as prescribed in this article, must be made by affidavit, except as follows:

1. If the service was made by the sheriff, it may be proved by his certificate thereof. * * *

Code Civ. Pro. § 434.

Meaning of Managing Agent.

A manager must be some person invested by the corporation with general powers involving the exercise of judgment and discretion, as distinguished from an ordinary agent or attorney, who acts in an inferior capacity and under the direction and control of superior authority. Taylor v. Granite State Prov. Assn., 136 N. Y. 343 (1893).

A representative of a foreign corporation who obtains orders here and sends them to the home office for acceptance and who acts in a similar capacity for various corporations and whose office expenses are partly paid by the corporation is not a managing agent. Beck v. North Packing & Prov. Co., 159 A. D. 418 (1913).

In determining what agents are managing agents under this section of the Code each case must necessarily depend upon its own facts. A reasonable requirement is that the person served should be of sufficient responsibility to render it probable that the company will receive notice of the service. Coler v. Pittsburgh Bridge Co., 84 Hun 285, revsd. on other grounds, 146 N. Y. 281 (1905).

The term "managing agent" imports a person invested with general powers involving the exercise of judgment and discretion. Where the foreign corporation has not designated any person as prescribed, the service of a summons upon one having no other connection with the corporation than that of attorney of record in an action to which the corporation is a party, gives the court no jurisdiction. Taylor v. Granite State P. Assn., 136 N. Y. 343 (1893); Reddington v. Mariposa L. & M. Co., 19 Hun 405 (1879); Palmer v. Penn. Co., 35 Hun 369 (1885); Tuchband v. C. & A. R. R. Co., 115 N. Y. 437 (1889). See, also, A. & P. Tel. Co. v. B. & O. R. R. Co., 87 N. Y. 355 (1882); Pope v. Terre Haute C. & M. Co., 87 N. Y. 137 (1881); Childs v. Harris Mfg. Co., 104 N. Y. 477 (1887).

An agent who has general supervision of a business is a managing agent, although the district in which his powers are exercised may be limited. Mullins v. Met. Life Ins. Co., 78 Hun 297 (1894); Ives v. Same, 78 Hun 32. An agent who merely superintends certain soliciting agents and has no authority to employ or discharge them is not a managing agent. Schryver v. Same, 29 N. Y. Supp. 1092 (1894).

The term "managing agent" includes any person holding some responsible and representative relation to the company. Coler v. Pittsburgh Bridge Co., 146 N. Y. 281 (1895).

An agent of a foreign newspaper corporation who signs as its "eastern representative" and conducts its business transacted in the State, is the managing agent of the corporation within the meaning of subdivision 3 of the foregoing section. Palmer v. Chicago Evening Post Co., 85 Hun 403 (1895).

Service of summons on the general superintendent of the work of operating the lines of a domestic telegraph company is sufficient as a service on the "managing agent." Barrett v. Am. Telephone & Teleg. Co., 138 N. Y. 491 (1893), affg. 56 Hun 430.

Where it appears that a person has been managing agent for a corporation, the burden rests upon the corporation to show a termination of such relation. Id.

When no designation has been made service upon a special agent is proper if it does not appear that he was not the president or secretary of the corporation or an officer performing corresponding functions, or its cashier, director or managing agent. Silver v. Western Assurance Co., 3 A. D. 572 (1896).

When the person designated by a foreign corporation cannot be found within the State, a delivery of the summons and complaint to the custodian of property attached and a delivery thereof by the latter to the managing agent of the corporation, who calls the attention of the board of directors of the corporation thereto, is a sufficient service to support the attachment, although the papers were not delivered to such agent with intent to effect a service, and were subsequently returned to said custodian. Kieley v. Central Complete Combustion Mfg. Co., 13 Misc. 85 (1895).

A designation, under section 30 of the Insurance Law, chapter 690, Laws of 1892, of the superintendent of insurance as the person upon whom service of process may be made in an action against a foreign insurance corporation does not preclude service of summons pursuant to the foregoing section. Silver v. Western Assurance Co., 3 A. D. 572 (1896); Howard v. Prudential Ins. Co., 1 A. D. 135 (1896). In such a case a proper service may be made upon a foreign insurance corporation either under the provisions of the Code or the Insurance Law. 3 A. D. 572, supra.

Officer Temporarily in State.

Although the Federal rule is to the contrary, in our courts jurisdiction over a foreign corporation, which has neither done nor is authorized to do business in this State, may be obtained by service of summons upon its treasurer, resident of the foreign State, while passing through this State. Sadler v. Boston & Bolivia Rubber Co., 140 A. D. 367 (1910), and cases cited; affd., 202 N. Y. 547.

A New York court cannot acquire jurisdiction of a foreign corporation, which is not doing business in the State, by service of summons on its president, who is in the State on private business, although the corporation had previously done business here, and the president, when served, had incidentally called in relation to a contract growing out of such business, but which had been completed. Buffalo Sandstone Brick Co. v. Am. Sandstone Brick Mach. Co., 141 Fed. 211 (1905). See, also, to same effect, Donovan v. Dixieland Am. Co., 152 Fed. 661 (1907); Case v. Smith, Lineaweaver & Co., 152 Fed. 730 (1907); Ladd Metals Co. v. Am. Min. Co., 152 Fed. 1008 (1907).

Where a foreign corporation has complied with all statutory requirements to do business in the State and after transacting business here ceased such business, revoked the designation of its agent and withdrew its office and property from the State, its subsequent maintenance of an action in a State court, which was begun before it withdrew from the State and related to its business therein, does not constitute a continuance of such business so as to subject it to suit therein by making service on the Secretary of State. Lathrop-Shea & Henwood Co. v. Interior Const. & Imp. Co., 150 Fed. 666 (1907).

Designation of Two Persons is Permissible.

Where a corporation designates two persons, or either of them, as the persons upon whom process may be served, it greatly facilitates the service of papers upon the corporation and satisfies every requirement of the statute. Opinion of Atty. Genl. (1907), p. 292.

Decisions Generally.

Where the president of a foreign corporation resides within the State of New York and maintains an office therein from which he manages its business, the service of a summons upon the corporation by the delivery of a copy thereof to its president within this State is valid. Grant v. Cananea Cons. Copper Co., 189 N. Y. 241 (1907).

Where a foreign corporation has property within this State and receivers have been appointed by the United States District Court, and no designation has been made by the receivers of a person to receive process, in an action by a resident of this State against such receivers, service may be made upon their managing agent in this State. Jacobs v. Blair, 157 A. D. 601 (1913).

Where the president, general counsel, transfer agent and the members of the executive committee of a foreign corporation, reside in New York City, and the corporation, under the terms of a trust mortgage, maintains an office in that city, process may be served upon the president in New York. Smith v. Western Pac. Ry. Co., 138 N. Y. 244 (1910).

Proper service of process upon a foreign corporation may be waived Tierney v. Helvetia Swiss Fire Ins. Co., 138 A. D. 469 (1910).

§ 17. Reincorporation of foreign moneyed corporations. Any moneyed corporation duly organized by or under the laws of any state of the United States, and having an office or doing business in this state, may file, if a banking corporation or authorized to make loans upon pledges or deposits, in the office of the superintendent of banks, and if an insurance corporation in the office of the superintendent of insurance, the documents described in section eighteen of this chapter, and such documents shall be recorded as original certificates of incorporation are required by law to be recorded. The fees for filing and recording such documents, together with the tax, if any, required by law to be paid before the incorporation of a domestic company of the same class, must be paid before filing.

New; formerly L. 1900, ch. 733, § 1.

§ 18. Papers to be filed upon reincorporation. The documents to be filed by any such corporation shall include,

1. A copy of its charter, certificate of incorporation, or other document constituting it a body corporate, with such amendments, if any, as are desired by the corporation or are required by the laws of New York, authenticated as an original certificate of incorporation is required to be authenticated;

2. A declaration of its desire to become a corporation of this state and of its submission to the laws of this state, duly executed by the authority of the body in which its corporate powers are vested.

3. A certificate of the superintendent of that department in which these papers are filed that the charter, certificate of incorporation or other constituent document, with its proposed amendments, if any, as filed, is in all respects consistent with the laws of this state relating to domestic corporations of the same class;

that the corporation applicant has complied with all conditions imposed by its laws upon domestic corporations of the same class beginning business in this state, with the exception of any provisions concerning the residence of a majority of the corporators, trustees, or directors of such corporation; that its name is not the same* with the name of any domestic corporation, nor likely to be confounded with any such name, and that it has paid all fees and taxes due from it to the state, including the tax, if any, imposed by this state upon the original incorporation of a company of the same class.

New; formerly L. 1900, ch. 733, § 2.

§ 19. When reincorporation effected and effect thereof. From the date of filing these documents the corporation shall become and be a corporation of this state, and shall be subject to all the laws of this state applicable to corporations of the same class; but its existence and powers as such corporation shall terminate if it shall fail at any time for one month to maintain an office within the state at which an authorized officer or agent shall be present at all reasonable business hours, prepared to exhibit the books of the company to the proper authorities of this state and to receive service of process; or if it shall fail within two years to terminate its corporate existence derived from any other state, by surrender of its charter or by dissolution.

New; formerly L. 1900, ch. 733, § 3.

§ 20. Acquisition of real property in this state by certain foreign corporations. Any foreign corporation doing business in this state and created under the laws of the United States, or of any state or territory thereof, or of any foreign state or nation which borders the United States of America and which by its laws confers similar privileges on corporations created by the laws of the state of New York, may acquire and hold such real property in this state as may be necessary for its corporate purposes in the transaction of its business in this state, and convey the same by deed or otherwise in the same manner as a domestic corporation.

Formerly § 20, L. 1890, ch. 563, as am'd by L. 1892, ch. 687, § 17; L. 1910, ch. 68.

By the amendment of 1910 the right of a foreign corporation to hold real property in this State is made dependent upon the existence of a reciprocal right in the State of its domicile.

* So in the original.

This section permits corporations organized under the laws of any State or Territory of the United States to acquire real estate here for its corporate purposes, and convey the same in like manner as a domestic corporation. See Chautauqua Co. Bk. v. Risley, 19 N. Y. 369 (1859); Moss v. Averell, 10 N. Y. 449 (1853).

The power of corporations to take and hold property depends upon their charters. The law of this State cannot enlarge or change the powers of a foreign corporation. They are solely those given by the law of domicile. Foreign corporations are permitted by comity to exercise their powers within this State, when not in contravention of our statutes or public policy. In re Estate of Prime, 136 N. Y. 347 (1893).

As to a foreign corporation which holds real estate contrary to law, see Fritts v. Palmer, 132 U. S. 282 (1889), and the dissenting opinion therein.

Whether a corporation holds real property in excess of the limit permitted by law is a question that can be raised only in a direct proceeding by the State against the corporation. Barnes v. Suddard, 117 Ill. 237.

The courts of this State will not interfere with internal administration of the affairs of a foreign corporation. Fisher v. Charter Oak Life Ins. Co., 52 Super. Ct. 179 (1885); Berford v. N. Y. Iron Mine, 56 Super. Ct. 236 (1888).

Public policy does not forbid transaction of business in this State by a corporation formed in another State by citizens of this State, for the purpose of transacting business here. Demarest v. Flack, 128 N. Y. 205 (1891).

§ 21. Acquisition by foreign corporation of real property in this state. Any foreign corporation may purchase at a sale upon the foreclosure of any mortgage held by it, or, upon any judgment or decree for debts due it, or, upon any settlement to secure such debts, any real property within this state covered by or subject to such mortgage, judgment, decree or settlement, and may take by devise any real property situated within this state and hold the same for not exceeding five years from the date of such purchase, or from the time when the right to the possession thereof vests in such devisee, and convey it by deed or otherwise in the same manner as a domestic corporation.

Formerly § 13, L. 1890, ch. 563, as am'd by L. 1892, ch. 687, § 18; L. 1894, ch. 136.

By the amendment of 1894 the provision was inserted extending to foreign corporations the right to acquire real property by devise.

Sections 17 and 18 (now §§ 20 and 21) afford no warrant for ignoring the broad and general authority contained in sections 15 and 16. Section 18 (now § 21) may still have an office to perform in limiting the period of time for which a foreign corporation, without a certificate from the Secretary of State, may hold land taken for a debt, or purchased at a sale under a judgment or decree; while the necessity for retaining section 17 (now § 20) is not readily perceived. The foreign corporation, which desires to acquire real property, solely for use connected with the transaction of its business here, must, under section 15, procure the certificate of the Secretary of State as a condition of being permitted to carry on business and, having the certificate, its right to do business as freely as a domestic corporation, necessarily carries with it the recognition of the right to acquire and hold what real prop-

erty may be necessary for that purpose. Both sections, possibly, were retained in the revision of the corporation laws out of abundant caution. Neither section is a new enactment, but merely the continuation of an existing law. Whatever the reason to be assigned for retaining sections 17 and 18 (now §§ 20 and 21), the provisions of sections 15 and 16 contain an authoritative declaration by the Legislature, and no attempt should be made to refine away their comprehensive meaning. It is not the policy of this State to prevent foreign corporations from acquiring and holding real property here, if desired for the transaction of any lawful business. Lancaster v. Amsterdam Imp. Co., 140 N. Y. 576 (1894).

The provisions of this section do not require a foreign religious corporation to obtain permission of the court before conveying its real property in this State as is required of a domestic non-stock corporation. The words "a corporation" or "any corporation" apply only to domestic corporations. Muck v. Hitchcock, 212 N. Y. 283 (1914), revsg. 149 A. D. 323 (1912).

§ 22. Prohibition of banking powers. No corporation, domestic or foreign, other than a corporation formed under or subject to the banking laws of this state or of the United States, except as permitted by such laws, shall by any implication or construction be deemed to possess the power of carrying on the business of discounting bills, notes or other evidences of debt, of receiving deposits, of buying and selling bills of exchange, or of issuing bills, notes or other evidences of debt for circulation as money, or of engaging in any other form of banking; nor shall any such corporation, except an express company having contracts with railroad companies for the operation of an express service upon the lines of such railroad companies, or a transatlantic steamship company, or a telegraph company, or a corporation incorporated prior to the year eighteen hundred and fifty, to promote the welfare of emigrants, possess the power of receiving money for transmission or of transmitting the same, by draft, traveler's check, money order or otherwise.

Formerly § 14, L. 1890, ch. 563, as am'd by L. 1892, ch. 687, § 19; L. 1904, ch. 236; L. 1911, ch. 771.

The last clause was added by the amendment of 1911.

The provisions of this section conferring upon transatlantic steamship companies power to receive money for transmission apply to the bona fide agents, whether individual or corporate, of such company. Opinion of Atty. Genl. (1911), Vol. 2, p. 621.

A foreign transportation corporation is prohibited by the provisions of this section from issuing, buying and selling drafts or bills of exchange or issuing evidences of debt for circulation as money. Opinion of Atty. Genl. (1911), Vol. 2, p. 544.

By an amendment of 1904, ch. 236, a prohibition against buying gold and silver bullion and foreign coins, previously contained in this section, was stricken out.

It is the settled policy of the Legislature to prevent corporations not formed for banking purposes from carrying on, or in any way interfering with the same. N. Y. Loan & Trust Co. v. Helmer, 77 N. Y. 64 (1879). See, also, N. Y. Life Ins. & Trust Co. v. Beebe, 7 N. Y. 364 (1852); Pratt v. Short, 79 N. Y. 443-444 (1880).

Certificates of deposit irredeemable within twenty years and bearing interest as loans are violations of this provision. N. Y. Life Ins. & Trust Co. v. Beebe, 7 N. Y. 364 (1852).

§ 23. Qualification of members as voters. Unless otherwise provided in the certificate of incorporation, every stockholder of record of a stock corporation shall be entitled at every meeting of the corporation to one vote for every share of stock standing in his name on the books of the corporation; and at every meeting of a non-stock corporation, every member, unless disqualified by the by-laws, shall be entitled to one vote. The stockholders of a stock corporation, by a by-law adopted by a vote at any annual meeting, or at any special meeting duly called for such purpose, may prescribe a period, not exceeding forty days prior to meetings of the stockholders, during which no transfer of stock on the books of the corporation may be made. Except in cases of express trust, or in which other provision shall have been made by written agreement between the parties, the record holder of stock which shall be held by him as security, or which shall actually belong to another, upon demand therefor and payment of necessary expenses thereof, shall issue to such pledgor or to such actual owner of such stock, a proxy to vote thereon. No member of a corporation shall sell his vote or issue a proxy to vote to any person for any sum of money or any thing of value. The books and papers containing the record of membership of the corporation shall be produced at any meeting of its members upon the request of any member. If the right to vote at any such meeting shall be challenged, the inspectors of election, or other persons presiding thereat, shall require such books, if they can be had, to be produced as evidence of the right of the person challenged to vote at such meeting, and all persons who may appear from such books to be members of the corporation may vote at such meeting in person or by proxy, subject to the provisions of this chapter.

Formerly L. 1890, ch. 563, § 20, part, as am'd by L. 1892, ch. 687; L. 1901, ch. 355. The other parts of former section 20 are now §§ 24 and 25.

For form of pooling agreement, see post, Forms Nos. 333 and 334.

As amended in 1901 this section authorizes a provision in the certificate of incorporation to withhold, limit or amplify the voting power of the dif-

ferent classes of stockholders. Prior to this amendment every stockholder was entitled to one vote for every share of stock held by him, except when the certificate of incorporation provided for cumulative voting. The amended section also empowers stockholders by a by-law to prescribe the time for closing stock books for voting purposes, not exceeding forty days prior to meetings of stockholders. This is in lieu of the former provision which entitled persons who became stockholders at least ten days prior to a stockholders' meeting to vote thereat. The amendment of 1901 further provides that, except in certain specified cases, the real owner or pledgor of stock standing in the name of another is entitled, upon demand and payment of necessary expenses, to receive a proxy to vote thereon.

As to stock book, inspectors of election and meeting for election of directors, see Stock Corp. Law, §§ 32, 31 and 25, respectively.

As to powers of Supreme Court respecting disputed elections, see § 32 of this law.

Consolidators' Note.

This section was added to Laws 1890, chapter 563, by Laws 1892, chapter 687. This section as amended contained provisions that could well be placed in separate sections, and in furtherance of clearness and so as to enable the different provisions to be more readily found, this has been done. Thus, the matter relating to cumulative voting commencing with the words "The certificate of incorporation" and ending "according to the provisions of this section," has been taken out of section 23, "old" section 20, and placed in the consolidated law as section 24.

Again, the matter relating to voting trust agreements, which was added to the section by Laws 1901, chapter 355, commencing with the words "A stockholder may, by agreement" and ending with the words "daily, during business hours," has also been taken out of section 23 and placed in the consolidated law as section 25. These changes work no change of substance but will result in bringing these important provisions into a form where they will be readily seen and found.

Penal Law Provision.

Any person who, being entitled to vote at any meeting of the stockholders or bondholders, or both, of a stock corporation, sells his vote, or who issues a proxy to vote to any person for any sum of money or thing of value, except as expressly authorized by law, is guilty of a misdemeanor. Penal Law, § 668, post.

Right to Deny or Limit Voting Privileges.

There being no statute to the contrary, a certificate of incorporation which classifies stock into common and preferred, may provide that one class of stock shall be deprived of voting power. Such a provision is but an arrangement between different classes of stockholders, which does not concern the public and does not violate any rule of the common law or any rule of public policy. The legislature did not intend to compel every class of stockholders to be endowed with the right to vote, nor to prohibit the formation of a corporation which deprived one class of stockholders of the voting power. Peo. ex rel. Browne v. Koenig, 133 A. D. 756 (1909), 118 N. Y. Supp. 136, citing with approval, State ex rel. Frank v. Swanger, 190 Mo. 561.

The power to vote upon shares of stock, which is incidental to the ownership of the stock itself, may not be taken from the holder in invitum; but he may qualify his ownership by his own consent that another may vote for

him, as in the familiar manner of a vote by proxy, or he may accept the ownership with a condition which involves the consent of others controlling the manner of voting. Elger v. Boyle, 69 Misc. 273 (1910), citing Peo. ex rel. Browne v. Koenig, 133 A. D. 756 (1909).

A provision in a certificate of incorporation that stockholders shall be entitled to one vote irrespective of the number of shares of stock which they own, is legal. Opinion of Atty. Genl. (1910), p. 406, citing Peo. ex rel. Browne v. Koenig, 133 A. D. 756.

This section does not authorize provisions in a certificate of incorporation which (a) assume to give holders of certificates of indebtedness the right to determine the question whether any of the property of the corporation shall be sold, exchanged, mortgaged, leased or otherwise disposed of or encumbered, and the terms and conditions upon which such transactions shall be effected, and takes the same away from the stockholders and (b) provides that the question whether the business of the corporation shall be discontinued, its affairs liquidated and its assets converted into cash and distributed according to law shall be determined by the holders of certificates of indebtedness, and also deprives the stockholders of the right to vote thereon. Opinion of Atty. Genl. (1912), Vol. 2, p. 238.

The phrase "unless otherwise provided in the certificate of incorporation," in the beginning of this section, does not relate only to cumulative voting permitted by section 24, but permits the certificate of incorporation to provide what voting right classes of stockholders shall possess; and it is lawful for different classes of stockholders to agree among themselves, through the certificate of incorporation, that one class shall have no right to vote upon all or certain questions relating to the management of the corporation, and such agreement does not contravene public policy. The Legislature did not intend to compel every class of stockholders to retain the right to vote, or to prohibit formation of a corporation depriving preferred stockholders of voting power. Peo. ex rel. Browne v. Koenig, 118 N. Y. Supp. 136 (App. Div., July, 1909).

A stockholder's right to vote for directors, once acquired, cannot be divested, even by legislation, as it is a right to protect the property from loss and make it effective in earning dividends, and to deprive him of such right or to so undermine it as to essentially affect its power of protection is to deprive him of an essential attribute of his property involved in the ownership of stock. Lord v. Equitable Life Assur Soc., 194 N. Y. 212 (1909), revsg. 126 N. Y. 937; Stokes v. Continental Trust Co., 186 N. Y. 285 (1906).

Discussion of Non-Voting Clauses in Certificate of Incorporation and Effect Thereof.

Where a certificate of incorporation provides that one class of stockholders is to have no voting rights or privileges whatever, the question arises as to the effect of such a provision in cases where proceedings are taken under various sections of the law either to change the amount of authorized capital stock, the number of directors or to give assent to mortgage or some other corporate matter and the affirmative vote or consent of a specified number of stockholders is required. For example, section 26 of the Stock Corporation Law provides that the number of directors may be increased or decreased "when the stockholders owning a majority of the stock of the corporation shall so determine." If the preferred stock is deprived of all voting power, thus vesting the entire voting power with holders of common stock, will the consent of a majority of the outstanding common stock be a compliance with the statute? It is believed that this question must be answered in the

affirmative in view of the reasoning in Ripin v. U. S. Woven Label Co., 205 N. Y. 442 (1912). It was there held that a clause in the certificate of incorporation was valid which provided that the number of directors should not be changed except by unanimous consent of stockholders, although the Stock Corporation Law, section 26, provided for such change by majority vote. The court recognized that the provision in the certificate was in conflict with the Stock Corporation Law but held that unless it was intended by section 10 of the General Corporation Law to allow limitations on the power of the corporation and its members different from those prescribed by statute, the privilege granted by section 10 would be of little or no efficacy. The argument of the court, at pages 446 and 447 of the opinion, is of equal cogency when applied to the question now being considered. The court said:

> "When the statute provided for the organization and internal regulation and management of corporations it was necessary to prescribe many details which did not involve public policy or the relations of the corporations with the public. It was necessary simply because there had to be some rules or regulations on the subject. Appreciating this, the lawmakers, while prescribing general rules in default of agreement to the contrary, permitted the incorporators, by agreement made at the inception of the corporation and embodied in the certificate by which the corporation got life, to regulate these unessential matters in such manner as they might agree."

In view of this interpretation of the scope of section 10 of the General Corporation Law, the various provisions of other sections with respect to the number of votes required to effect a change in the organization or stock of the corporation must be read having in view the right to deprive certain stockholders of voting power and must be deemed to have reference solely to stockholders having the right to vote. So that where the consent of a specified percentage of outstanding stock is required it must be held to mean "outstanding stock having voting power." It should be borne in mind, however, in case holders of preferred stock are deprived of voting rights without any reservation, that their proportionate interest in the corporation might be changed by an increase in the amount of the authorized preferred stock, effected solely by the holders of the common stock. If it is desired to provide against such contingency, a right to vote upon such matters may be reserved, as in Form No. 275, post.

Married Women May Vote.

Laws of 1851, ch. 231, provided that married women who are stockholders have the same rights at corporate elections as other stockholders. This act was repealed and superseded in 1896 by the Domestic Relations Law (now L. 1909, ch. 19), section 51 of which upon this subject reads as follows:

§ 51. **Powers of married woman.**—A married woman has all the rights in respect to property, real or personal, and the acquisition, use, enjoyment and disposition thereof, and to make contracts in respect thereto with any person, including her husband, and to carry on any business, trade or occupation, and to exercise all powers and enjoy all rights in respect thereto and in respect to her contracts, and be liable on such contracts, as if she were unmarried; * * * (Formerly L. 1884, ch. 381, as re-enacted and am'd by Domestic Relations Law of 1896, ch. 272; re-enacted by L. 1909, ch. 19, § 51.)

Since ch. 381, L. 1884 (now Domestic Relations Law, § 51) was enacted all disabilities of a married woman to make valid contracts are removed,

and she may now make contracts and bind herself in the same way as a femme sole. Where such a contract is made she is no longer to be considered as acting as the agent of her husband. O'Connell v. Shera, 66 A. D. 467 (1901).

The ruling in the case of People v. Webster, 10 Wendell 554 (1833), to the effect that when a married woman sues, or is sued, her husband must be joined with her, was superseded by the enactment of ch. 381, Laws of 1884 (now Domestic Relations Law, § 51).

Holding Companies May Vote.

As to such companies, see Stock Corp. Law, § 52, and decisions thereunder.

A corporation which has purchased a majority of the stock of another corporation may vote thereon the same as any other stockholder. Oelbermann v. N. Y. & Northern R. R. Co., 77 Hun 332 (1894); In re Buffalo, N. Y. & Erie R. R. Co., 74 St. Rep. 345 (1896). Such right does not authorize the corporation to divert business to the injury of minority stockholders. Farmers' Loan & Trust Co. v. N. Y. & N. R. R. Co., 150 N. Y. 410 (1896).

Vote by Administrators and Executors.

An administrator or executor may vote at corporate elections on the stock of the deceased stockholder, although there has been no formal transfer to such administrator or executor on the books of the corporation. Matter of North Shore S. I. Ferry Co., 63 Barb. 556 (1872); Matter of Hastings, 120 A. D. 756, 759 (1907); Schmidt v. Mitchell, 101 Ky. 570 (1897), 41 S. W. 929, 72 Am. St. Rep. 427.

Where stock of an estate is held by three co-executors, any one of them who is present at the meeting may, in the absence of an objection by the other executors, vote the shares belonging to the estate. Schmidt v. Mitchell, 101 Ky. 570 (1897), 41 S. W. 929, 72 Am. St. Rep. 427.

Vote by One Executor Against Wishes of Co-Executor Not Permissible.

Where the stock of an estate is held by three executors, two out of the three have no power to vote at corporate meetings in opposition of the wishes of their co-executor. Tunis v. Hestonville & Fairmount R. R. Co., 149 Pa. 70 (1892).

Partners or Co-Owners of Stock Cannot Vote if They Disagree as to Such Vote.

Where stock stands on the corporate books in the name of a firm or of two or more persons as co-owners and there is a disagreement between the holders of such stock respecting the manner in which it shall be voted at a meeting of stockholders, the stock cannot be voted, and the right of voting thereon must remain in abeyance. In re Pioneer Paper Co., 36 How. Pr. 111 (1865); Tunis v. Hestonville & Fairmount R. R. Co., 149 Pa. 70 (1892).

Fractional Votes.

Fractional votes by the owners of fractions of a share of stock are not permissible. Provident Bldg. & Loan Assn., 62 N. J. Law 590, 41 Atlantic 592.

Pledgor and Pledgee.

See, also, "Pledgor and Pledgee of Stock; Rights of, Generally," under the Stock Corp. Law, § 50, post.

A pledgee of stock standing on the books in the name of a deceased

pledgor is not a stockholder. Matter of First Nat. Bk. of Brooklyn, 28 Misc. 662 (1899).

Until the pledge has been enforced and the title made absolute in the pledgee, and the name has been changed on the corporate books, the pledgor is entitled to vote. McHenry v. Jewett, 26 Hun 454 (1882), revsd. on other grounds, 90 N. Y. 58; Elyea v. Lehigh Salt Mining Co., 45 A. D. 231, 236 (1899); Lawrence v. Maxwell, 53 N. Y. 19 (1873).

Partner May Vote for the Firm.

One partner of a firm, which owns stock in a corporation, registered on the corporate books in the partnership name, has the power to represent that stock in all matters which relate to it in the usual management of such firm's business, and his action binds the firm. He may receive and waive notice of stockholders' meetings and vote at such meetings. Kenton Furnace R. & Mfg. Co. v. McAlpin, 5 Fed. 737 (1880).

Decisions Generally.

Only stockholders of record or those holding proxies are entitled to vote at an election of directors, and the situation is not changed by the fact that no regular stock book was kept; the record of title contained in the stock certificate book is in such case controlling as to the right to vote. In re Utica Fire Alarm Tel. Co., 115 A. D. 821 (1906).

In a suit by a corporation against a stockholder to rescind a sale of stock induced by fraud, the court may properly enjoin the defendant from assigning the stock pendente lite but should not prevent him from voting or exercising other rights incident to ownership. Maine Products Co. v. Alexander, 115 A. D. 112 (1906). See, also, Same v. Same, 115 A. D. 475.

Only stockholders who are parties to the action may be restrained from exercising the right to vote upon stock alleged to have been issued illegally. Jones v. Nassau Suburban Homes Co., 53 Misc. 63 (1907).

Certificates of stock of a corporation issued in excess of the limit imposed by its charter are void, and the holder of them is not entitled to the rights, nor subject to the liabilities of a holder of authorized stock. Scoville v. Thayer, 105 U. S. 143 (1881).

The right of a stockholder to vote and to transfer his stock can be limited only by statute, or by the certificate of incorporation. Kinnan v. Sullivan County Club, 26 A. D. 213 (1898).

An election will not be set aside on account of a mere informality. In re M. & H. R. R. R. Co., 19 Wend. 135 (1838); Partridge v. Badger, 25 Barb. 146 (1857).

Stockholders are not divested of the right to vote by giving an option to the purchasers of stock. Matter of Newcomb, 42 St. Rep. 442 (1891).

If votes erroneously rejected would have elected a certain ticket, the election will be set aside. In re L. I. R. R. Co., 19 Wend. 37 (1837); Ex parte Murphy, 7 Cow. 153 (1827).

Provisions of this section and section 32 of the Stock Corporation Law should be construed together, respecting the right to vote for directors. In re Glen Salt Co., 17 A. D. 235, affd., 153 N. Y. 688 (1897).

No stockholder is bound to vote for a larger number of persons than he chooses. Vandenburgh v. Broadway Ry. Co., 29 Hun 356 (1883).

When the regular stock book is not accessible, directors must provide a new one to enable stockholders to exercise their legal rights. In re The Argus Co. v. Manning, 138 N. Y. 557 (1893); Socorro M. Mining Co. v. Preston, 17 Misc. 220 (1896).

Certificates of stock of a corporation issued in excess of the limit imposed

by its charter are void, and the holder thereof is not entitled to the rights, nor subject to the liabilities of a holder of authorized stock. Scoville v. Thayer, 105 U. S. 143 (1881).

In the absence of provisions in the certificate or by-laws as to the manner of voting, such voting must be by shares of stock owned by the stockholders present. Matter of Rochester Dist. Tel. Co., 40 Hun 172 (1886).

A shareholder may vote on a measure although personally interested therein. Gamble v. Queens County Water Works Co., 123 N. Y. 91 (1896).

A transfer of stock which is designed merely to give a transferee power to vote is void. In re Glen Salt Co., 17 A. D. 235, affd., 153 N. Y. 688 (1897). But this case was decided prior to the amendment of 1901, ch. 355, which authorizes voting trusts.

It has been held, prior to the change in this section authorizing pooling of stock, that an agreement that stock should be held for ten years, during which time the power of attorney was to remain irrevocable, was not void as against public policy. Hey v. Dolphin, 92 Hun 230 (1895).

§ 24. **Cumulative voting.** The certificate of incorporation of any stock corporation may provide that at all elections of directors of such corporation, each stockholder shall be entitled to as many votes as shall equal the number of his shares of stock multiplied by the number of directors to be elected, and that he may cast all of such votes for a single director or may distribute them among the number to be voted for, or any two or more of them as he may see fit, which right, when exercised, shall be termed cumulative voting. The stockholders of a corporation heretofore formed, who, by the provisions of laws existing on April thirtieth, eighteen hundred and ninety-one, were entitled to the exercise of such right, may hereafter exercise such right according to the provision of this section.

Formerly part of § 20, L. 1890, ch. 563, as am'd by L. 1892, ch. 687, as am'd by L. 1901, ch. 355. Other parts of former § 20 are now §§ 23 and 25.

The method of cumulative voting above provided for is derived from L. 1875, ch. 611, § 26, which was repealed by L. 1890, ch. 563, and re-enacted by L. 1901, ch. 355.

Agreement for Cumulative Voting Prior to Incorporation.

Where an agreement was made by stockholders of several corporations to form a new corporation, the stock of which was to be issued for that of the old corporations and the agreement provided for cumulative voting and that the number of directors be increased so as to make the cumulative voting effective, the new corporation by accepting title to the stock of the old corporations did not accept and ratify such agreement of the stockholders and became bound thereby; and the new corporation and its stockholders will not be restrained, at the suit of a minority stockholder, from reducing the number of its directors, and rendering cumulative voting less effective. Bond v. Atlanta Terra Cotta Co., 137 A. D. 671 (1910).

§ 25. **Voting trust agreements.** A stockholder may, by agreement in writing, transfer his stock to any person or persons

for the purpose of vesting in him or them the right to vote thereon for a time not exceeding five years upon terms and conditions stated, pursuant to which such person or persons shall act; every other stockholder, upon his request therefor, may, by a like agreement in writing, also transfer his stock to the same person or persons and thereupon may participate in the terms, conditions and privileges of such agreement; the certificates of stock so transferred shall be surrendered and canceled and certificates therefor issued to such transferee or transferees in which it shall appear that they are issued pursuant to such agreement and in the entry of such transferee or transferees as owners of such stock in the proper books of said corporation that fact shall also be noted and thereupon he or they may vote upon the stock so transferred during the time in such agreements specified; a duplicate of every such agreement shall be filed in the office of the corporation where its principal business is transacted and be open to the inspection of any stockholder, daily, during business hours.

Formerly part of § 20, added by L. 1901, ch. 355. Other parts of former § 20 are now §§ 23 and 24.

For form of pooling agreement, see post, Forms Nos. 333, 334.

The foregoing provisions authorizing agreements for "pooling" stock or creating "voting trusts," and the issuance of certificates of beneficial interest in lieu of stock deposited with the trustee in pursuance of such agreement were added by L. 1901, ch. 355.

Validity of Voting Trusts Prior to Statute.

Even prior to the enactment of this section it was held that an agreement that stock should be held in a pooling arrangement for a period of ten years, during which time the power of attorney given to the trustee was to remain irrevocable, was not void as against public policy. Hey v. Dolphin, 92 Hun 230 (1895).

Revocation of Agreement.

A voting trust agreement made pursuant to this statute would ordinarily be valid, but whether it might not be revocable in many instances depends on the facts. Knickerbocker Investment Co. v. Voorhees, 100 A. D. 414 (1905).

Agreement Restricting Sales of Stock.

An agreement is valid whereby a majority of the stockholders of a corporation bind the parties to designate one of their number to act as proxy in case of inability to be present at an election of directors and provide that such proxy shall be irrevocable for a period of three years, and that none of them would sell the stock represented in such agreement within such period, except with the written consent of all the other parties to the agreement, and which provides further that in case of a sale preference should be given to the other parties to the agreement. Brown v. Britton, 41 A. D. 57 (1899).

Provision for Forfeiture of Deposited Stock Construed.

A voting trust agreement containing a provision for the forfeiture of deposited stock construed in West v. Guaranty Trust Co., 162 A. D. 301 (1914).

§ 26. **Proxies.** Every member of a corporation, except a religious corporation, entitled to vote at any meeting thereof may so vote by proxy.

No officer, clerk, teller or bookkeeper of a corporation formed under or subject to the banking law shall act as proxy for any stockholder at any meeting of any such corporation.

Every proxy must be executed in writing by the member himself, or by his duly authorized attorney. No proxy hereafter made shall be valid after the expiration of eleven months from the date of its execution unless the member executing it shall have specified therein the length of time it is to continue in force, which shall be for some limited period. Every proxy shall be revocable at the pleasure of the person executing it; but a corporation having no capital stock may prescribe in its by-laws the persons who may act as proxies for members, and the length of time for which proxies may be executed.

Formerly L. 1890, ch. 563, § 21, as am'd by L. 1892, ch. 687.

For forms of proxies, see post, Forms Nos. 225–228.

One who issues his proxy for anything of value is guilty of a misdemeanor. See Penal Law, § 668, post.

Inspectors of election have no power to determine the genuineness of proxies. If they are apparently the acts of stockholders, and regular upon their face, that ends the matter, so far as the inspectors are concerned. In re Cecil, 36 How. Pr. 477 (1869). See, also, In re White v. New York State Agl. Soc., 45 Hun 580 (1887).

Although a foreign corporation is not directly controlled by this section, this State will not enforce an agreement which in the case of a domestic corporation would be void as a violation of the section relating to a proxy to be voted in New York in violation of its general policy thus declared. Sullivan v. Parks, 69 A. D. 221 (1902).

Proxies need not be under seal. Hankins v. Newell, 46 Vroom (N. J.) 26 (1907).

A proxy which merely states the year and month of the election, the day not having been determined when it was signed, is sufficient. In re U. S. Cremation Co., 18 N. Y. Supp. 905, 46 St. Rep. 135; Matter of Townshend, 46 St. Rep. 135 (1892).

A proxy need not be a stockholder. In re Lighthall Mfg. Co., 47 Hun 258 (1888).

A corporation has no authority to adopt a by-law which requires that proxies must be held by a stockholder, as it is the right of a stockholder to select any person whom he might consider to be desirable for that purpose, to vote upon his shares. As the statute creating this right did not impose any restriction whatever upon the stockholder, as to the person he

should be at liberty to select, a corporation will not be permitted to restrict the privilege thereby conferred or to declare in its by-laws that it should not be so used. In re Lighthall Mfg. Co., 47 Hun 258 (1888).

An irrevocable proxy given to secure a debt is invalid. In re Germicide Co., 65 Hun 606, 48 St. Rep. 294 (1892).

§ 27. Challenges. Every member of a corporation offering to vote at any election or meeting of the corporation shall, if required by an inspector of election or other officer presiding at such election or meeting, or by any other member present, take and subscribe the following oath: "I do solemnly swear that in voting at this election I have not, either directly, indirectly or impliedly received any promise or any sum of money or any thing of value to influence the giving of my vote or votes at this meeting or as a consideration therefor." Any person offering to vote as proxy for any other person shall present his proxy and, if so required, take and subscribe the following oath: "I do solemnly swear that I have not, either directly, indirectly or impliedly, given any promise or any sum of money or any thing of value to induce the giving of a proxy to me to vote at this election, or received any promise or any sum of money or any thing of value to influence the giving of my vote at this meeting, or as a consideration therefor." The inspectors or persons presiding at the election may administer such oath, and all such oaths and proxies shall be filed in the office of the corporation.

Formerly § 22, as am'd by L. 1892, ch. 687; L. 1895, ch. 672; L. 1901, ch. 355.

An amendment of 1901, ch. 355, simplified the form of oath to be taken by a challenged voter and conformed the section to the modified provisions of section 23.

For forms under this section, see post, Forms Nos. 229, 230.

For form of oath of inspectors and certificate of result, see post, Forms Nos. 223, 224.

§ 28. Effect of failure to elect directors. If the directors shall not be elected on the day designated in the by-laws, or by law, the corporation shall not for that reason be dissolved; but every director shall continue to hold his office and discharge his duties until his successor has been elected.

Formerly L. 1890, ch. 563, § 18, as am'd by L. 1892, ch. 687, § 23.

Provisions in statutes and by-laws requiring election on a specified day are directory, and the election may be held at a later day. Beardsley v. Johnson, 121 N. Y. 224 (1890); St. George Vineyard Co. v. Fritz, 48 A. D. 233 (1900).

Officers holding over, at the end of their term of office, and continuing to act are directors de jure until their successors are chosen. Phila. & Rdg. C. & I. Co. v. Hotchkiss, 82 N. Y. 474 (1880).

Directors are not bound to hold over until their successors are elected. Unless they choose to act, their offices become vacant at the end of the term. Van Amburgh v. Baker, 81 N. Y. 46 (1880), 82 N. Y. 474, supra.

The continuous neglect of a corporation for a number of years to hold any election of officers affords a proper case for the issue of a mandamus. People ex rel. Walker v. Albany Hospital, 11 Abb. Pr. (N. S.) 4 (1871). See, also, People v. Twaddell, 18 Hun 427 (1879); In re Vandenburgh v. Broadway Ry. Co., 29 Hun 348 (1883). See, also, 38 A. D. 159.

§ 29. Mode of calling special election of directors. If the election has not been held on the day so designated, the directors shall forthwith call a meeting of the members of the corporation for the purpose of electing directors, of which meeting notice shall be given in the same manner as of the annual meeting for the election of directors.

If such meeting shall not be so called within one month, or, if held, shall result in a failure to elect directors, any member of the corporation may call a meeting for the purpose of electing directors by publishing a notice of the time and place of holding such meeting at least once in each week for two successive weeks immediately preceding the election, in a newspaper published in the county where the election is to be held and in such other manner as may be prescribed in the by-laws for the publication of notice of the annual meeting, and by serving upon each member, either personally or by mail, directed to him at his last known post-office address, a copy of such notice at least two weeks before the meeting.

Formerly L. 1890, ch. 563, § 24, as am'd by L. 1892, ch. 687.

For forms of notice of special election, see post, Forms Nos. 239, 240.

Notice of election of directors. Stock Corp. Law, § 25. By-laws regulating election to be published. Gen. Corp. Law, § 11, subd. 5, ante.

Failure to give notice as required by this section is ground for setting the election aside. Matter of Keller, 116 A. D. 58 (1907).

§ 30. Mode of conducting special election of directors. Such meeting shall be held at the office of the corporation, or if it has none, at the place in this state where its principal business has been transacted, or if access to such office or place is denied or cannot be had, at some other place in the city, village or town where such office or place is or was located.

At such meeting the members attending shall constitute a quo-

rum. They may elect inspectors of election and directors and adopt by-laws providing for future annual meetings and election of directors, if the corporation has no such by-laws, and transact any other business which may be transacted at an annual meeting of the members of the corporation.

Formerly L. 1890, ch. 563, § 25, as am'd by L. 1892, ch. 687.

A by-law which provides that "a majority of the stock, present in person or by proxy, at any meeting of the stockholders shall constitute a quorum," does not apply to an election, which is governed by section 20 of Stock Corporation Law. Any number of stockholders, however small their holdings, may elect directors, provided they hold a plurality of stock voted. Matter of R. T. Ferry Co., 15 A. D. 530 (1897), revsg. in part 19 Misc. 409.

As to inspectors, see also § 31 of the Stock Corp. Law. See In re Lighthall Mfg. Co., 47 Hun 258 (1888).

§ 31. Qualification of voters and canvass of votes at special election. In the absence at such meeting of the books of the corporation showing who are members thereof, each person, before voting, shall present his sworn statement setting forth that he is a member of the corporation; and if a stock corporation, the number of shares of stock owned by him and standing in his name on the books of the corporation, and, if known to him, the whole number of shares of stock of the corporation outstanding. On filing such statement, he may vote as a member of the corporation; and if a stock corporation, he may vote on the shares of stock appearing in such statement to be owned by him and standing in his name on the books of the corporation.

Am'd.

The inspectors shall return and file such statements, with a certificate of the result of the election, verified by them, in the office of the clerk of the county in which such election is held, and the persons so elected shall be the directors of the corporation.

Formerly § 26, as am'd by L. 1892, ch. 687.

For form of sworn statement of voter, see post, Form No. 241.

The right to vote is determined by the transfer books which are conclusive upon the inspectors. See People v. Tuthill, 31 N. Y. 550.

For form of inspectors' certificate for filing in county clerk's office, see Stock Corp. Law, § 31, post.

§ 32. Powers of supreme court respecting elections. The supreme court shall, upon the application of any person or corporation aggrieved by or complaining of any election of any corporation or any proceeding, act or matter touching the same, upon notice thereof to the adverse party, or to those to be affected

thereby, forthwith and in a summary way hear the affidavits, proofs and allegations of the parties, or otherwise inquire into the matters or causes of complaint, and establish the election or order a new election, or make such order and give such relief as right and justice may require.

Formerly § 15, L. 1890, ch. 563, as am'd by L. 1892, ch. 687, § 27.

For form of application to set aside an election under the above section, see Form No. 242.

For form of an order setting aside election of directors, see Form No. 242-a.

Purpose and Application of Section.

This section was enacted in order that courts might have power to proceed in a summary manner to test the title of corporate officers without resorting to the more cumbersome proceedings in a writ of quo warranto. The Supreme Court now has the power to inquire into any corporate election of directors or officers, whether the same is made by the stockholders or by trustees or directors to fill vacancies. Matter of Ringler & Co., 205 N. Y. 30 (1912). History of section discussed. Id.

Scope of Section.

This section only authorizes an application to the court to establish or set aside an election in a summary way, and not by mandamus. Peo. ex rel. Putzel v. Simonson, 61 Hun 338 (1891); In re The Argus Co. v. Manning, 138 N. Y. 557 (1893).

The court has power to annul the election of an ineligible trustee, and it is not necessary that the Attorney-General should proceed under section 1948 of the Code of Civil Procedure. Matter of Northern Dispensary, 26 Misc. 147 (1899).

This proceeding and the one under the Code (§§ 1948–1956) are exclusive of all other methods of testing the legality of an election. H. R. & W. S. R. R. Co. v. Kay, 14 Abb. Pr. (N. S.) 191 (1873).

Defective Ballot Does Not Invalidate Vote.

At an election of directors the failure of a stockholder to write the christian name of his candidates on the ballot does not invalidate his vote, and directors holding over on the claim of the invalidity of such ballot may be proceeded against under the Code, section 1948; but the petitioners may not avail themselves of the provisions of this section. Opinion of Atty. Genl. (1913), Vol. 2, p. 266.

Election of Directors by De Facto Directors.

Persons elected as directors by other directors, themselves merely de facto and not qualified to act as such, acquire no right or title to the office as against the corporation or its stockholders. Matter of Ringler & Co., 204 N. Y. 30 (1912). The de facto directors participating in the election are themselves removable in a direct proceeding brought for that purpose. Id.

Election of Disqualified Director.

Where the by-laws require a director to be the holder or owner of at least one share of stock and the stock had been transferred prior to an election for the sole purpose of qualifying the transferees as directors and such shares had been immediately assigned back in blank to the true owner, their election

as directors is invalid. Matter of Ringler & Co., 204 N. Y. 30 (1912), revsg. 145 A. D. 361.

Stock Transfer to Qualify a Director.

When a transfer of stock is made in good faith for the purpose of qualifying a person as director and after his election such person actually holds the stock during his incumbency of office, such transferee is a stockholder and is a director de jure. Matter of Ringler & Co., 204 N. Y. 30 (1912), revsg. 145 A. D. 361.

Where neither the certificate of incorporation nor the by-laws provide that a director need not be a stockholder, the title to the office of director cannot be predicated upon an alleged purchase of stock by another person in the interest of or as the representative of the claimant to office. Matter of Hassam Paving Co., 152 A. D. 610 (1912), citing Matter of Ringler & Co., 204 N. Y. 30.

Right to Apply for Relief.

A stockholder cannot be aggrieved by an election in which neither he nor his assignor had a right to participate. It must be shown that he or his assignor was deprived of that right, or opposed the action taken, or refrained from exercising the right on the assumption that the proceedings would be conducted legally, and that, instead of being so conducted, they were taken illegally. In re Scheel, 134 A. D. 442 (1909); In re Syracuse, Chenango & N. Y. R. R. Co., 91 N. Y. 1 (1883).

An application will not be granted when made by one who was not a stockholder at the time of the election, but subsequently received a certificate of stock from one who took part in it. Matter of Syracuse, Chenango & N. Y. R. R. Co., 91 N. Y. 1 (1883).

Where one set of trustees claim to be de facto in office, and have possession of corporate books and assets, and a rival board, claiming to be trustees de jure, are seeking to obtain possession of the corporate assets, a court of equity will interfere. Model Bldg. & Loan Assn. v. Patterson, 12 Misc. 400 (1895). See, also, Reis v. Rhode, 6 Civ. Pro. 406 (1884); Ciancimino v. Man, 1 Misc. 121 (1892), and cases cited.

The fact that another party is joined, without authority, as petitioner with a stockholder, does not affect the latter's right to have his petition heard. In re Argus Co. v. Manning, 138 N. Y. 557 (1893).

Procedure.

Order to show cause in proceedings under this section may be granted by justice of the Supreme Court out of court. In re Argus Co. v. Manning, 138 N. Y. 557 (1893).

All the persons complaining should be named and the alleged irregularities set out. In re Mohawk & H. R. R. R. Co., 19 Wend. 135 (1838).

The provision as to notice does not make it necessary to notify all the stockholders. Notice to persons who claim to be elected and to the corporation is sufficient. In re Schoharie Valley R. R. Co., 12 Abb. Pr. N. S. 394 (1872). The corporation must be a party and is entitled to notice. In re Pioneer Paper Co., 36 How. 111 (1865).

The objections upon which proceedings are based should be taken at the time of the election. In re Lighthall Mfg. Co., 47 Hun 258 (1888). See, also, Matter of L. I. R. R. Co., 19 Wend. 37 (1838); In re U. S. Cremation Co., 46 St. Rep. 135 (1892); Vandenburgh v. Broadway Underg. C. Ry. Co., 29 Hun 348 (1883).

Power of Court.

Where on an application to review an election, at which the petitioners were not allowed to vote on stock alleged to have been forfeited, it is determined that the attempted forfeiture was invalid, a new election should be ordered. The court may also provide that all persons who are stockholders when the new election is held shall be allowed to vote and may restrain issuance of new stock pending the election. In re N. Y. & Westchester Town Site Co., 145 A. D. 623 (1911); see, also, in same matter, 145 A. D. 630.

The mere fact that a person is stockholder of record is conclusive upon inspectors of election, but is not binding upon the court in determining the validity of his election as director, the court having the power to investigate the facts. Matter of Ringler & Co., 204 N. Y. 30 (1912), revsg. 145 A. D. 361.

This provision vests the court with power to inquire into elections or appointments by a board of directors. It does not limit the power to elections by stockholders. Matter of Ringler & Co., 204 N. Y. 30 (1912), distg. Matter of Mohawk & Hudson R. R. R. Co., 19 Wend. 135.

The court may go behind entries in the transfer book and determine whether a transfer appearing thereon was a sale or only a pledge. Strong v. Smith, 15 Hun 222, affd., 80 N. Y. 637 (1880); Matter of Elias, 17 Misc. 718 (1896).

The court cannot compel inspectors to count votes which they have erroneously refused. The only relief is to order a new election if justice requires it. Peo. ex rel. Putzel v. Simonson, 61 Hun 338 (1891).

When a voter presents his ballot he does all that the law requires him to do. It is then the duty of inspectors to credit him with the votes to which the books show that he is entitled. Matter of Mutual Fire Ins. Co., 51 A. D. 163 (1900).

Where a reorganization committee, holding 60 per cent. of the stock, has been enjoined from voting, the election represents only the wishes of a minority, and must be set aside. Matter of Townsend, 24 Misc. 80 (1898).

A corporation holding the title to certain shares of stock in another corporation and claiming equitable title to certain other shares, partly paid for with its funds but recorded in the name of certain of its directors who paid the balance of the purchase price, is not entitled to vote on the shares recorded in the directors' names, even though it might be able to enforce its equitable title in a proper action. The court will not determine the validity of the equitable title in a proceeding to impeach an election brought under Gen. Corp. Law, § 27. In re Utica Fire Alarm Tel. Co., 115 A. D. 821 (1906).

An order made upon notice to the borrower, in a proceeding instituted by the lender under this section, adjudging that the lender, having the legal title to the stock, might lawfully be elected a director, is not res adjudicata upon the question of the actual ownership of the stock, where an absolute bill of sale thereof was accompanied by another instrument providing that the stock shall be returned to the vendor if he pays the lender within a specified time. Farmer v. A. D. Farmer & Son Type Founding Co., 83 A. D. 218 (1903).

The fact that qualified persons were permitted to vote after the hour for closing had expired does not vitiate election. Rudolph v. Southern Beneficial League, 23 Abb. N. C. 199 (1889).

The receipt of illegal votes in favor of one who has received a majority of legal votes cast will not defeat his election. In re Argus Co. v. Manning, 138 N. Y. 557 (1893). See, also, Matter of Utica Fire Alarm Tel. Co., 115 A. D. 821 (1907).

Where inspectors reject ballots, thereby causing no choice, a new election was properly had. Peo. ex rel. Thorn v. Pangburn, 3 A. D. 456 (1896).

A trustee voting upon estate stock in favor of himself, despite protests of his cotrustee, will not be permitted to derive personal profit therefrom. Matter of Elias, 17 Misc. 718 (1896).

Foreign Corporations.

The validity of an election of a foreign corporation will not be determined in this State upon a motion for an injunction, nor does section 1948 of the Code apply to foreign corporations. Washington Lighting Co. v. Dimmick, 41 A. D. 596 (1899).

§ 33. Stay of proceedings in actions collusively brought. If an action is brought against a corporation by the procurement or default of its directors, or any of them, to enforce any claim or obligation declared void by law, or to which the corporation has a valid defense, and such action is in the interest or for the benefit of any director, and the corporation has by his connivance made default in such action, or consented to the validity of such claim or obligation, any member of the corporation may apply to the supreme court, upon affidavit, setting forth the facts, for a stay of proceedings in such action, and on proof of the facts in such further manner and upon such notice as the court may direct, it may stay such proceedings or set aside and vacate the same, or grant such other relief as may seem proper, and which will not injuriously affect an innocent party, who, without notice of such wrongdoing and for a valuable consideration, has acquired rights under such proceedings.

Formerly L. 1890, ch. 563, § 16, as am'd by L. 1892, ch. 687, § 28.

A stay of proceedings will not be granted unless it is shown that actions were collusively brought in the pecuniary interest of a director. Matter of Gardner, 86 Hun 30 (1895).

Where a judgment is collusively obtained, a stockholder is entitled to an order vacating the judgment. Matter of Virgil, 26 Misc. 320 (1899).

As to what matters are sufficient to constitute a cause of action, see Phenix Nat. Bk. v. A. B. Cleveland Co., 34 St. Rep. 498 (1890); Meyers v. Scott, 20 St. Rep. 35.

When injunction pendente lite is proper. Hoyt v. Malone, 31 St. Rep. 739 (1890).

When resident stockholders may maintain action to restrain foreign corporation. Ives v. Smith, 28 St. Rep. 917 (1889). See Rogers v. Phelps, 31 St. Rep. 872 (1890).

Where a corporate contract was voidable, but all the stockholders assented thereto, no fraud was practiced upon the company. Barr v. N. Y., L. E. & W. R. R. Co., 125 N. Y. 263 (1891). See, also, Thomas v. Mus. Pro. Union, 121 N. Y. 45 (1890).

§ 34. Quorum of directors and powers of majority. The affairs of every corporation shall be managed by its board of directors, at least one of whom shall be a resident of this state. Am'd.

Unless otherwise provided a majority of the board of directors of a corporation at a meeting duly assembled shall be necessary to constitute a quorum for the transaction of business and the act of a majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors. The members of a corporation may in by-laws fix the number of directors necessary to constitute a quorum at a number less than a majority of the board, but at least equal to one-third of its number. Subject to the by-laws, if any, adopted by members of a corporation, the directors may make necessary by-laws of the corporation.

Formerly L. 1890, ch. 563, § 29, as am'd by L. 1892, ch. 687; L. 1901, ch. 214; L. 1904, ch. 737.

Prior to the Consolidation Act (L. 1909, ch. 28), the second sentence in this section began thus: "Unless otherwise provided (by law) a majority of the board of directors," etc., the words "by law" having been dropped in the act of 1909.

The last sentence but one was inserted by L. 1904, ch. 737.

At least two directors were required to be residents of the State prior to L. 1901, ch. 214.

A majority of a quorum of the board may act. Gen. Corp. Law, § 43, post. Stockholders may make by-laws. Gen. Corp. Law, § 11, subd. 5. Effect of failure to adopt certain by-laws. Stock Corp. Law, § 27. Election, qualification and classification of directors. Stock Corp. Law, § 25. Change of number of directors. Stock Corp. Law, § 26.

Directors De Jure and De Facto.

For collection of authorities on this subject, see section 25 of the Stock Corporation Law, post.

Election of Director; Acceptance of Office Necessary.

The mere election of a person as a director by the stockholders does not make him such. There must be in addition an acceptance on his part of the office either express or implied from the circumstances of the case. Cameron v. Seaman, 69 N. Y. 396 (1877); United Growers Co. v. Eisner, 22 A. D. 1, 6 (1897).

Directors, not Stockholders, Represent the Corporation.

As a general rule stockholders cannot act in relation to the ordinary business of a corporation. The body of stockholders have certain authority conferred by statute which must be exercised to enable the corporation to act in specific cases, but except for such statute authority, which is mainly permissive or confirmatory, they have no express power given by the statute. Any action by them relating to the details of the corporate affairs is necessarily in the form of an assent, request or recommendation. Continental Securities Co. v. Belmont, 206 N. Y. 7, 17 (1912), affg. 150 A. D. 298.

The directors represent the corporate body and a representative action may be maintained by a stockholder where the directors on demand have failed to bring same. No demand need be made to the body of the stockholders

to bring the action for the stockholders as a body have no authority to act for the corporation except as authorized by statute. Continental Securities Co. v. Belmont, 206 N. Y. 7 (1912).

Stockholders have no power to act on behalf of the corporation in the transaction of its regular business. When a statute covers the whole subject and prescribes the persons who may bind a corporate body and the manner in which they may bind it, resort cannot be had to other instrumentalities. The designation of certain agents and methods for the doing of an act implies a prohibition of any others. Landers v. Frank Street M. E. Ch., 97 N. Y. 119, 124 (1884), and cases cited.

Duty of Directors; Diligence and Care Required.

Directors owe a certain measure of duty not only to existing stockholders, but as well to those from whom the corporation solicits subscriptions for its stock or securities. In that behalf they are bound to use some degree of both diligence and care in the performance of their duties, and are liable for negligence in failing so to do. What constitutes due diligence and care varies with the circumstances of each case; therefore, general rules cannot be formulated to cover all states of fact. Directors, however, are bound to use a reasonable degree of care in the performance of those acts, which, under the circumstances, prudence would fairly seem to require them to perform. Childs v. White, 158 A. D. 1 (1913); see, also, Briggs v. Spaulding, 141 U. S. 132, 148 (1891); Dykman v. Keeney, 154 N. Y. 483, 491 (1897); Hun v. Cary, 82 N. Y. 65, 71; McClure v. Wilson, 70 A. D. 149, 153 (1902); Peo. v. Equitable Life Assur. Soc., 124 A. D. 714, 731 (1908); Rives v. Bartlett, 156 A. D. 552 (1913).

In an action against a director based upon his liability for negligence, it is immaterial whether the action is brought by stockholders or creditors to their own use or on behalf of the corporation. Childs v. White, 158 A. D. 1 (1913).

The classes of actions in which the duties of directors have been defined have commonly been those based upon deceit, or breach of trust. Some have arisen upon rights of action originally accruing to the corporation but which have been prosecuted in its behalf by stockholders or by receivers; others have been actions brought by stockholders or creditors directly to their own use. But the circumstances under which the action must be pursued in the right of the corporation and those under which it may be brought for the use of the individual plaintiff (see Niles v. N. Y. C. & H. R. R. R. Co., 176 N. Y. 119, 123, 124) suggest no distinction so far as the duties of a director are concerned. Childs v. White, 158 A. D. 1, 3 (1913).

The measure of care required of directors depends upon the subject to which it is to be applied and is a question to be determined with reference to the particular circumstances of each case. Briggs v. Spaulding, 141 U. S. 132 (1891); Warner v. Penoyer, 91 Fed. 587 (1898).

Testamentary Provision for Formation of Corporation and Management Thereof.

Where a testator in his will provided that a corporation be formed to carry on his business, named the directors and directed that the stock be held by his executors, and that the corporate acts should be approved by his widow or by a majority of those named in the will to serve as directors, the executors hold such stock subject to the necessity of having their acts approved by the persons thus designated. Elger v. Boyle, 69 Misc. 273 (1910).

Where a testator directed the creation by his testamentary trustees of a corporation to which they should transfer part of his residuary estate, such corporation, when formed as directed by the testator, must be created and its affairs conducted as required by statute and not according to the terms of the testamentary trust so far as they are in conflict with the statutes. Boyle v. Boyle & Co., Inc., 136 A. D. 367 (1910); affd., 200 N. Y. 597. Where part of the residuary estate is conveyed to such corporation by the trustees in exchange for its capital stock, such property ceases to be subject to the provisions of the trust estate, the stock received in return being substituted therefor. Id.

Powers of Directors in General.

Although directors have implied power to bind the corporation without a formal submission of the question to the board, a contract employing a broker to secure a tenant on condition that any proposition be approved by the board, the broker cannot recover commissions unless the proposition has been so approved. Roberts v. New & Beaver St. Corpn., 138 A. D. 47 (1910).

The powers vested in a corporation reside, for purposes of practical administration, in the board of directors. The corporation being a legal entity merely, can only act through instrumentalities and by delegation. The statute creating it may prescribe its mode of action, and when methods and agencies by which it may act are designated, that designation operates as a limitation and excludes other modes of action. People's Bank v. St. Anthony's Roman Cath. Ch., 109 N. Y. 512, 521 (1888).

Since a corporation is a mere conception of the legislature, and since all power resides in its directors, a prohibition to the corporation extends also to the board of directors and to each director individually. Peo. v. Knapp, 206 N. Y. 373, 381 (1912), affg., 147 A. D. 436.

All powers directly conferred by statute, or impliedly granted, of necessity, must be exercised by the directors who are constituted by the law as the agency for the doing of corporate acts. Beveridge v. N. Y. Elev. R. R. Co., 112 N. Y. 22 (1889); Leslie v. Lorillard, 110 N. Y. 519 (1888); People's Bank v. St. Anthony R. C. Church, 109 N. Y. 512 (1888).

Directors are authorized to manage the business of the corporation, audit and pay its debts, and make contracts within the ordinary scope and business of the corporation. Kelsey v. Sargent, 40 Hun 150 (1886).

One dealing with an officer of a corporation who assumes to act for it in matters in which the interests of the corporation and its officers are adverse is put upon inquiry as to the authority and good faith of the officer. McCloskey v. Goldman, 62 Misc. 462 (1909), and cases therein cited.

It is only where the statute or the by-laws require it that co-operation of stockholders is needed. Beveridge v. N. Y. El. R. R. Co., 112 N. Y. 1 (1889); Dabney v. Stevens, 40 How. Pr. 341 (1870); Sheridan Elec. L. Co. v. Chatham Nat. Bank, 127 N. Y. 517 (1891), affg. 52 Hun 580.

A stockholder cannot, as such, bind his corporation by his acts and admissions. McCloskey v. Goldman, 62 Misc. 462 (1909).

Directors cannot ratify an act which they could not lawfully do in the first instance. A. C. Nellis Co. v. Nellis, 62 Hun 63, 67 (1891), citing Peterson v. Mayor, etc., 17 N. Y. 449; Brady v. Same, 20 N. Y. 312.

The officers of a corporation have no implied power to execute a contract which appears upon its face to be ultra vires, and persons claiming under such a contract must prove that the officers had special authority to execute it. Broadway Theatre Co. v. Dessau Co., 45 A. D. 475 (1899).

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An unconditional employment by corporate officers of a person for life is repugnant to the express authority of such officers to appoint, remove, and fix the compensation of employees, and also that directors elected for a limited time may not make contracts unreasonably interfering with the powers of future directors. Rollins v. Co-Operative Bldg. Bank, 98 A. D. 606 (1904), affd., 184 N. Y. 525, and citing Beers v. N. Y. Life Ins. Co., 66 Hun 75; Carney v. Same, 162 N. Y. 453; Caldwell v. Mut. Res. Fund Life Assn., 53 A. D. 245. See, also, Usher v. N. Y. C. & H. R. R. R. Co., 76 A. D. 422 (1902), affd., 179 N. Y. 544.

A resolution at a special meeting of directors, although the by-laws make no provision for a special meeting, held without objection and not in violation of any by-law, at a proper place, upon notice to all the persons elected as directors, and who have accepted the office, and where all such persons are present, is valid. United Growers' Co. v. Eisner, 22 A. D. 1 (1897).

Until the contrary is proven the acts of directors must be assumed to be honest and for the best interest of the corporation. Matter of Watertown Gas Light Co., 127 A. D. 466 (1908).

The minority directors or stockholders cannot come into court upon allegations of want of judgment or lack of efficiency on the part of the majority and change the course of administration. Corporate elections furnish the only remedy for internal dissensions if no fraud is involved. Schwab v. Potter Co., 194 N. Y. 409 (1909), affg. 129 A. D. 36.

Directors, with secret knowledge of a contract of great value, may not issue treasury stock and buy it themselves without giving all the stockholders equal information concerning the contract and an opportunity to subscribe for a proportional share of the new stock issue. Whitaker v. Kilby, 55 Misc. 337 (1907).

Directors have power to lease mining property of the corporation for five years with stipulations for payment of a fixed rental and for development of the property, reserving to the corporation certain portions of the metals mined or their avails, and that all equipments shall revert to the corporation at the end of the term and that default of the lessee to perform the covenants of the lease shall terminate the same. Hennessy v. Muhleman, 40 A. D. 175 (1899), revsg. 27 Misc. 232.

A court will not interfere in the internal policy and management of a corporation, unless it is manifest that it is about to exceed its corporate powers, and do an act in fraud of the rights of stockholders. Lowe v. Pioneer Threshing Co., 70 Fed. 646 (1895).

Courts will not, at the instance of a stockholder assailing the acts of directors, interfere unless the powers have been illegally exercised, or unless it be shown that the acts were fraudulent or collusive and destructive of the rights of the stockholders. Mere errors of judgment are not sufficient as grounds for court interference as the powers of directors are largely discretionary. Hennessy v. Muhleman, 40 A. D. 175 (1899); Leslie v. Lorillard, 110 N. Y. 519 (1888).

Directors have an absolute right to inspect the corporate books. Peo. ex rel. Leach v. Central Fish Co., 117 A. D. 77 (1907).

The acts of de facto directors are valid. Lord v. Equitable Life Ins. Co., 57 Misc. 417, affd., 126 A. D. 937, affd., 194 N. Y. 225 (1909).

Where it can be proven that proposed acts of directors are in the interest of majority stockholders only and in wanton disregard of the rights of the minority the court will restrain them by injunction. Robinson v. New York, W. & B. Ry. Co., 123 A. D. 339 (1908).

It is outside the scope of the treasurer's authority to sell and assign accounts due the corporation and unless the assignment purports to have been made by authority of the directors the assignee cannot recover. Maroney v. Cole, 52 Misc. 451 (1907).

In the absence of proof of authority conferred upon an auditing board, beyond its usual functions to allow or reject claims, it has no authority to rescind a contract or determine the future action of the corporation. Such authority is in the board of directors. Skinner v. Wood M. & R. Mach. Co., 140 N. Y. 217 (1893), aflg. 20 N. Y. Supp. 251.

It is the duty of courts to protect corporations from unauthorized acts of its officers, yet when directors permit its officers to hold themselves out as clothed with power to manage its affairs, and thus lead innocent persons to contract with them, they cannot repudiate such contracts. Parmelee v. Associated Physicians & Surgeons, 11 Misc. 363 (1895).

A deed which does not, in all respects, conform to the resolution of the directors, is nevertheless effective where the consideration has been accepted by the corporation. White v. Sheppard, 41 A. D. 113 (1899).

When directors have intrusted the preparation of a contract to an agent, he cannot bind them by any secret arrangement with the other party to the contract which is intended to deceive his principals. Callanan v. Keeseville, A. C. & L. C. R. R. Co., 131 A. D. 306 (1909).

Power of Directors to Sell Corporate Assets.

See also, Stock Corpn. L., §§ 16 and 17, post, and notes thereunder.

At common law neither the directors nor a majority of the stockholders have power to sell or otherwise transfer all the property of a going, prosperous corporation as against the dissent of a single stockholder; but, where the corporation is without available capital and without the means of procuring it and with its de jure corporate existence at an end, where the further transaction of its business would be unprofitable, if not impracticable, the closing of its business and the sale of its corporate property is justified. Under such circumstances, no rights of creditors interfering, it was in furtherance of the interests of the corporation to pay its debts and close its affairs on terms deemed most advantageous. Hoag v. Edwards, 69 Misc. 237 (1910), citing Skinner v. Smith, 134 N. Y. 240, 250 (1892).

A by-law requiring the unanimous consent of the directors to a sale of the business of a corporation as a going concern does not violate the provision of this section that unless otherwise provided the action of a majority of the board of directors at a lawful meeting shall be the act of the board. Levin v. Mayer, 86 Misc. 116 (1914). Notwithstanding such by-law, however, where a corporation, although not insolvent is doing a losing business and unable to continue without further loss, it has the right to sell out its business to another corporation and to cease operations, and a contract to that effect, in the absence of fraud or bad faith and where the assets were not sacrificed or sold for less than their value, is valid and binding. Id., and cases there cited.

Delegation of Powers of Directors to Other Persons.

Even though the formation of a New Jersey corporation to control, manage and operate a New York corporation, through the ownership of a majority of the stock of the latter corporation were valid under the laws of the State of New Jersey and not opposed to the public policy of the State of New York, yet it does not follow that a New Jersey corporation thus organized may delegate to individuals, not its directors or officers, exclusive power to manage

and control the other corporation for a period of five years, leaving its directors, through whom the law contemplates that the corporation shall exercise its powers, virtually without any function to perform. Knickerbocker Investment Co. v. Voorhees, 100 A. D. 414 (1905).

Meetings of Directors.

Where the by-laws of a corporation having nine directors provided that whenever, at a regular meeting of the board, there should attend less than a quorum, three or more directors present should have power to adjourn to such time and place as they should deem proper, not passing over the next regular meeting, and pursuant to such by-law, at a regular meeting at which only three directors were present, on motion they adjourned to a future day, when there were five directors present, and at that meeting a resolution was adopted authorizing the issue of a bond, such a by-law is reasonable and valid and the resolution adopted thereat was binding upon the corporation. Smith v. Law, 21 N. Y. 296 (1860).

Whenever, under the provisions of any of the corporate laws, a corporation is authorized to take any action by the agreement or action of its directors, managers or trustees, such agreement or action may be taken by such directors, regularly convened as a board, and acting by a majority of a quorum, except when otherwise expressly required by law or the by-laws of the corporation. Gen. Corp. Law, § 43.

Neither stockholders nor directors can do a corporate act, out of the jurisdiction creating the corporation, which can bind those who do not participate in it. Ormsby v. Vermont Copper Mining Co., 56 N. Y. 623 (1874). But meetings of directors of corporations organized under or subject to the provisions of the Business Corporations Law may be held outside the State unless otherwise expressly provided in the certificate of incorporation or in the by-laws. Bus. Corp. Law, § 2, added by L. 1904, ch. 446.

The collective authority of the directors, acting as a board, is necessary, in order to bind the corporation by the action of the directors. Cammeyer v. Churches, 2 Sandf. Ch. 186 (1844); Constant v. Rector, 4 Daly 305.

Directors have no separate or individual authority to bind the corporation, and this, although a majority of the whole number acting singly and not collectively as a board should assent to the particular transaction. Such action must be taken at a meeting of the board. People's Bank v. St. Anthony's Church, 109 N. Y. 512, affg. 39 Hun 498 (1888).

Resolutions of Directors; When Unnecessary.

It is not necessary for every person who has dealings with a corporation to show a resolution of the board of directors for everything which is done in and about the corporate business when it is attempted to bind the corporation by the action of its officers. Hall v. Herter Bros., 90 Hun 280 (1895), affd., 157 N. Y. 694.

Where a corporation consists of a small number of persons, it may transact business without the formality of resolutions. Hall v. Herter Bros., 83 Hun 19 (1894); Hall v. Herter Bros., 90 Hun 280 (1895), affd., 157 N. Y. 694; M. Groh's Sons v. Groh, 80 A. D. 85 (1903), revsd. on other grounds, 177 N. Y. 8.

Where all the stock and bonds of a corporation are owned by a mother and her son, who are also directors, the remaining director being a mere employe, and the son conducts the corporate business without the formality of holding director's meetings or evidencing any act of the corporation by written minutes,

a third party may charge the corporation upon an obligation incurred by the son within the general scope of the corporate business without showing formal action to establish corporate liability. M. Groh's Sons v. Groh, 80 A. D. 85 (1903), revsd. on other grounds, 177 N. Y. 8.

Minutes of Meetings of Directors.

Where the minute book purports to show that a meeting was that of the board of directors, the corporation is estopped from asserting that it was a meeting of the executive committee. In re N. Y. & Westchester Town Site Co., 145 A. D. 623 (1911).

Parol evidence that the resolution of the board of directors, ratifying the previous acts of a committee engaged in organizing the corporation, was intended to confirm plaintiff's contract is not competent. Gardner v. Bronx Natl. Bank., 158 A. D. 288 (1913).

Directors to Act Only as a Board.

Directors have no separate or individual authority to bind the corporation. Only when acting as a board can they perform or authorize acts binding on the corporation. People's Bank v. St. Anthony's R. C. Church, 109 N. Y. 512 (1888); Columbia Bank v. Gospel Tab. Ch., 127 N. Y. 361 (1891).

Conversations with directors at times and places other than at meetings of the board of directors are not binding on the corporation, and are insufficient to establish a contract. Gardner v. Bronx Natl. Bank., 158 A. D. 288 (1913).

Dummy Directors.

Where two directors own the entire interest in a corporation they cannot be heard to say that they have created a dummy director for the purpose of enjoying a corporate asylum without dividing their real powers with the third person required by the statute to share them. He must be taken to be a real director, who has been incurring the responsibilities and risks of that position, and is equal to either of his colleagues in directorial power and standing. Peo. ex rel. Stauffer v. Bonwit Bros., 69 Misc. 70 (1910).

When the directors and officers acting in pursuance of a conspiracy resigned their positions and elected in their places persons whom they knew to be irresponsible and untrustworthy and placed in their possession and under their management the corporate property in consideration of certain unlawful payments to be made and contracts to be performed for their benefit by such new directors, and the corporate assets were in consequence wasted thereby and by unnecessary expenses and improvident contracts made by the substituted directors, an action in equity for an accounting may be maintained against the directors, who resigned pursuant to such conspiracy, to discover and fix the value of assets improperly withheld and of all property lost and damages caused by their wrongful acts, and to compel them jointly and severally to pay the aggregate amount thereof over to the corporation or to a receiver thereof, and, since it was part of the fraudulent confederation into which they all entered and part of the wrong intended and accomplished by them, to also set aside a written contract between one of them and the corporation whereby corporate assets were to be wrongfully diverted to him. Bosworth v. Allen, 168 N. Y. 157 (1901).

Right of Director Holding Claim against the Corporation.

Where a director receives property of the corporation as collateral security for a debt honestly due him, or a liability justly incurred, the payment of

the debt or the discharge of the obligation is essential for an avoidance of the transaction, whether the pledge is taken for a present or precedent debt. Duncomb v. N. Y., Housatonic & Northern R. R. Co., 84 N. Y. 190 (1881).

Directors Cannot Vote by Proxy.

No director can vote at a meeting of the board of directors by proxy. Craig Med. Co. v. The Merchants' Bank of Rochester, 59 Hun 561 (1881).

Executive Committee, Powers of.

The board of directors may appoint an executive committee of its own members with power to transact its business during the intervals between the meetings of the board. Olcott v. Tioga R. R. Co., 27 N. Y. 546 (1863); Sheridan Elec. L. Co. v. Chatham Nat. Bank, 127 N. Y. 517 (1891); First Nat. Bank v. Com'l Travelers' Home Assn., 108 A. D. 78 (1905), affd., 185 N. Y. 575. Even though such business involves the giving of negotiable notes for corporate indebtedness. Id. As to authority to appoint an executive committee, see also Gause v. Commonwealth Trust Co., 124 A. D. 438 (1908); In re Empire State Supr. Lodge, 118 A. D. 616 (1907); Mills v. U. S. Printing Co., 99 A. D. 605 (1904).

It is only discretionary powers respecting corporate affairs that directors are prohibited from delegating to a sub-committee or to an agent. The directors may vest the performance of ministerial duties in a committee of their own members or in an individual. First Nat. Bank v. Commercial Travelers' Home Assn., 108 A. D. 78 (1905), affd., 185 N. Y. 575.

The board may delegate its authority to agents, or to a quorum composed of less than a majority of the number. Hoyt v. Thompson's Executor, 19 N. Y. 207 (1859).

An executive committee which, under a by-law, had authority to exercise any powers of the board of directors when the latter was not in session, has no power to execute, immediately prior to a meeting of the board which had been called for the afternoon of the same day, a contract appointing a sole selling agent of the output of the corporation for a term of years. Com'l Wood & Cement Co. v. Northampton Portland Cement Co., 190 N. Y. 1 (1907), affg. 115 A. D. 388.

Where a board of directors appointed an executive committee, giving it no power to issue stock, and thereafter stock was issued by the president of the corporation under the authority of such committee and the board of directors neither authorized nor ratified such issue, no title was conferred upon one who was not a purchaser in good faith for full value. Ryder v. Bushwick R. R. Co., 134 N. Y. 83 (1892).

Directors, Relation of, to Corporation and Others.

In every action where the interest of the corporation is involved, particularly where the same is in conflict with the individual interest of the directors, they act as trustees and are strictly accountable to the creditors or stockholders for their action. Billings v. Shaw, 209 N. Y. 265, 282 (1913), and cases cited. They cannot dispose of its property and divide the proceeds according to a secret agreement, and thus realize a profit to themselves. Id.

The directors hold their office charged with the duty to act for the corporation according to their best judgment, and in so doing they cannot be controlled in the reasonable exercise and performance of such duty. The corporation is the owner of the property, but the directors in the performance of their duty possess it and act in every way as if they owned it. They are trustees empowered to control the property and manage the corporate affairs

without let or hindrance. As to third parties they are its agents, but as to the corporation itself, equity holds them liable as trustees. Continental Securities Co. v. Belmont, 206 N. Y. 7, 16 (1912), affg. 150 A. D. 298.

The relation existing between a corporation and its directors, so far as the dealings of directors with the corporate property are concerned, is fiduciary in its character, and, while not strictly that of a trustee and cestui que trust, it partakes of that nature. It is only in their dealings as agents of the corporation with third persons that the relation between the corporation and the directors is that of principal and agent. Mabon v. Miller, 81 A. D. 10 (1903), which quite exhaustingly discusses this dual relationship, and cites O'Brien v. Fitzgerald, 143 N. Y. 377; Dykman v. Keeney, 154 N. Y. 483; Higgins v. Tefft, 4 A. D. 62; O'Brien v. Fitzgerald, 6 A. D. 509, affd., 150 N. Y. 572; Duncomb v. N. Y., H. & N. R. R. Co., 84 N. Y. 190; Redhead v. Parkway Driving Club, 148 N. Y. 471; Bosworth v. Allen, 168 N. Y. 157; Porter v. Intern'l Bridge Co., 163 N. Y. 79; Jacobson v. Brooklyn Lumber Co., 184 N. Y. 152 (1906), revsg. 101 A. D. 609.

The officers cannot, by resigning in a body, deprive themselves of their authority over the corporate property nor free themselves from the obligation to care for it until others are elected in their stead. Such resignation does not create the condition contemplated by Gen. Corp. Law, § 306, authorizing the bringing of an action "to preserve the assets of a corporation having no officers empowered to hold the same." Zeltner v. Zeltner Brewing Co., 79 A. D. 136 (1903), affd., 174 N. Y. 247.

The Supreme Court has no jurisdiction to entertain a suit in equity brought by a stockholder in his own behalf and on that of other stockholders similarly situated to determine the respective rights to the office of director as between rival claimants, not parties to the action; nor can it enjoin a de facto director holding under color of election from exercising the duties of his office. Moir v. Provident Savings Life Ass. Soc., 127 A. D. 591 (1908).

Any resolution passed at a meeting at which a director having a personal interest in the matter voted is voidable without regard to its fairness when the vote of that director was necessary to the result. Miller v. Crown Perfumery Co., 57 Misc. 383, affd., 125 A. D. 881 (1908).

A director or officer of a corporation is not precluded from entering into contracts with it for his personal benefit where the rights of the corporation are fully protected. Veeder v. Horstmann, 85 A. D. 154. Such contracts, especially where the corporation is represented by a majority of the directors, exclusive of the party interested, are not void, but are simply voidable at the suit of the corporation or persons claiming through it. Id.

As in the case of every other trustee or agent, no director can, in acting on behalf of the corporation, reserve or secure to himself any advantage or benefit. Koster v. Pain, 41 A. D. 443 (1899). However, agreements openly made, to the knowledge of all the stockholders, are valid. Goldshear v. Barron, 42 Misc. 198 (1903).

Director Accountable for Money Received for Transferring Control of Corporation.

See the above topic under section 90 of the General Corporation Law, post.

Liabilities of Directors Generally.

Directors who transfer all the corporate property to another corporation which assumes payment of all the debts of the vendor are liable to account to the judgment creditors of the latter for the property so transferred. The fact that the directors did not know of the claim is immaterial for they should have provided for unknown claims. If they undertake to divest the

corporation of all its property and practically dissolve it without taking the proceedings for a voluntary dissolution which are prescribed by law they are bound to give some notice to creditors of the proposed transfer. Darcy v. Bklyn. & N. Y. Ferry Co., 196 N. Y. 99 (1909), affg. 127 A. D. 167. The agreement of the vendee corporation to assume payment of the debts of the vendor is not binding upon a creditor unless he accepts the substituted debtor. Id.

Upon the dissolution of a corporation under section 221 of this law the directors become trustees for the creditors and are personally liable for corporate debts to the extent of the corporate assets coming into their hands. Cunningham v. Glauber, 133 A. D. 10 (1909).

Where a corporation seeks to hold directors liable for negligence and fraud in failing to carry out terms of a concession from a foreign government to build a railroad, it must allege and prove the financial status of the corporation; its ability to accept the concession and construct the road and that the undertaking would be profitable or advantageous. Occidental Const. Co. v. Miller, 154 A. D. 437 (1913).

Where directors and officers engage in ultra vires transactions and cause loss to the corporation, they must be held jointly and severally liable for the damages. Holmes, Booth & Hayden v. Willard, 125 N. Y. 75, 79 (1890); Austin v. Daniels, 4 Den. 299 (1847); Hun v. Cary, 82 N. Y. 65 (1880). However, where the acts are simply ultra vires without being either mala prohibita or mala in se, a stockholder who has acquiesced and accepted pecuniary benefits thereunder, cannot maintain an action for himself, to set aside the transaction or to compel restitution to the corporation. Wormser v. Met. St. Ry. Co., 184 N. Y. 83 (1906).

The liability of directors to the corporation for damages caused by unauthorized acts rests upon the common law rule which renders every agent liable who violates his authority to the damage of his principal. Briggs v. Spaulding, 141 U. S. 132, 146 (1891).

Where directors, acting in good faith, apply money to the use of the corporation, which should have been applied in payment of its bonds, they should not be held personally liable where the corporation itself had already been held liable. Seymour v. Spring Forest Cem. Assn., 4 A. D. 359 (1896), affd. 157 N. Y. 697.

Directors of a corporation, owning substantially all its stock, do not own the corporation itself, and for converting its property to their own use the same liability attaches as if they had appropriated property of an individual, as the corporation is a distinct legal entity. Saranac & Lake Placid R. R. Co. v. Arnold, 167 N. Y. 368 (1901), revsg. 41 A. D. 482; Buffalo Loan, Trust & Safe Deposit Co. v. Medina Gas & Elec. Lt. Co., 162 N. Y. 67 (1900), affg. 12 A. D. 199.

Directors are bound to manage the corporate property and affairs in good faith, and for a violation of duty resulting in waste of assets, injury to its property or unlawful gain to themselves, they are liable to account to the corporation or its representatives. Bosworth v. Allen, 168 N. Y. 157, revsg. 57 A. D. 633 (1901).

Directors of a corporation failing to administer its affairs honestly and with reasonable prudence, not through excusable neglect but by actual misfeasance in appropriating corporate funds to their own use, are personally liable to a receiver of the corporation for the damage occasioned by their misconduct. Bowers v. Male, 186 N. Y. 28 (1906).

Liability of directors for negligence extends only to damages sustained as the natural and proximate result of their acts or omissions. Bloom v. Nat'l United Benefit Sav. & Loan Co., 152 N. Y. 114, affg. 81 Hun 120 (1897).

Where one makes a promissory note in the name of a corporation he

Directors must manifest good faith and obedience to the law and reasonable diligence. People v. Mancuso, 255 N.Y. 463, 175 N.E. 177, 76 A.L.R. 514.
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impliedly warrants that he has authority to do so, and, if he has no such authority, he is liable upon the implied warranty for damages which have resulted from the breach. Miller v. Reynolds, 92 Hun 400 (1895).

An agreement whereby a majority of the directors holding a majority of the corporate stock agree to vote to continue themselves in office and to draw excessive salaries is void. Snow v. Church, 13 A. D. 108 (1897).

In an action to recover damages from directors and stockholders of a corporation because of alleged fraudulent representations as to its prosperity and solvency, defendants who were active in consummating the fraud are to be deemed the agents of those who were passive and received the benefits of the fraud. Reynolds v. Leyden, 24 A. D. 395 (1897).

A complaint in an action brought by a receiver against the directors to compel them to account for dissipating, misappropriating and diverting corporate property, and as an incident to an accounting to recover damages resulting from their official misconduct states a cause of action in equity. The cause of action is single and equity may lay hold of the entire transaction, subject each and every action of the directors to scrutiny, and determine the liability of each director for his culpable acts. Mabon v. Miller, 81 A. D. 10 (1903).

Directors are not liable for losses caused by mere errors of judgment. Peo. v. Equitable Life Ass. Soc., 124 A. D. 714 (1908). Cf. Campbell v. Watson, 50 Atl. 120.

Where the acts of directors resulting in loss to the corporation are such as to constitute actual malfeasance an action at law will lie to recover damages. Peo. v. Equitable Life Ass. Soc., 124 A. D. 714 (1908).

Money obtained from an outsider by a director by virtue of his office belongs to the corporation. McClure v. Law, 161 N. Y. 78, revsg. 20 A. D. 459 (1899).

Where the directors authorize proceedings for voluntary dissolution and an attorney is employed who takes the requisite action, the proceeding is that of the corporation, and the directors are not personally liable to the attorney. Drew v. Longwell, 81 Hun 144 (1894).

One is not chargeable with actual knowledge of corporate business merely because he is a director or stockholder. Rudd v. Robinson, 126 N. Y. 113, 36 St. Rep. 501 (1891).

Directors are not personally liable to stockholders for a declared dividend until it has been set aside from the assets so as to become a trust fund in their hands. Searles v. Gebbie, 115 A. D. 778 (1907), affd., 190 N. Y. 533.

The mere fact that a party is a trustee or director of a corporation does not make him chargeable with actual knowledge of its business transactions and of the entries made on its books so as to render such books per se evidence against him. Powell v. Conover, 75 Hun 11 (1894).

Liability of Directors for Sale of Corporate Property at Inadequate Price.

Where a stockholder brings a representative action on behalf of the corporation against its directors and officers for having disposed of its property for an inadequate price, another stockholder is not entitled to be brought in on his own motion as a party defendant, because whatever money is recovered from the directors and officers will be received by the corporation to be applied to its corporate uses, and other stockholders are not necessary to a determination of a claim in favor of the corporation in such an action. Hay v. Brookfield, 160 A. D. 277 (1914).

Corporate assets constitute a trust fund for the payment of the corporate debts, and if two directors transfer all the corporate property to a third direc-

tor for a nominal consideration, they commit a breach of duty toward creditors and become personally liable for existing claims. Cullen v. Friedland, 152 A. D. 124 (1912), on the authority of Darcy v. Bklyn. & N. Y. Ferry Co., 196 N. Y. 99. Such third director is also liable to a creditor, on the additional ground that he received, with notice and without consideration, corporate property which was impressed with a trust for the payment of corporate debts. Id.

Where the majority stockholders of a corporation, who are also its officers and directors, organize another corporation and become the officers, directors and stockholders thereof, and then sell all the property of the first mentioned corporation to the new corporation at a grossly inadequate price, the transaction constitutes a fraud upon the vendor corporation which will entitle that corporation or a minority stockholder thereof suing in its right to have the transaction set aside and the directors held responsible for the injury caused to such corporation by a violation of their duty. Hinds v. Fishkill & Matteawan Gas Co., 96 A. D. 14 (1904).

Liability of Directors for Expense of Litigation.

It was held in Godley v. Crandall & Godley Co., 153 A. D. 697, that directors against whom judgment is rendered in a representative action brought by stockholders are properly required by such judgment to pay legal fees and expenses paid in defense of the action rather than the corporation itself; but, on appeal it was held that there being no claim in the complaint for such items they should be eliminated from the recovery without prejudice to the plaintiff's right to bring a new action therefor. Godley v. Crandall & Godley Co., 212 N. Y. 121, 137 (1914).

Directors Not Liable for Errors of Judgment.

Directors are not liable for mere errors of judgment so long as they have not acted with corrupt intent, and this is true in errors of law as well as of fact. Cass v. Realty Securities Co., 148 A. D. 96 (1911), affd., 206 N. Y. 649; Peo. v. Equitable Life Assur. Soc., 124 A. D. 731 (1908); Seymour v. Spring Forest Cem. Assn., 4 A. D. 359 (1896).

Liability of Directors after Resignation.

An action is maintainable for an accounting not only against directors elected upon the resignation of the former directors but also against those who have ceased to be directors. The object of the statute (Gen. Corpn. L., § 90) was to authorize an action to prevent waste and injury to the corporate property and to recover property of the corporation wrongfully and unlawfully disposed of and damages of and an accounting by the wrongdoer, because the efficacy of the statute would be seriously impaired if it were held that an action could only be maintained against directors while in office. Jacobus v. Diamond Soda Water Mfg. Co., 94 A. D. 366, 379 (1904); Bosworth v. Allen, 168 N. Y. 157 (1901).

Liability of Directors under Penal Statute of Another State.

Where the statutes of another State attempt to impose upon directors or stockholders a liability not arising out of contract or known to the common law, the courts of this State will not enforce the same, there being no obligation of comity to enforce a statute which is penal and not contractual. Worthington v. Grieser, 77 A. D. 203, 208 (1902), citing Marshall v. Sherman, 148 N. Y. 9. Contractual obligations incurred in other States are enforceable in our courts in a proper action. Stoddard v. Lum, 159 N. Y. 265 (1899).

Abatement of Action against a Director.

An action by a director against his co-directors under sections 90 and 91 for mismanagement, etc., abates by reason of the fact that he is not re-elected to office. The action does not survive merely because the former director continues to be a stockholder, nor by virtue of section 756 of the Code, providing that in case of transfer of interest or a devolution of liability the action may be continued by or against the original party unless the court directs a substitution. Hamilton v. Gibson, 145 A. D. 825 (1911).

Good Will; Conduct of Directors Relative Thereto.

If directors fraudulently permit the good will to be appropriated by another corporation, in which they are interested, such directors must account for the value of such good will in an action brought by a stockholder in the right of the corporation. Good will is an asset of the corporation. Godley v. Crandall & Godley Co., 212 N. Y. 121 (1914); Jacobus v. Diamond Soda Water Mfg. Co., 94 A. D. 366 (1904).

Where two persons enter into a contract, relative to a corporation to be organized by them, for the purchase and sale of shares of stock at the book value as shown on the accounts of the corporation, and thereafter one of the parties causes the good will value to be reduced on the books to a mere nominal sum, a court of equity, in a suit against such party and the corporation, will not interfere with the management of the books, especially when no provision was made as to the method of keeping the books and the corporation was not a party to the agreement. Drucklieb v. Harris, 209 N. Y. 211 (1913), revsg. 155 A. D. 83.

Actions Against Directors by Bondholders.

See also, Stock Corpn. L., § 6, and collection of authorities thereunder.

The directors of a corporation as individuals owe no direct duty to an owner of its bonds, the contract of the bondholder being with the corporation itself; hence, such bondholder cannot maintain an action against the directors personally for disposing of the proceeds of the sale of the corporate property under a prior mortgage without first exhausting his remedies against the corporation. Cass v. Realty Securities Co., 148 A. D. 96 (1911), affd., 206 N. Y. 649 (1912).

Judgment against Corporation as Evidence against Directors.

A judgment against a corporation is evidence in favor of the plaintiff in a subsequent action in which he seeks to follow the corporate assets; but it is not admissible in an action against the directors based upon original liability to the plaintiff and not upon the possession of corporate funds by the directors. Schenck Chem. Co. v. Industrial Adv. & Distrib'g Co., 66 Misc. 597 (1910), citing Miller v. White, 50 N. Y. 137, and McMahon v. Macy, 51 N. Y. 155; see, also, Stock Corpn. Law, § 56, discussion under the heading "Judgment against Corporation as Evidence against Stockholder."

Where a contract created an exclusive agency in the defendant corporation and a former judgment construed the relation as fiduciary, such judgment is not evidence against the directors in a subsequent action in which the plaintiff claims that the moneys received by the corporation were dissipated by the directors in payment of corporate debts. Schenck Chem. Co. v. Industrial Adv. & Distrib'g Co., 66 Misc. 597 (1910), and cases cited.

Corporate Books as Evidence against Directors.

See also "Corporate Books as Evidence," under section 32 of the Stock Corporation Law, post.

In an action to charge an individual liability against directors for the corporate debts the account books of the corporation, without proof of correctness, are not evidence against the directors of the existence of the indebtedness, in the absence of evidence that such directors had access to, or were familiar with, the contents of the books of account. Minor v. Crosby, 76 A. D. 561 (1902).

In an action by the trustee of a bankrupt corporation to recover unauthorized dividends from the directors who voted therefor, the ledger of the corporation is admissible as evidence to show the financial status of the corporation at the date the dividends were declared. Wesp v. Muckle, 136 A. D. 241 (1910), affd., 201 N. Y. 527, without opinion. In this case the court distinguished the numerous other cases, in which it has been held that where the corporation brings suit it cannot establish its debt by an entry in its own books unless the defendant assents to the entry, because, in the declaration of a dividend, it is the duty of a director to ascertain whether the earnings justified the payment of such dividend.

Creditor's Action against Directors.

In order to share in a fund obtained through a representative action brought by a creditor against directors to enforce a personal liability, other creditors must come in, after the interlocutory judgment, be made parties and prove their claims. If this is not done they are barred from participation in the fund. Davids v. Bauer, 155 A. D. 97 (1913); Hirshfeld v. Fitzgerald, 157 N. Y. 156, 180 (1898).

In an action by a judgment creditor of a corporation to recover the amount of his judgment from its directors and from another corporation, to which the corporate assets were sold, if the complaint does not allege that the transferee knew of plaintiff's claim, or that it was concerned in a fraudulent attempt to injure him, or that he did not pay full value for the assets, a demurrer by the transferee on the ground of insufficiency will be sustained. But if the complaint joins as defendants the judgment debtor, its directors and the transferee of the assets and alleges that the directors distributed the proceeds of the sale of the assets among the stockholders without paying or providing for plaintiff's claim, a demurrer on the ground that causes of action have been improperly united is not well taken. Teague v. Ridgway Co., 145 A. D. 277 (1911).

Where an action is brought by a single creditor, under section 90, upon the ground that the directors have transferred all the corporate assets without providing for the payment of debts, the recovery should be limited to such proportion of the value of the property transferred as the creditor's claim in connection with other creditors existing at that time bears to the value of the property transferred. Buckley v. Stansfield, 155 A. D. 735 (1913). A judgment creditor may maintain the action in his own right and need not bring it as representing all creditors where it does not appear that rights of other creditors are involved. Id. The liability of the directors is several and the creditor may proceed against one or more without joining all. Id.

Director; when Chargeable with Knowledge of Corporate Affairs.

A director when dealing with his own corporation is chargeable not only with such knowledge of its affairs as he actually possesses, but also with such as he would have had if he had properly discharged his duties as director. Logan v. Fidelity Phenix Fire Ins. Co., 161 A. D. 404 (1914).

Directors are bound to know the uniform course pursued by their sole agent in the transaction of business at the corporate office, especially where regular entries of the acts of such agent were made in the corporate books, and they

are responsible on the ground of a tacit assent and approval, unless they can show that by a strict vigilance and scrutiny into his acts they were unable to ascertain the course he was pursuing and hence unable to prevent it or put the public upon their guard. Conover v. Mutual Ins. Co. of Albany, 1 N. Y. 290, 292 (1848).

The mere fact that a person is a director or stockholder of a corporation does not make him chargeable with actual knowledge of its business transactions or of entries made in its books. Rudd v. Robinson, 126 N. Y. 113, 121 (1891). Therefore, in an action by the receiver of a corporation against one of its directors to recover property alleged to have been improperly appropriated, the books of the corporation were not competent evidence against him to establish a liability. Id. However, when such books were proved by a corporate officer to have been kept by him and to contain correct entries they are admissible. Chenango Bridge Co. v. Lewis, 63 Barb. 111 (1872).

Notice to directors when assembled as a board would undoubtedly be notice to the corporation and notice to an individual director which he communicates to the board, is notice to the corporation for this thus becomes notice to the board. Shattuck v. Guardian Trust Co., 145 A. D. 734, 747 (1911), revs'd on other grounds, 204 N. Y. 200.

Knowledge of Director Imputable to Corporation.

The rule stated generally in Casco Nat'l Bk. v. Clark, 139 N. Y. 307, 313 (1893) is that where a director or an officer has knowledge of material facts respecting a "proposed" transaction, which his relations to the corporation, as representing it, have given him, then, as it becomes his official duty to communicate that knowledge to the corporation, he will be presumed to have done so, and his knowledge will then be imputed to the corporation; but, the rule thus stated has been extended in Shattuck v. Guardian Trust Co., 204 N. Y. 200, 208 (1912), revsg. 145 A. D. 734, so as to include knowledge derived by a director who is also counsel for the corporation, where such knowledge relates to a past or present transaction.

Resignation of Directors.

Where all the officers and all the directors of an insolvent corporation resign for the purpose of procuring the appointment of a receiver under the Code, § 1810, subd. 3, authorizing an action "to preserve the assets of a corporation having no officers to hold the same," such resignations are neither legal or effective. Although the provision is broad enough to cover any case in which a corporation is without officers it was not designed to permit officers to abdicate their functions for the purpose of shifting their burdens to the courts. Zeltner v. Zeltner Brewing Co., 174 N. Y. 247 (1903), affg. 79 A. D. 136; Yorkville Bank v. Same, 80 A. D. 578 (1903), appeal dismissed, 178 N. Y. 572.

The acceptance of the resignation of a director of a corporation is ordinarily not essential to its effectiveness. Manhattan Co. v. Kaldenberg, 165 N. Y. 1 (1900), revsg. 27 A. D. 31; Noble v. Euler, 20 A. D. 548 (1897); Wilson v. Brentwood Hotel Co., 16 Misc. 48 (1896), and cases cited supra.

The acceptance by the board of directors of the resignation of a duly elected director, after he had withdrawn the same, and a refusal to recognize him as a director, does not authorize the court to enjoin him from acting, nor to compel the recognition of the rival claimant. Moir v. Provident Savings Life Assur. Soc., 127 A. D. 591 (1908).

Removal or Suspension of a Director.

Respecting the removal of a director for misconduct, etc., see Gen. Corp Law, §§ 90, 91, and notes thereunder.

A director cannot be removed by his fellow directors during his term, at least without cause, in the absence of some statute or provision in the corporate charter authorizing such removal. Peo. ex rel. Manice v. Powell, 201 N. Y. 194 (1911). The remedy is by action under Gen. Corp. Law, §§ 90, 91. Id.

The remedy of a director who claims that he was illegally removed and another was elected in his place is by quo warranto, under Code Civil Pro. § 1948, and not by mandamus for reinstatement. Peo. ex rel. Manice v. Powell, 201 N. Y. 194 (1911).

The certificate of incorporation may provide for the suspension or removal of directors from office. Peo. ex rel. Manice v. Powell, 201 N. Y. 194 (1911); however, if it does not so provide the suspension or removal of directors can be had only in judicial proceedings brought by the Attorney-General pursuant to sections 90, 91 and 307 of the General Corporation Law. Welcke v. Tragresser, 131 A. D. 731 (1909).

Where by reason of the removal of three directors by order of the court there remain only two who are at least de facto directors and one of them as vice-president de facto is given power in the by-laws to exercise the duties of president, they may conduct the ordinary business of the corporation and take charge of and preserve its assets, and in such case a receiver should not be appointed under subd. 3, section 306 of this law, on the ground that there are no officers entitled to hold corporate assets. Ehret v. Ringler Co., 144 A. D. 480 (1911); appeal dismissed because of changed conditions, 204 N. Y. 638.

Forfeiture of Office of Director.

Since a person not a stockholder may be a director if the certificate of incorporation or by-laws so provide, a person elected director and president, unless he has resigned or his successor has been elected, cannot be presumed to have forfeited his office as director, even assuming that he has parted with all his stock, when nothing further is shown; and, in such a case, he may institute an action on behalf of the corporation pursuant to a resolution of the directors. Buf. Electro-Plating Co. v. Day, 151 A. D. 237 (1912).

In the absence of any specific authority or provisions in the certificate of incorporation, or in by-laws duly adopted by the stockholders, directors have no power to expel a fellow director from the board, and, hence, no power to pass a valid amendment to the by-laws under which they may assume to exercise that power. Raub v. Gerken, 127 A. D. 42 (1908).

The Gen. Corp. Law, § 90, subd. 4 (formerly Code, § 1781), authorizing an action by the Attorney-General to remove directors and other officers for misconduct, should not be so construed as to prevent the removal of directors for their misconduct as officers, for one who is both a director and an executive officer and is guilty of misconduct in one capacity cannot remain in partial control in the other capacity. Re-election of directors after alleged misconduct does not prevent removal as their terms of office are treated as continuous. Peo. v. Lyon, 119 A. D. 361 (1907), aff'd., 189 N. Y. 544.

The Supreme Court has no jurisdiction to entertain a suit in equity brought by a stockholder in his own behalf and that of all other stockholders to determine the respective rights to the office of director as between rival claimants. Moir v. Provident Savings Life Assur. Soc., 127 A. D 591 (1908).

Compensation of Directors.

Directors may appoint and fix the compensation of the ministerial officers of the corporation, but in the absence of some provision of the statute, the by-laws or charter, they have no authority to vote salaries to each other as mere incidents of their office, nor for services already performed under a stipulated salary. Salaries voted by the directors to themselves under such circumstances may be recovered in a representative action brought by a stockholder. Godley v. Crandall & Godley Co., 212 N. Y. 121 (1914).

Where directors distributed surplus earnings among themselves and certain employee stockholders under the guise of additional salaries, but on a uniform basis of the capital stock held by each and not according to the services rendered by them, such a distribution of assets is without consideration, and a stockholder who did not share in the distribution may maintain a representative action to compel the corporate officers to account for the wrongful diversion of the property. Godley v. Crandall & Codley Co., 212 N. Y. 121 (1914).

Directors have no power to vote increases of compensation to themselves for services which have already been performed under a stipulated salary. Godley v. Crandall & Godley Co., 212 N. Y. 121 (1914).

An agreement between the officers of a corporation, that each shall have a salary for a term of years and that the profits shall be distributed in a manner irrespective of the amount of stock held by them, is void as against public policy, being an attempt by the officers to use the corporation for their own benefit and not for that of the stockholders. Abbott v. Harbeson Textile Co., 162 A. D. 405 (1914).

Where a business partnership is transformed into a close business corporation and thereafter the majority elect themselves directors and then officers and distribute amongst themselves a substantial part of the profits as excessive salaries and additional compensation, a minority stockholder may maintain an action in the right of the corporation to recover back the sums improperly taken. Carr v. Kimball, 153 A. D. 825 (1912); Godley v. Crandall & Godley Co., 212 N. Y. 121 (1914).

A provision in the by-laws of a corporation authorizing the board of directors to fix the compensation of officers, employees or agents does not deprive a court of equity of jurisdiction to determine the legality of salaries and compensation paid to directors. Carr v. Kimball, 153 A. D. 825 (1912); Godley v. Crandall & Godley Co., 212 N. Y. 121 (1914).

If officers who have fraudulently voted themselves excessive salaries and extra compensation are called to account in a court of equity, they may be allowed to retain a sum equal to the fair and reasonable value of their services. Carr v. Kimball, 153 A. D. 825 (1912), and cases cited; Godley v. Crandall & Godley Co., 212 N. Y. 121 (1914).

Where the three directors of a corporation meet and vote themselves salaries for services actually to be rendered to the company, an enforceable contract between them and the corporation is not created. Haas v. Universal Phonograph & Record Company, 75 Misc. 119 (1912).

Moneys paid to officers as salaries, without a pre-existing by-law or resolution or agreement authorizing the same, may be recovered on behalf of the corporation at the suit of a stockholder, and a ratification of such payments by a mere majority of stockholders is not effectual. Lewis v. Matthews, 161 A. D. 107 (1914). A resolution fixing the salaries of officers for services to be rendered thereafter may be ratified by the stockholders, and in such case the corporation and minority stockholders are estopped from questioning the validity of such payments or the right of the officers to receive the salaries thus fixed. Id.

A director seeking to recover on a contract of employment for five years made by himself and his co-directors, which contract has been repudiated by the corporation, after part performance by him, cannot recover for time not served without showing the fairness and propriety of the contract. Merrill v. United Box Board & Paper Co., 143 A. D. 833 (1911).

A suit by the equitable owner of stock to protect his interests and those of other stockholders from a conspiracy of those in control of the corporation to pay themselves large salaries and otherwise dissipate the assets is not an individual action but one in equity. Baum v. Sporborg, 146 A. D. 537 (1911). Plaintiff's suit is one to preserve corporate assets and solely for the benefit of the corporation and one which the corporation itself should have brought if properly officered; therefore, an answer of intervening defendants, which sets up as a counterclaim an alleged lien on plaintiff's stock, is demurrable. Id.

The payment of large salaries irrespective of earnings in disregard of the rights of creditors will justify an action for an accounting against the directors and officers by a trustee in bankruptcy of the corporation. Williams v. McClave, 85 Misc. 184 (1914).

Statements in the prospectus of a promoter that officers of a proposed corporation are to receive no salary do not preclude directors of the corporation subsequently created from paying salaries to its officers. Metzger v. Knox, 77 Misc. 271 (1912).

An agreement made with a practical hotel man by the directors of a corporation organized to erect a hotel, giving him a monthly salary for services while the hotel is being built, and the management thereof for 10 years on completion, is not a breach of faith by the directors, and although at the same meeting when such contract was authorized the manager was elected to the board of directors he may be entitled to recover for salary subsequently earned. Bklyn. Heights Realty Co. v. Kurtz, 115 A. D. 74 (1906).

Where directors, who are also officers, vote themselves excessive increase of salaries, restitution, at the suit of an aggrieved stockholder, will be decreed to the corporation not only of the excessive salaries voted, but also, of the amount of their salaries as originally fixed. Davids v. Davids, 135 A. D. 206 (1909).

Excessive increases of salaries voted to themselves by directors, who are also officers, will not be upheld merely because each increase was voted upon separately and each director refrained from voting upon the resolution fixing his own salary. A director's omission to so vote merely gives the semblance of legality to a wrongful act which would not prevent a court of equity from decreeing restitution. Davids v. Davids, 135 A. D. 206 (1909).

The burden is upon the directors to prove that the salaries voted were not excessive. Davids v. Davids, 135 A. D. 206 (1909).

While a minority stockholder has no part in the management of the corporate business, through a court of equity he may prevent the directors from misappropriating corporate funds under the guise of salaries of officers. Davids v. Davids, 135 A. D. 206 (1909).

A stockholder may invoke the equity powers of the court to restrain officers from wasting the corporate funds by the payment of excessive salaries. Lawrence v. Weber, 65 Misc. 603 (1910).

A director may not audit his own claim for extra compensation for his services as secretary and treasurer, nor be one of a quorum necessary to allow it, and the directors may be sued by any stockholder for himself and the others to recover a payment so allowed. Butts v. Wood, 37 N. Y. 317 (1867).

The general rule is that a director, assuming office as such without any agreement as to compensation, is presumed to render his official services

gratuitously; for he assumes thereby, in a sense, a trust relation toward the company, and it would be against public policy to permit him to assert claims for services which were within the line of his duties. Bagley v. Carthage, Watertown & S. H. R. R. Co., 165 N. Y. 179, affg. 25 A. D. 475 (1898).

The president and director of a corporation who renders services outside of his official duties, upon an employment of the directors with a promise of compensation, is entitled to receive payment therefor and the expenses incurred, although the by-laws omit to provide a salary for his official services and there is no express resolution of the board of directors containing an agreement to employ and to compensate him. Bagley v. Carthage, Watertown & S. H. R. R. Co., supra. It may often happen, from the nature of the business to be done, that it is essentially preferable and advantageous to employ a director. Id. See, also, Bogart v. N. Y. & L. I. R. R. Co., 118 A. D. 50, affd., 191 N. Y. 550 (1907).

Directors have no right to vote themselves salaries as a mere incident to their offices. Fitchett v. Murphy, 26 Misc. 544 (1899), revsd. on other grounds in 46 A. D. 181; Marshall v. Industrial Fed'n, 84 N. Y. Supp. 866 (1903); Bagley v. Carthage, Watertown & S. H. R. R. Co., 165 N. Y. 179 (1900), affg. 25 A. D. 475; Stout v. Security Trust & Life Ins. Co., 82 A. D. 129 (1903).

Directors may become employees of the corporation and receive compensation therefor, but their action may be questioned by stockholders and reviewed by the latter in equity. Fitchett v. Murphy, supra; Hooke v. Financier Co., 99 A. D. 186 (1904).

The grounds of reversal in Fitchett v. Murphy, supra, are strongly criticised in Polhemus v. Polhemus, 43 Misc. 141 (1904).

The mere fact that services were outside the scope of the ordinary duties of a director does not presume a promise to pay therefor. Gill v. N. Y. Cab Co., 48 Hun 524 (1888); Smith v. L. I. R. R. Co., 102 N. Y. 193 (1886); Starbuck v. Housatonic R. R., 83 Hun 534 (1895).

Where there was no agreement for compensation of a director the board has no authority to pay for services rendered. Kelsey v. Sargent, 40 Hun 150 (1886). See, also, Miller v. Crown Perfumery Co., 57 Misc. 383, 393 (1908), affd., 125 A. D. 881.

One may be connected with a corporation as a director and yet be at liberty to employ his talents and ability after business hours, provided he does not employ them in a way inconsistent with his obligation to or detrimental to the business of the company. Giveen v. Gans, 91 A. D. 37 (1904), affd., 181 N. Y. 538.

A railroad corporation, which has leased its road, but still maintains its organization, may, by its board of directors, lawfully agree to compensate its president for services rendered on behalf of the corporation. Bagley v. Carthage, W. & S. H. R. R. Co., 165 N. Y. 179, affg. 25 A. D. 475 (1900).

The fact that an officer of the corporation voted in favor of giving himself a salary does not render such contract void, but only voidable at the instance of the corporation, or one whose interests are concerned. Keans v. N. Y. & College Point Ferry Co., 17 Misc. 272 (1896), affd., 19 Misc. 19. See, also, Miller v. Crown Perfumery Co., 57 Misc. 383, affd., 125 A. D. 881 (1908).

The fact that a director owns a majority of the stock does not make his employment at a reasonable salary void in the absence of fraud. Hirsch v. Jones, 115 A. D. 156, appeal dismissed, 191 N. Y. 195 (1908).

Directors, who are also officers and own nearly all the stock, may increase their salaries where each refrains from voting to increase his own salary. McNab v. McNab & Harlin Co., 62 Hun 18, aff'd., 133 N. Y. 687 (1892).

It is well settled that a director of a corporation is not entitled to compensation for services performed by him, as such, without the aid of a pre-existing provision expressly giving the right to it. Mather v. Eureka Mower Co., 118 N. Y. 629 (1890).

The directors are presumed to perform the duties of their trust gratuitously; they are not entitled to compensation even for services outside of the ordinary duties of their offices, unless it is expressly stipulated before the services are rendered; but an express contract by the board to pay a fixed or reasonable sum is binding. Kelsey v. Sargent, 40 Hun 150, 156 (1886), quoting from Pierce on Railroads.

Directors Dealing with Themselves.

While the sale of corporate property to a director will be closely scrutinized by a court when objected to by a stockholder, it will be upheld where it clearly appears that it was fairly made and for an adequate price and was for the best interest of the corporation and its stockholders. Union Trust Co. v. Carter, 139 Fed. 717.

Directors are trustees of the corporation and for all the stockholders and may not deal with themselves for their own benefit to the detriment of the corporation and the minority stockholders, and the latter may maintain a representative action to compel the return of funds improperly taken. Carr v. Kimball, 153 A. D. 825 (1912), citing and analyzing many New York authorities; Godley v. Crandall & Godley Co., 212 N. Y. 121 (1914).

Where the agent and organizer of a syndicate to purchase certain properties sells property of his own to the new corporation without knowledge of the other subscribers, the agreement is voidable because an agent to buy may not purchase of himself. Upon tender of the stock received under the agreement a recovery may be had of the moneys paid even though some part thereof had already been expended in the purchase of other properties. Heckscher v. Edenborn, 207 N. Y. 210 (1911), revsg. 137 A. D. 399.

Where a director of a gas and electric company holding but one share of stock, being chairman of its executive committee, participated in the negotiations whereby such corporation made contracts to furnish power and light practically free of cost, to a manufacturing corporation, of which such director was president and the largest stockholder, and the terms of such contracts are grossly inequitable, burdensome and unconscionable, they may be repudiated by the former corporation. Globe Woolen Co. v. Utica Gas & Elec. Co., 151 A. D. 184 (1912).

Contracts of Directors with the Corporation.

Illegality of a profit made by a director arises almost wholly by reason of some undisclosed and secret bias on his part against the corporate interest. If a profit is made that is honest in itself, and is open and fully disclosed, and the transaction is effected after an honest statement of the facts to the directors and to the stockholders, at a meeting of each, there is no reason for criticism or for charging such director with any profits that he may make. Billings v. Shaw, 209 N. Y. 265, 280 (1913).

It is a well established rule of law that all contracts made by a trustee or fiduciary, in which he is personally interested, may be invalidated at the election of the party he represents. He is not permitted to deal with the corporation in which he is a director, in a matter where the interests of the

contracting parties are or might be in conflict. He is not permitted to stand in the attitude of selling as owner and purchasing as trustee, for the law permits no one to act in such inconsistent relations. It does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside the transaction or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case. It prevents frauds by making them as far as may be, impossible, knowing that real motives often elude the most searching inquiry, and it leaves neither to judge nor jury the right to determine upon a consideration of its advantages or disadvantages, whether a contract made under such circumstances shall stand or fall. It can make no difference in the application of the rule where the associates of the interested party were not themselves disabled from contracting with the corporation, or that the interested party was only one of ten directors who voted in favor of the contract. A corporation, in order to defeat a contract entered into by directors, in which one or more of them had a private interest, is not bound to show that the influence of the director or directors, having such private interest, determined the action of the board. The law cannot accurately measure the influence of a director with his associates, nor will it enter into the inquiry, in an action by the director in his private capacity to enforce the contract in the making of which he participated. The value of the rule of equity, adverted to, lies to a great extent in its stubbornness and inflexibility. Munson v. Syracuse, Geneva & Corning R. R. Co., 103 N. Y. 58 (1886), citing Davoue v. Fanning, 2 Johns. Ch. 251, 252; Billings v. Shaw, 209 N. Y. 265, 282 (1913), citing 103 N. Y. 58, supra.

A director or officer of a corporation is not precluded from entering into contracts with it for his personal benefit where the rights of the corporation are fully protected. Such contracts, especially where the corporation is represented by a majority of the directors, exclusive of the party interested, are not void, but are merely voidable at the suit of the corporation or persons claiming through it. Veeder v. Horstman, 85 A. D. 154, 159 (1903).

The general rule is, that acts of officers of a corporation, in any transaction in which both the corporation and they as individuals are interested, do not bind the corporation, except in favor of innocent parties, unless such acts are specially authorized or ratified by the corporation. McCloskey v. Goldman, 62 Misc. 462 (1909); Claflin v. Farmers' & Citizens' Bank, 25 N. Y. 293 (1862).

The directors and agents of a corporation impliedly undertake to give it the benefit of their best care and judgment and to use the powers conferred upon them solely in the interest of the corporation, and they have no right to use their official positions for their own benefit, or the benefit of any one except the corporation. McCloskey v. Goldman, 62 Misc. 462 (1909).

A contract of a director with his corporation is not necessarily void, although it is always subject to the strictest scrutiny by the courts. Vennoli v. Sixty-seventh St., Atelier Bldg., 55 Misc. 222 (1907).

A contract made by a director with the corporation is not void, but merely voidable, in case he fails to show that it was fair, and that no undue advantage was taken of his position. Sage v. Culver, 147 N. Y. 241 (1895); Barr v. N. Y., L. E. & W. R. R. Co., 125 N. Y. 263 (1891); Marbury v. Stone, 17 A. D. 352, affd., 160 N. Y. 701 (1899); Strobel v. Brownell, 16 Misc. 657 (1896); Skinner v. Smith, 134 N. Y. 240; Munson v. S. G. & C. R. R. Co., 103 N. Y. 58 (1886); Keans v. N. Y. & College Point Ferry Co., 19 Misc. 19 (1896); Davoue v. Fanning, 2 Johns. Ch. 251 (1816).

If the contract is just, and all of the stockholders are competent to assent, and do so, with full knowledge of its terms, it is binding on the corporation. Welch v. Importers & Traders' Nat. Bank, 122 N. Y. 177 (1890).

Delay in moving to set aside a voidable contract may be deemed equivalent to ratification. Barr v. N. Y., L. E & W. R. R. Co., 125 N. Y. 263 (1891).

It is only where the promoter informs every subscriber, or the director informs every fellow director and stockholder, that he is personally interested in and of the amount of profit he expects to make on a sale to the corporation, that the promoter or director will be permitted to retain or make a profit on such sale. Colton Imp. Co. v. Richter, 26 Misc. 26 (1899).

A director may purchase outstanding unmatured obligations of the corporation at less than their par value and enforce them at maturity. Seymour v. Spring Forest Cem. Assn., 144 N. Y. 333 (1895). He may loan money to the corporation and receive mortgage security for his debt. Preston v. Loughran, 58 Hun 210 (1890); Kinsman v. Fiske, 83 Hun 494 (1895). A director may purchase the corporate property at a foreclosure sale. Harpending v. Munson, 91 N. Y. 650 (1883).

An officer who makes an individual profit in purchasing corporate supplies through dealing with a firm of which he is a member is liable to account for it to the corporation. Richert v. White, 54 Misc. 114 (1907).

A director can only become the purchaser of property of the corporation subject to its right to elect to disaffirm the sale and demand a resale. Hoyle v. Plattsburgh & Montreal R. R. Co., 54 N. Y. 329 (1873). See, also, Bulkley v. Whitcomb, 121 N. Y. 107 (1890); Gardner v. Ogden, 22 N. Y. 332; Kelsey v. Sargent, 40 Hun 150 (1886), citing 38 N. Y. 201, 39 N. Y. 202, 37 N. Y. 317, 73 N. Y. 511, 54 N. Y. 314, 56 N. Y. 486, 103 N. Y. 58, 41 Hun 189.

The fact that the payee of a promissory note made by a corporation is a director of such corporation is not notice to a transferee of any infirmity of the note nor is it sufficient to put him on inquiry concerning the circumstances under which the note was issued. The rule applicable to notes made by officers of a corporation to their own order, and used to pay their individual debts, has no application to notes duly signed by the proper officers and made payable to a director. Orr v. South Amboy Terra Cotta Co., 113 A. D. 103 (1906).

An owner of property may sell it to a corporation of which he is a stockholder and trustee, if he does not, while acting in his own interests, also act as trustee or representative of the corporation. Gamble v. Q. C. W. Co., 123 N. Y. 91 (1890); Flynn v. Brooklyn City R. R. Co., 9 A. D. 269, affd., 158 N. Y. 493 (1899).

Directors have no authority to bind the company by any contract made with themselves personally, or to represent it in any transaction with third parties in which they have a private interest at stake. Wardell v. Union Pac. R. R. Co., 103 U. S. 651; Hoyle v. Plattsburgh R. R. Co., 54 N. Y. 315 (1873); Blake v. Buffalo Creek R. R. Co., 56 N. Y. 485 (1874); McCloskey v. Goldman, supra.

One dealing with an officer of a corporation who assumes to act for it in matters in which the interests of the corporation and officer are adverse is put upon inquiry as to the authority and good faith of the officer. McCloskey v. Goldman, supra; Moores v. Citizens' Nat. Bk., 111 U. S. 156 (1883).

Dealings between Corporations having Common Directors.

Where common directors act on behalf of two corporations and to the disadvantage of one, the entire transaction is void and there can be no ratification where the taint attaches to the entire transaction, except by the action

of the stockholders taken with knowledge of the situation. This also applies to stockholders in a holding company although they have merely an equitable interest in the holding of the stocks of another corporation which are affected by the illegal acts. Bklyn. Heights R. R. Co. v. Bklyn. City R. R. Co., 151 A. D. 465 (1912).

When there is an identity of some of the directors of two corporations dealing with each other so as to bring the transaction under the condemnation of the rule, which forbids those who fill fiduciary positions from making use of them for their personal benefit, the rule is strict and extends to all transactions where personal interest comes into conflict with a director's acts in a fiduciary capacity, and it works independently of the questions of whether there was fraud, or good intention. Where the possibility of such a conflict exists there is the danger intended to be guarded against by the absoluteness of the rule. The rule, however, does not avoid ab initio all transactions of a trustee, where he is interested; but operates to render them voidable, at the election of the party whose interests are concerned in the question of their affirmance or disaffirmance. If, therefore, nothing is done in avoidance, the transaction stands. If knowledge and opportunity concur whereupon to move, delay, if unreasonable, or attended by retention of the results of the transaction, may be deemed equivalent to ratification of that which before was the subject for action, in repudiation of any obligation. Barr v. N. Y., L. E. & W. R. R. Co., 125 N. Y. 263, 274 (1891); Bklyn. Heights R. R. Co. v. Bklyn City R. R. Co., 151 A. D 465, 480 (1912)

Ratification of Unauthorized Acts of Directors.

See, also, Stock Corpn. L., § 30, under the topic entitled "Ratification of Unauthorized Acts."

The general rule is that acts done in the interest of the corporation, which are voidable only and not fraudulent or ultra vires may be ratified by a majority of the shareholders, and that those who object must correct them within the corporation. But even majority stockholders may not for selfish purpose act in hostility to the interest of the corporation with the intention of defrauding the non-assenting stockholders. Godley v. Crandall & Godley Co., 212 N. Y. 121 (1914).

Stockholders may ratify and affirm the unauthorized acts of directors and officers, and when they do so their adoption of these acts is effective to bind the corporation, unless they offend against the public or the rights of creditors are impaired. C. S. Goss & Co. v. Goss, 147 A. D. 698 (1911), affd., 207 N. Y. 742 (1913); Groh's Sons v. Groh, 80 A. D. 85 (1903).

The authority of stockholders to ratify and confirm the acts of boards of directors is confined to acts voidable by reason of irregularities in the make up of the board or otherwise or by reason of the directors or some of them being personally interested in the subject-matter of the contract or act, or for some other similar reason which makes the action of the directors voidable. No such authority exists in case of an act of the board of directors which is prohibited by law or which is against public policy. In any case where action is taken by stockholders confirming and ratifying a fraud and misapplication of corporate funds by the directors or others the action is binding only by way of estoppel upon such stockholders as voted in favor of such approval. Continental Securities Co. v. Belmont, 206 N. Y. 7, 18 (1912), affg. 150 A. D. 298.

Acts of directors which are fraudulent cannot be ratified by a mere majority of the stockholders so as to bind the minority. Pollitz v. Wabash R. R. Co., 207 N. Y. 113 (1912); Continental Securities Co. v. Belmont, 206 N. Y. 7 (1912).

Where acts of directors are voidable because the contracting parties had common directors, such acts if otherwise intra vires and fair, candid and reasonable may be ratified by a majority of the stockholders and such ratification is binding on the minority. Pollitz v. Wabash R. R. Co., 207 N. Y. 113 (1912).

The direct or indirect misappropriation of corporate assets to his own use and benefit by an officer is incapable of being authorized or ratified by a vote or any act or omission of a majority of the stockholders. Pollitz v. Wabash R. R. Co., 207 N. Y. 113, 127 (1912).

It is a general rule that a director or an executive officer of a corporation has no power to bind it or the stockholders by a contract authorized by or entered into with himself and for his individual benefit. But if the contract so entered into is in all respects just as between the parties, and all the stockholders and directors are competent to assent, and with full knowledge of the terms of the contract, do assent and direct that it be made, it is binding on the corporation and cannot be avoided either by its stockholders or by persons who subsequently become its creditors. Welch v. Importers & Traders' Nat. Bk., 122 N. Y. 177, 189 (1890).

Acts of the board of directors which the stockholders or the corporation might avoid may be ratified by the stockholders, but the act of ratification must be founded upon knowledge of the situation or upon acquiescence in the action after knowledge or in the retention of benefits derived from the voidable action. Bklyn. Heights R. R. Co. v. Bklyn. City R. R. Co., 151 A. D. 465 (1912).

Ratification by stockholders of the voidable acts of directors may be inferred from circumstances provided no public interest is involved. Bklyn. Heights R. R. Co. v. Bklyn. City R. R. Co., 151 A. D. 465, 480 (1912).

Stockholders of a holding corporation, while they do not hold the legal title to the shares of stock of other corporations held by their corporation, yet they have an equitable interest therein, and the illegal acts of the board of directors regarding such stock which are capable of being cured would require ratification by the stockholders of the holding corporation in the same manner as is required in the case of illegal acts concerning any other property in which they were interested as stockholders and concerning which their rights would be affected. Bklyn. Heights R. R. Co. v. Bklyn. City R. R. Co., 151 A. D. 465, 480 (1912).

An agreement made by an officer of a corporation with himself by which he derives a benefit is voidable at the option of the corporation irrespective of whether the agreement was fair to the corporation or not. C. S. Goss & Co. v. Goss, 147 A. D. 698 (1911), affd., 207 N. Y. 742 (1913). But the stockholders, with full knowledge of all the facts, may ratify a contract made for the corporation by its officer with himself, and in such case the corporation is estopped from claiming that the act was invalid. Id.

The officers of a corporation who are sued by stockholders for damages arising from the transaction of business not authorized by the charter may defend by showing the stockholders' acquiescence in or assent to the business, express or implied. Wormser v. Met. St. Ry. Co., 184 N. Y. 83, 88 (1906); Holmes, Booth & Haydens v. Willard, 125 N. Y. 75, 82 (1890).

If a minority stockholder desires to set aside a contract on the ground that it is ultra vires he is required to act promptly, especially when the contract has been ratified by a majority of the stockholders. Warner v. Morgan, 81 Misc. 685 (1913).

A resolution of ratification is insufficient without showing also knowledge of the facts by the stockholders, and when acts of the directors are unauthor-

ized ratification even with full knowledge will not validate them. Missouri Pac. Ry. Co. v. Mercantile Trust Co., 76 Misc. 10 (1912).

When a contract made by common directors has been ratified by a majority vote of the stockholders of the two corporations the ratification is conclusive upon the parties unless the action of the majority of the stockholders was dictated by fraud or was procured by concealment and in ignorance of the true state of the facts. Continental Ins. Co. v. N. Y. & H. R. R. Co., 187 N. Y. 225, 238 (1907); Burden v. Burden, 159 N. Y. 287 (1899).

The doctrine of ultra vires, in its application has two phases: (1), where the public is concerned; (2), where the question is between the corporate body and its stockholders, or between it and its stockholders and third parties dealing with it and through it with them. When the public is concerned, an assent by the stockholders to the use of unauthorized powers will be of no avail. When it is a question of the stockholder's right to restrain the corporate body within its express or incidental powers, he may, in many cases, be denied on the ground of his ratification of corporate action, either by express assent or his intelligent though tacit consent thereto. Remington & Son Pulp & Paper Co. v. Caswell, 126 A. D. 142 (1908); Kent v. Quicksilver Mining Co., 78 N. Y. 159.

Ratification of Void Acts not Permissible.

Where common directors act on behalf of two corporations and to the disadvantage of one, the entire transaction is void and there can be no ratification where the taint attaches to the entire transaction, except by the action of the stockholders taken with knowledge of the situation. This also applies to stockholders in a holding company although they have merely an equitable interest in the holdings of the stocks of another corporation which are affected by the illegal acts. Bklyn. Heights R. R. Co. v. Bklyn. City R. R. Co., 151 A. D. 465 (1912).

Misconduct of Directors Generally.

See also, Gen. Corpn. L., §§ 90 and 91, and authorities cited thereunder.

In a representative action brought by a stockholder on his own behalf and also on behalf of all the other stockholders against the directors for their alleged negligent and wrongful acts in wasting assets, where the right of action belongs to the corporation and it has failed on demand to bring the action, the complaint should set forth but two things: first, the cause of action in favor of the corporation, which should be stated in exactly the same manner and with the same detail of facts as would be proper in case the corporation itself had brought the action; second, the facts which entitle the plaintiff to maintain the action in place of the corporation, that he is a stockholder therein, and that the corporation itself has either refused or unreasonably failed to bring the action. Kavanaugh v. Commonwealth Trust Co., 181 N. Y. 121 (1905); O'Connor v. Virginia Passenger & Power Co., 184 N. Y. 46 (1906); Continental Securities Co. v. Belmont, 206 N. Y. 7, 15 (1912), affg. 150 A. D. 298; Flynn v. Brooklyn City R. R. Co., 158 N. Y. 493 (1899); Clubb v. Cook, 161 A. D. 775 (1914); Weingreen v. Michelbacher, 139 A. D. 931 (1910); Kolb v. Mortimer, 135 A. D. 542 (1909); Sage v. Culver, 147 N. Y. 241 (1895). Ordinarily no other allegations are necessary or material. The amount of the corporate moneys or assets lost or wasted by the negligent or wrongful acts of the directors would be the measure of the amount of the recovery; allegations, therefore, as to the depreciation in the market value of plaintiff's stock is immaterial; neither would it be defense or mitigation that despite such wrongful acts the market value of the stock had been greatly

enhanced. To justify a judgment there must be proof of some actual or threatened wrongdoing on the part of the defendants. 181 N. Y. 121, supra.

A stockholder, who asserts that a wrong has been done to the corporation which it will not itself seek to remedy because it is under the control of the wrongdoers, and who claims to be entitled to prosecute remedial proceedings in its behalf, cannot maintain an action in a representative capacity unless there is a cause of action made out in favor of the corporation. Waters v. Waters & Co., 201 N. Y. 184 (1911), affg. 130 A. D. 678.

In Hawes v. Oakland, 140 U. S. 450, Miller, Justice, asserted the doctrine established in the case of Dodge v. Woolsey, 18 Howard 331, to be, that to enable a stockholder in a corporation to sustain in a court of equity, in his own name, a suit founded on a right of action existing in the corporation itself, there must exist as a foundation for the suit, "Some action or threatened action of the managing board of directors or trustees of the corporation, which is beyond the authority conferred on them by their charter or other source of organization; or such a fraudulent transaction, completed or contemplated by the acting managers in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury to the corporation, or to the interests of the other shareholders; or where the board of directors or a majority of them, are acting for their own interest in a manner destructive of the corporation itself, or of the rights of the other shareholders." In the case of Leslie v. Lorillard, 110 N. Y. 519, at page 536 the court concurred in the adoption of these principles for application to such actions.

Where the vice-president and general manager of a corporation makes secret profits out of a contract with it, which contract was authorized by resolution of his co-directors who had no knowledge of such profits at the time but who subsequently accepted from such officer an interest in such secret profits, they became liable as trustees to account in equity for their official misconduct and to restore to the corporation the entire sum which they participated in diverting, irrespective of the share which each received. Asphalt Const. Co v. Bouker, 150 A. D. 691 (1912). Such directors were guilty not merely of non-feasance in failing to prevent the wrong, but of misfeasance by actively participating in it. Id.

The liability of directors for their acts of non-feasance is a purely legal one for damages, and the stockholders, as such, have no standing to maintain an action therefor. Moran v. Vreeland, 81 Misc. 664 (1913).

Where a corporation, after the expiration of its legal existence, maintained unchallenged a de facto existence, the plaintiff, in a stockholder's action, brought to recover damages sustained by the corporation in consequence of an unauthorized conveyance of realty made by the directors, having thus recognized the corporate existence, is estopped from questioning corporate acts otherwise valid, on the ground of the expiration of the legal existence of the corporation. Hoag v. Edwards, 69 Misc. 237 (1910).

A complaint which alleges that the board of directors of a New Jersey corporation declared and paid a dividend which was not earned; that at the time the statute prohibited payment of dividends except from profits and made directors liable to the corporation and its creditors for amount of such unlawful dividend in case of insolvency; that the directors intended that such dividend should be regarded by the public as a representation that it had been earned; that at the time the directors knew that such representations were false and made with intent to deceive the public and to induce it to purchase stock, is sufficient in an action for deceit against a director who knew that the dividend was paid from capital and yet remained silent while

plaintiff purchased the stock in the belief that the dividend was a distribution of net earnings. Ottinger v. Bennett, 203 N. Y. 554 (1911), revsg. 144 A. D. 525, upon dissentg. op. of Justice Miller: Keeler v. Seaman, 47 Misc. 292 (1905).

Corporate assets constitute a trust fund for the payment of the corporate debts, and if two directors tranfer all the corporate property to a third director for a nominal consideration, they commit a breach of duty toward creditors and become personally liable for existing claims. Cullen v. Friedland, 152 A. D. 124 (1912), on the authority of Darcy v. Bklyn. & N. Y. Ferry Co., 196 N. Y. 99. Such third director is also liable to a creditor, on the additional ground that he received, with notice and without consideration, corporate property which was impressed with a trust for the payment of corporate debts. Id.

In a stockholder's action against a corporation and three other defendants to have certain certificates of its stock and bonds declared void, or, in lieu thereof, that the three individual defendants pay to the corporation the value of such stock and bonds, the plaintiff's claim is derivative and he must allege, first, a good cause of action in favor of the corporation, and, second, facts which authorize his intervention and suit in behalf of the corporation. O'Connor v. Virginia Passenger & Power Co., 184 N. Y. 46 (1906).

In an action by a stockholder of a corporation for an accounting as to its business and to compel its president to account for and pay over moneys alleged to have been wrongfully diverted by him, the joinder of the remaining stockholders as defendants is erroneous where the complaint does not allege that the defendant stockholders, either as a body or individually, participated in the wrongdoings, nor anything showing that they claimed an interest in the controversy adverse to plaintiff, or that they were necessary parties defendant for the determination of the questions involved. The necessary defendants to such an action are the defaulting officials and the directors, who direct, and are responsible for the corporation, and while it would have been proper for the plaintiff to bring such an action in his own name, and in behalf of the other stockholders, in which case it would have been open to them to intervene, their compulsory joinder as parties defendant in this action is improper. McCrea v. Robertson, 192 N. Y. 150 (1908); Hay v. Brookfield, 160 A. D. 277 (1914).

When the loss is peculiar to the stockholder he may have his redress in damages against a director or other person who committed the wrong without making the corporation a party. Greaves v. Gouge, 69 N. Y. 154, 157 (1877); Bissell v. Mich. Southern & N. I. R. R. Co., 22 N. Y. 258, 275 (1860). It is only when the stockholder seeks to recover his share of the loss, which might be recovered by the corporation, that it must be made a party. Robinson v. Smith, 3 Paige 222 (1832); Cunningham v. Pell, 5 id. 607 (1836); 11 How. Pr. 242 (1855).

Where a majority of the directors, or stockholders, or both, acting in bad faith, carry into effect a scheme which, even if lawful upon its face, is intended to circumvent the minority stockholders and defraud them out of their legal rights, the courts interfere and remedy the wrong. Action on the part of directors or stockholders, pursuant to a fraudulent scheme designed to injure the other stockholders, will sustain an action by the corporation or, if it refuses to act, by stockholders in its stead for the benefit of all the injured stockholders. Flynn v. Brooklyn City R. R. Co., 158 N. Y. 493 (1899).

Officers and directors of a corporation may not be called to account by a stockholder as a matter of right but only for some specific act of negligence or misconduct in the management of the corporate affairs or in the disbursement of corporate funds. Tilton v. Gans, 155 A. D. 612 (1913), and cases cited.

Where the owners of property promote the organization of a corporation so that they may dispose of the property to it and make a secret arrangement with two of the directors whereby they are to divide between themselves the difference between the actual value of the property and the purchase price, the corporation, upon the discovery of the fraud, may rescind the sale. Finck v. Canadaway Fertilizer Co., 152 A. D. 391 (1912), modified on other grounds, 208 N. Y. 607.

Where the officers of a railroad corporation which had become the lessee of a railroad were largely interested in the stock of the lessor corporation and would be greatly benefited by a default in the performance of the lease, it was improper for them to obtain active control and management of the lessee corporation, regardless of the existence of actual fraud. Bklyn. Heights R. R. Co. v. Bklyn. City R. R. Co., 151 A. D. 465, 475 (1912).

Rights of Purchaser of Stock Respecting Previous Misconduct of Directors.

A representative action in the right of the corporation may be maintained by a stockholder although the acts complained of were consummated before such stockholder acquired his stock and it is not necessary to allege that plaintiff's predecessor in title did not assent to or acquiesce in the alleged fraudulent acts. Assent or acquiescence must be pleaded as a defence. Continental Securities Co. v. Belmont, 206 N. Y. 7 (1912); Pollitz v. Gould, 202 N. Y. 11 (1911).

A stockholder has an indivisible interest in the property and assets of a corporation subject to the discharge of its obligations. This indivisible interest, generally speaking, is represented by certificates of stock and is transferred by their transfer, and a right of action by or in behalf of the corporation for fraud to set aside a conveyance of its assets, or to avoid obligations imposed upon it, is part of its rights, property and assets in which a stockholder has this indivisible interest which passes by the transfer of a certificate of stock. Therefore, an action may be maintained by a stockholder in the right of the corporation for his benefit and that of other stockholders to set aside a fraudulent transaction occurring before he acquired his stock. Continental Securities Co. v. Belmont, 206 N. Y. 7 (1912), affg. 150 A. D. 298; Pollitz v. Gould, 202 N. Y. 11 (1911), affg. 142 A. D. 939, and distg. Hawes v. Oakland, 104 U. S. 450.

Each Director Liable Only for His Own Misconduct.

Each director is liable only for his own acts or omissions. One director is not liable for the acts or omissions of another unless he participated therein to the injury of the corporation, or had some knowledge by which in the exercise of reasonable care he could have prevented the loss or unless he connived at it or failed to perform his duty of exercising the authority he possessed to prevent loss which could in the exercise of reasonable care and skill have been foreseen and guarded against. Peo. v. Equitable Life Assur. Soc., 124 A. D. 714 (1908); Nash v. Hall Signal Co., 90 Hun 354 (1895).

In a stockholder's action, in the right of the corporation, the directors having refused to bring it, to compel an accounting to the corporation, which is also made a party defendant, for the proceeds of stock converted by the individual defendants to their own use, a director who was not connected with the conversion nor with the corporation until after the wrongful act, is not a proper party. Mulheran v. Gebhardt, 93 A. D. 98 (1904); see also, Hay v. Brookfield, 160 A. D. 277, 279 (1914).

If A. and B., directors in a corporation, waste its funds during one year and B. and C., directors by some act not connected with the first offense,

waste the corporate funds in another year, the three cannot be joined as defendants in an equitable action brought by or in behalf of the corporation to compel them to account for and pay the damages sustained by reason of these independent wrongful acts. Wasting the property of a corporation by its directors is a tort. A. is not liable for the acts of B. and C., and C. is not liable for the acts of A. and B., and these independent, tortious acts constitute distinct causes of action which cannot be united in one complaint. Nash v. Hall Signal Co., 90 Hun 354 (1895); Peo. v. Equitable Life Assur. Soc., 124 A. D. 714 (1908).

Frauds of Directors in Inducing Purchases or Sales of Stock.

See also, "Purchases of Stock Induced by Fraud," under Stock Corpn. L., § 50, and authorities there cited.

Directors, who are also the promoters, knowing that attempts are being made to induce the public to subscribe to the stock of the corporation, or to purchase its securities, cannot wilfully shut their eyes to the acts of other officers or agents of the corporation as to methods used to procure money from the public. They cannot authorize the issue of circulars and other appeals to the public to secure subscriptions and not be responsible for false and fraudulent statements by which investments in its securities are procured. Rives v. Bartlett, 156 A. D. 552 (1913).

The promoter of a corporation, whether he be a director or not, who knowingly issues or sanctions the circulation of a false prospectus containing untrue statements of material facts tending to mislead and to induce purchases of its stock or other securities is responsible to those who are injured thereby, and where there are a number of such promoters all of them are liable in damages for the fraud of an agent employed by them to effect the sale of the corporate securities without reference to their own moral guilt or innocence. Downey v. Finucane, 205 N. Y. 251 (1912), affg. 146 A. D. 209.

A receiver will not be appointed in a representative action brought by a stockholder against directors alleged to have induced plaintiff to purchase stock by fraud and for unlawfully issuing stock and declaring dividends, where it appears that the directors, who had intrusted the shares of stock to a co-director, repudiated his unlawful acts when discovered, compelled partial restitution, removed him from the offices of treasurer and general manager, undertook criminal proceedings against him, and the stockholders had appointed a committee to preserve the assets and prevent further waste. Sedgwick v. Seward Dev. Co., 144 A. D. 455 (1911).

A director who knowingly issues or sanctions the circulation of a false prospectus containing untrue statements of material facts, the natural tendency of which is to deceive and to induce the public to purchase stock, is liable for the damages sustained by those who are injured by reliance upon such false statements. Morgan v. Skiddy, 62 N. Y. 319, 326 (1875); Lehman-Charley v. Bartlett, 135 A. D. 674 (1909), affd., 202 N. Y. 524; Brackett v Griswold, 112 N. Y. 454 (1889); Lambert v. Elmendorf, 124 A. D. 758 (1908).

In an action against a corporation and its individual directors to rescind a purchase of stock and recover the purchase price, because of false and fraudulent representations, the plaintiff is not entitled to a lien on the property of the corporation to the extent of his judgment, where it appears that there are other stockholders in the same position as he who are not parties to the action. Lehman-Charley v. Bartlett, 135 A. D. 674 (1909), affd., 202 N. Y. 524 (1911).

Where a person has been induced to purchased stock by false and fraudulent representations of material facts contained in a prospectus, he may rescind the purchase and recover back the purchase price from the corporation, and he is also entitled to recover from the individual directors who knowingly issued or sanctioned the circulation of such false prospectus any damage that he sustained in consequence of the fraud. Lehman-Charley v. Bartlett, 135 A. D. 674 (1909), affd., 202 N. Y. 524. Such individual directors and the corporation may be joined as defendants in one action. Id.

Directors having the power to so manage the affairs of the corporation as to affect the value of its shares, owe a duty to stockholders to refrain from intentionally abusing that power actually or apparently to depress the value of its shares for the purpose of acquiring them at an undervaluation; therefore, when directors owning a large portion of the stock, which had previously paid dividends from nine to fourteen per cent., declared only a three per cent. dividend and represented to the plaintiff, a stockholder, that the company had suffered reverses, and at the same time increased their own salaries, but the day after purchasing plaintiff's stock and less than a month from the time they declared such reduced dividend, declared a special dividend of ten per cent., and at the next regular meeting reduced the salaries of officers, a case of fraud and deceit is established. Von Au v. Magenheimer, 126 A. D. 257 (1908), affd., 196 N. Y. 510.

Corporate officers who, knowing that circulars offering stock for sale contain false statements as to the condition of the corporation, and reap the benefits of a sale so induced are liable for fraud. Spotten v. DeFreest, 140 A. D. 792 (1910). The measure of damages for fraud in the sale of stock is the difference between the actual value of the stock sold and the value it would have had if the stock had been as represented. Id.; Vail v. Reynolds, 118 N. Y. 297, 301 (1890); Hubbell v. Meigs, 50 N. Y. 480, 491 (1872); Krumm v. Beach, 96 N. Y. 398, 407 (1884); Whitney v. Allaire, 1 N. Y. 305, 312 (1848).

Rights of Stockholders.

In this State, the rights that a minority stockholder can enforce against the holders of a majority of the stock have been strictly limited. The distinction between an action brought by a minority stockholder to enforce a right of the corporation whose stock he holds and the right of the minority stockholder to enforce a right of action vested in himself as a stockholder is discussed and stated in the case of Niles v. New York Central & H. R. R. R. Co., 176 N. Y. 119 (1903), affg. 69 A. D. 144.

A court of equity will not, at the suit of minority stockholders, enjoin the majority stockholder, itself a corporation, from selling its holdings to another corporation so as to vest the latter with control, where there is nothing in the complaint showing damage to the minority stockholders as distinguished from the damages which may be suffered by the corporation itself. Delavan v. N. Y., N. H. & H. R. R. Co., 154 A. D. 8 (1912), and cases cited.

An arrangement by which the entire property and good will of a corporation was turned over to a rival corporation without any restrictions or limitations for the protection of the stockholders of the former corporation is ultra vires and a constructive fraud upon the stockholders of the vendor corporation. Jacobus v. Diamond Soda Water Mfg. Co., 94 A. D. 366 (1904). The fact that the plaintiff and the other minority stockholders were offered an opportunity to sell their stock upon the same basis as the majority stockholders does not deprive the plaintiff of the right to obtain relief. Id.

Minority stkhldrs.: 19 Abb. p. 632-3.

A contract made by a corporation within the scope of its chartered powers may not be set aside merely because some stockholders believe it to be unwise; there must be fraud or conduct so manifestly oppressive as to be equivalent thereto. Holmes v. St. Joseph Lead Co., 84 Misc. 278 (1914).

Theoretically the respective rights of members of a corporation will not be considered where the rights of the corporation itself as a separate entity are involved, but where a court of equity is adjusting the rights between stockholders owning all the capital stock it looks at the merits rather than at the form and to that end will disregard the legal fiction that a corporation is a separate entity where justice so requires. C. S. Goss & Co. v. Goss, 147 A. D. 698 (1911), affd. 207 N. Y. 742.

A corporation entered into an agreement to employ none but union men. This, the evidence showed, was not done for the purpose of coercion of non-union men, but was for the financial benefit of the company. In an action brought by stockholders and employees to restrain the corporation, held that the agreement was lawful. Kissam v. U. S. Printing Co., 199 N. Y. 76 (1910), affg. 128 A. D. 889, 890.

A single minority stockholder has no right to set up his judgment against the judgment of his associates and dictate the policy of the corporation within its corporate powers. The majority has no right to act fraudulently or oppressively against him but he impliedly agrees that the will of the majority shall govern in all matters coming within the charter or act of incorporation. Hoag v. Edwards, 69 Misc. 237 (1910).

Whether a corporation shall redeem its property from mortgages, and, by so doing, practically abandon its business and appropriate its property to payment of its debts, is a question for the directors, acting in good faith to decide, and a stockholder may not maintain an action for that purpose in the right of the corporation. Lefi v. Nachod, 64 Misc. 497 (1909).

The directors act for the corporation, and a shareholder has only a secondary right to interfere, and his interference must be based on fraud or waste by the directors, or on acts by them in excess of their powers. Hawes v. Oakland, 104 U. S. 457.

It is the duty of a stockholder, if he desires to set aside acts of the corporation, to act promptly, and in failing to do so he is estopped from asserting any right as against a person acting in good faith. Drake v. N. Y. Suburban Water Co., 26 A. D. 499 (1898); Atlantic Trust Co. v. N. Y. C. S. W. Co., 75 A. D. 354 (1902).

Notes issued in the name of a corporation by trustees who have no right to act by reason of having parted with their stock, and at a meeting not duly called, and as a scheme to saddle its liability upon its stockholders, do not constitute valid claims as against its stockholders. Close v. Potter, 155 N. Y. 145, revsg. 11 Misc. 729 (1898).

A contract pertaining to the ordinary affairs of a corporation made by its directors cannot be revoked by the stockholders. Genesee Valley & Wyoming Ry. Co. v. Retsof Mining Co., 15 Misc. 187 (1895).

Stockholders may ratify and validate unauthorized transactions of corporate officers. First Nat. Bk. v. Com'l Travelers' Home Assn., 108 A. D. 78 (1905), affd., 185 N. Y. 575.

A stockholder cannot enjoin the execution of a contract made by his corporation with another corporation, within the corporate powers and free from fraud, on the sole ground that the promoters of the contract were directors in both corporations. Burden v. Burden, 159 N. Y. 287, affg. 8 A. D. 160 (1899).

A stockholder cannot bind his corporation by acts or admissions in the mere capacity of a shareholder, nor can he as officer, unless the acts or ad-

missions are within the scope of his agency. McCloskey v. Goldman, 62 Misc. 466 (1909).

When one corporation obtains control of the board of directors of another corporation, and, thereafter, without consideration, obtains the property of the latter, and so arranges its affairs as to render all its stock, other than that held by the controlling corporation, valueless, a stockholder of the corporation which has been thus despoiled may maintain an action to redress the wrong done to his company. Pondir v. N. Y., L. E. & W. R. R. Co., 72 Hun 385 (1893); Farmers' Loan & Trust Co. v. N. Y. & Northern Ry. Co., 150 N. Y. 410 (1896); Sage v. Culver, 147 N. Y. 241 (1895); Barr v. N. Y., L. E. & W. R. R. Co., 96 N. Y. 444 (1891).

The directors act for the corporation, and a shareholder has only a secondary right to interfere, and his interference must be based on fraud or waste by the directors, or on acts by them in excess of their powers. Hawes v. Oakland, 104 U. S. 457.

The accumulation of a surplus cannot be enjoined by stockholders so long as the directors are acting honestly and within their discretionary powers. Burden v. Burden, 159 N. Y. 287, affg. 8 A. D. 160 (1899).

While directors may not properly vote to discontinue an action when they are personally interested as defendants, yet a majority of the stockholders may do so. The latter are not disqualified to vote on a question at a shareholders' meeting because of an interest in the result. Socorro Mountain Mining Co. v. Preston, 17 Misc. 220, 40 N. Y. Supp. 1040 (1896).

If officers do an unauthorized act or incur indebtedness which would not create a corporate liability, the stockholders may ratify the acts and validate the transaction. Martin v. Niagara F. P. Co., 122 N. Y. 172 (1890), affg. 44 Hun 130. If an officer is allowed without interference for a long period to conduct the business of a corporation, the inference that he has authority is justified. Id.

Right of Stockholder to Maintain Existing Relation Between his Stock and the Entire Capital Stock.

See section 50 of the Stock Corporation Law, under the above heading for authorities on this subject.

Stockholders' Actions.

Where an interlocutory judgment directing payments by directors in a representative action brought by a creditor on behalf of himself and other stockholders was reversed and thereafter defendants settled with plaintiff and the action was discontinued without any attempt by other creditors to prove their claims in the action, such other creditors have no claim against the plaintiff in the action to obtain a share of the proceeds of settlement upon the theory that he was a trustee for all claimants. Davids v. Bauer, 155 A. D. 97 (1913); aff'd. 209 N. Y. 97; Hirshfeld v. Fitzgerald, 157 N. Y. 166, 180 (1898).

A representative action by stockholders in which the corporation, although a nominal defendant, is really a plaintiff and a cause of action to dissolve the corporation, which cause of action does not belong to the corporation itself, cannot be joined, as they belong to different plaintiffs. Dusenberry v. Saga more Dev. Co., 157 A. D. 485 (1913).

A stockholder of a corporation which had been merged with another corporation cannot, in his individual name, maintain a suit in equity to compel the latter corporation to account to him and other stockholders similarly situated on the ground that the defendant wrecked the plaintiff's corporation and bought it at an inadequate price. Even a representative action does not

lie in the courts of this State on behalf of a resident stockholder where the plaintiff's corporation has ceased to exist and it and the defendant were both foreign corporations, because the courts of this State will not undertake to administer foreign assets of a defunct foreign corporation any more than it would in the case of a natural person. Howe v. N. Y., N. H. & H. R. R. Co., 142 A. D. 451 (1911); see also Delavan v. N. Y., N. H. & H. R. R. Co., 154 A. D. 34.

In a representative action by a stockholder on behalf of the corporation a charge of fraud in inducing the purchase of stock is irrelevant. It is doubtful whether a party who accepted bonus stock and illegal dividends can maintain an action in behalf of the corporation thereon. Sedgwick v. Seward Dev. Co., 144 A. D. 455 (1911).

Where dividends are being paid both upon the preferred and common stock of a corporation, a receiver will not be appointed on the application of a minority stockholder who claims that the president is violating a contract made by it, especially where it appears that such minority stockholder had known of such violation for several years and did not begin his suit until the president had refused to purchase his stock or give him a position with the corporation. Metzger v. Knox, 77 Misc. 271 (1912).

Where it can fairly be gathered from all the allegations of a complaint that officers and directors have made use of relations of trust and confidence to secure or promote selfish interests, enough is averred to set a court of equity in motion. Watkins v. Watkins & Turner Lumber Co., 11 A. D. 517 (1896); Sage v. Culver, 147 N. Y. 241 (1895); O'Brien v. Fitzgerald, 143 N. Y. 377 (1894); Lawrence v. Weber, 65 Misc. 603 (1910).

An action brought by and in behalf of stockholders of a business corporation in which it is alleged that the directors, when the company was insolvent, wrongfully and fraudulently transferred its property to themselves or to preferred creditors, is equitable in its nature, and cannot be maintained unless the corporation is made a party. Corning v. Barrett, 22 Misc. 241 (1898).

In an action to hold directors responsible to a receiver for neglectful and wrongful performance of duties, the action is one at law, and more is required for the intervention of a court of equity than mere allegations that the acts complained of are numerous and complicated. Dykman v. Keeney, 154 N. Y. 483 (1897), revsg. 21 A. D. 114; distd. in Mabon v. Miller, 81 A. D. 10, 16 (1903).

When a director bears such a relation to the property of the corporation that he is chargeable with it or its proceeds when called upon for it, either by the corporation or by the court, a suit in equity for an accounting is maintainable. Mabon v. Miller, supra; Higgins v. Tefft, 4 A. D. 62 (1896).

Where it can fairly be gathered from all the allegations of a complaint that officers and directors have made use of relations of trust and confidence to secure or promote selfish interests, enough is averred to set a court of equity in motion. Watkins v. Watkins & Turner Lumber Co., 11 A. D. 517 (1896); Sage v. Culver, 147 N. Y. 241 (1895); O'Brien v. Fitzgerald, 143 N. Y. 377 (1894).

A stockholder's action for an accounting for the benefit of the corporation is not affected by the bankruptcy of the corporation after suit brought. The accounting must be made to the trustee. Meyer v. Page, 98 N. Y. Supp. 739 (1906).

A stockholder need not demand that the directors sue before instituting suit against the corporation and its directors to set aside a sale to the corporation by one of them where it appears that a majority of the delinquent directors are still in office. Fitchett v. Murphy, 46 A. D. 181, and Flynn v. Brooklyn City R. R. Co., 158 N. Y. 493, criticised in Polhemus v. Polhe

mus, 114 A. D. 781 (1906), affg. 43 Misc. 140. See, also, Browne v. Smith, 44 Misc. 575 (1904); Meyers v. Scott, 20 St. Rep. 35; Jacobson v. Brooklyn Lumber Co., 184 N. Y. 152 (1906), revsg. 101 A. D. 609; O'Connor v. Virginia Passenger Assn., 184 N. Y. 46 (1906).

An individual stockholder cannot maintain an action for damages resulting from an alleged conspiracy entered into by the majority stockholders of a corporation to wreck it by refusing to accept business that would enable it to pay interest on its bonds, thereby causing a foreclosure sale, as such damages belong to the corporation and not to the stockholder. Niles v. N. Y. C. & H. R. R. R. Co., 176 N. Y. 119 (1903), affg. 69 A. D. 144. Such an action must be brought by the corporation or its receiver or by any stockholder after demand on behalf of the corporation. Id. The measure of damages in such an action would be the value of the property and franchises of the corporation as it existed prior to the unlawful acts, less the amount realized on the foreclosure sale. Id.

The court will not substitute its own judgment upon a business proposition for that of the directors provided they are acting honestly. A case must be made out which plainly shows that such action is so far opposed to the true interests of the corporation itself as to lead to the clear inference that no one thus acting could have been influenced by honest motives. Content v. Metropolitan Street Ry., 37 Misc. 618, affd., 73 A. D. 230 (1902), distinguishing Flynn v. Brooklyn City Ry., supra. See, also, Continental Ins. Co. v. N. Y. & H. R. R. Co., 187 N. Y. 225 (1907).

In an action by a stockholder to require the officers or trustees of a corporation to account for a breach of their trust, allegations as to the dealing of such officers or trustees with the corporate property are proper. Scharf v. Warren-Scharf Paving Co., 15 A. D. 480 (1897).

A court will not interfere with the control of a corporation by its directors and a majority of its stockholders, although the directors may have acted unwisely and not for the best interest of the corporation they represented, unless it is shown that the action of the governing body has been so clearly against the interests of the minority stockholders as to amount to a wanton and fraudulent destruction of the rights of such minority. Hart v. Ogdensburg & Lake Champlain R. R. Co., 89 Hun 316 (1895); Gamble v. Queens Co. Water Co., 123 N. Y. 91 (1890); Flynn v. Brooklyn City R. R. Co., 9 A. D. 269 (1896), affd., 158 N. Y. 493; Lewisohn Bros. v. Anaconda Copper Mining Co., 26 Misc. 613; Beveridge v. N. Y. E. R. R. Co., 112 N. Y. 1; Leslie v. Lorillard, 110 N. Y. 519 (1888); Hawes v. Oakland, 104 U. S. 450. Mere errors of judgment on the part of directors are not sufficient to warrant interference. Hennessy v. Muhlman, 40 A. D. 175 (1899).

Laches not a Bar to Stockholder's Action.

An action by a stockholder brought in the right of the corporation against directors is one in equity to enforce a legal right, to wit, the right of the corporation to recover damages for misuse of corporate assets and such action can only be barred by the statute of limitations and not by laches alone. Pollitz v. Wabash R. R. Co., 207 N. Y. 113, 130 (1912).

Demand upon Directors to Sue.

The directors represent the corporate body and a representative action may be maintained by a stockholder where the directors on demand have failed to bring same. No demand need be made to the body of the stockholders to bring the action for the stockholders as a body have no authority to act for the corporation except as authorized by statute. Continental Securities Co. v. Belmont, 206 N. Y. 7 (1912).

Where an aggrieved stockholder sues, in the right of the corporation, on behalf of himself and the other stockholders, he must allege that the corporation after a demand refused or unreasonably neglected to prosecute, but this general rule is subject to the exception that where facts are alleged showing that the demand would be unavailing, a demand is unnecessary. O'Connor v. Virginia Passenger & Power Co., 184 N. Y. 46 (1906); Kavanaugh v. Commonwealth Trust Co., 181 N. Y. 121 (1905); Flynn v. Brooklyn City R. R. Co., 158 N. Y. 493 (1899); Barr v. N. Y., L. E. & W. R. R. Co., 96 N. Y. 444, 450 (1884); Brinckerhoff v. Bostwick, 88 N. Y. 52, 56 (1822); Greaves v. Gouge, 69 N. Y. 154 (1877).

If the corporation is exclusively under the control of the directors and officers whose acts are questioned a demand that the corporation bring the action would be ineffectual, and in such cases equity permits a stockholder to bring the action for the benefit of himself and others similarly situated making the corporation a party defendant. Sage v. Culver, 147 N. Y. 241, 246 (1895); Brinckerhoff v. Bostwick, 88 N. Y. 52, 59 (1882); Greaves v. Gouge, 69 N. Y. 154 (1877); Lawrence v. Weber, 65 Misc. 603 (1910); Leslie v. Lorillard, 110 N. Y. 519 (1888); Roth v. Robertson, 64 Misc. 343 (1909).

Demand upon Directors to Sue.

A stockholder's action to set aside a corporate contract being derivative there must have been a demand on the corporation to sue and its refusal, or it must be shown that a demand would be futile, as where those in control are the wrongdoers so that an action by the corporation would not be prosecuted in good faith. McCoy v. Gas Engine & Power Co., 135 A. D. 771 (1909); O'Connor v. Virginia Passenger & Power Co., 184 N. Y. 46 (1906).

In a derivative action brought by a stockholder the prerequisite of a demand that the corporation bring the suit is not excused by alleging that the directors who authorized an unconscionable contract are still in office, if there be no charge that they were guilty of wrongdoing. McCoy v. Gas Engine & Power Co., 135 A. D. 771 (1909); see, also, same v. same, 152 A. D. 644.

Action to Rescind Corporate Contract.

Contractors acting under an agreement with a railroad corporation to reconstruct its road into an electric railroad, and to do other things, obtained under the agreement and by purchase of a small amount of stock, absolute control of the corporation and possession of bonds issued by it, after which the contractors failed to perform their agreement. A stockholder brought a representative action to rescind the contract and recover possession of the bonds and stock and to restore the corporation to its former situation, tendering restitution to the contractors of all benefits received, held, that the facts supported a judgment directing rescission of the contract. Callanan v. Keeseville, Ausable Chasm & L. C. R. R. Co., 199 N. Y. 268 (1910), revsg. 131 A. D. 306.

Stockholder's Action to Restrain Amendment of By-Laws.

A stockholder, who is also an officer, cannot maintain an action, brought not in behalf of the corporation or of other stockholders similarly situated, but individually, to restrain the holding of a special meeting called for amending the by-laws, where he fails to show that anything proposed to be done at the meeting will be injurious to the corporation, or its stockholders, or to himself individually. Gilleran v. Springfield, L. I., Cem. Soc., 161 A. D. 597 (1914). If such meeting be held and any action be attempted in derogation of plaintiff's legal rights he may take proper legal measures to protect those rights. Id.

Prosecution for Criminal Libel.

In a prosecution for criminal libel there is no presumption that the president, treasurer and secretary are "managers," arising from the mere fact that they held such offices, for under the statute the management of such corporations vest in the board of directors rather than in the directors individually. Peo. ex rel. Carvalho v. Warden of City Prison, 144 A. D. 24 (1911).

§ 35. Directors as trustees in case of dissolution. Upon the dissolution of any corporation, its directors, unless other persons shall be appointed by the legislature, or by some court of competent jurisdiction, shall be the trustees of its creditors, stockholders or members, and shall have full power to settle its affairs, collect and pay outstanding debts, and divide among the persons entitled thereto the money and other property remaining after payment of debts and necessary expenses.

Such trustees shall have authority to sue for and recover the debts and property of the corporation, by their name as such trustees, and shall jointly and severally be personally liable to its creditors, stockholders or members, to the extent of its property and effects that shall come into their hands.

Formerly L. 1890, ch. 563, § 30, as am'd by L. 1892, ch. 687.

The foregoing section empowers directors to act as trustees for settlement of its affairs in case of the termination of corporate existence by limitation, or in case of dissolution, when no others are appointed to act as trustees for the purpose of winding up its affairs.

For proceedings for the dissolution of corporations without making application to the court, see §§ 220 and 221 of the General Corporation Law.

For provisions as to judicial proceedings for voluntary and involuntary dissolutions, see Articles 6, 8 and 9, post.

Dissolution, How Effected.

The dissolution of a corporation may occur as the result (1) of an action brought pursuant to Gen. Corp. Law, § 101 or § 131; (2) a judicial proceeding for voluntary dissolution pursuant to Gen. Corp. Law, Article 9; (3) voluntary dissolution without judicial proceedings pursuant to Gen. Corp. Law, Article 10; (4) termination of the corporate existence by limitations contained in the charter or by self-executing statutory provisions.

The above section does not apply to dissolution under 1 and 2, supra, for in those cases the court appoints a permanent receiver and such receiver becomes the trustee by virtue of Gen. Corp. Law, § 231, which makes permanent receivers trustees of the property for the benefit of the creditors of the corporation and of its stockholders.

In cases of dissolution arising under 3 and 4, supra, the directors would clearly be trustees for the benefit of the creditors and stockholders.

A cause of action for injuries caused by negligence of a corporation survives its dissolution and the action may be maintained against its directors as trustees. Marstaller v. Mills, 143 N. Y. 398 (1894). But it must appear that the corporation is incorporated under the Business Corporations Law. Matter of Yuengling Brewing Co., 24 A. D. 223 (1897).

An action for libel may, after dissolution of the corporation by expiration of the term limited in its charter, be continued and revived against the former directors as trustees. Shayne v. Evening Post Publishing Co., 168 N. Y. 70 (1901). And so an action for assault. Hepworth v. Union Ferry Co., 62 Hun 257 (1891), appeal dismissed, 131 N. Y. 645.

As to survival of actions against corporations dissolved without judicial proceedings, see Gen. Corp. Law, § 221, post.

An action brought against a foreign corporation which is subsequently dissolved, and a liquidator appointed under the laws of the foreign State, who thereby becomes vested with all the powers of the existing trustees, cannot be continued against such trustees, under section 757 of the Code of Civil Procedure, where it is not alleged that there is in the State of New York, or that they have in their possession, any property of the corporation. Wamsley v. Horton & Co., 12 A. D. 312 (1896), aff'd. on op. below, 153 N. Y. 687 (1897).

This section is not applicable to a foreign corporation. Wamsley v. H. L. Horton & Co., Ltd., 12 A. D. 312, aff'd., 153 N. Y. 687.

This section has no application in the case of a foreign corporation, where the laws of the State in which it was incorporated provide for a continuance of its existence after the expiration of its charter for the purpose of bringing actions to collect debts due to it, as such continued existence will be recognized by the courts of this State. O'Reilly, Skelly & Fogarty Co. v. Greene, 18 Misc. 423 (1896).

When Corporation is Dissolved

A corporation which has been enjoined from the exercise of its franchises and deprived of its property, and thus has ceased to exist for all practical purposes, is not thereby actually dissolved. Until a judgment dissolving it is rendered, creditors may proceed by suit against it, unless restrained by injunction, and its stockholders do not cease to be such. Kincaid v. Dwinelle, 59 N. Y. 548 (1875); Decker v. Gardner, 124 N. Y. 334.

When the term of existence of a corporation expires no dissolution by the court is necessary. Sturges v. Vanderbilt, 73 N. Y. 384 (1878); Peo. v. Walker, 17 N. Y. 503 (1858); Peo. ex rel. Haberman v. James, 5 A. D. 412 (1896).

V. p. 127(n).

Upon the expiration of the charter, the title to the corporate property vests in the directors then in office, in trust for the creditors and stockholders. Cent'l City Savings Bank v. Walker, 66 N. Y. 424 (1876). See Long I. F. Co. v. Terbell, 48 N. Y. 427 (1872).

In case of dissolution the vested property rights of the corporation pass to the directors as trustees. City of N. Y. v. Bryan, 130 A. D. 658 (1909).

Where a foreign corporation is continued in existence after the expiration of the term of its charter for the purpose of suits by it to collect its debts, the provision that upon dissolution the directors or other persons appointed by the Legislature, or by the court, shall be the trustees of its creditors and stockholders, with authority to sue for and collect its debts, has no application. O'Reilly, Skelly & Fogarty Co. v. Greene, 18 Misc. 432 (1896).

A corporation cannot cease to exist of its own will; it continues until the charter has expired or the court has decreed a dissolution. Peo. v. Ballard, 134 N. Y. 269 (1892), Id., 136 N. Y. 639.

Powers of Directors.

After the term for which a corporation was organized has expired, its assets shall be held by the directors as trustees for its creditors and stockholders with full power to close up its affairs. Peo. ex rel. Haberman v. James, 5 A. D. 412 (1896).

V. p. 127(n).

The right of action to compel an officer or director of a corporation to account for the corporate property, which it is claimed that he has unlawfully obtained, inheres in the corporation, and in the event of a dissolution passes to the receiver. Michel v. Betz, 108 A. D. 241 (1905). In case of discharge of the receiver, such cause of action will then vest in the directors as trustees for the creditors and stockholders under section 30 (now § 35), Gen. Corp. Law. Id.

Upon the dissolution of a corporation, its real property does not revert to the grantors, but passes to the trustees under this section. Heath v. Barmore, 50 N. Y. 302 (1872). See, also, Peo. v. Westchester Traction Co., 123 A. D. 689 (1908).

Liability of Directors.

Upon dissolution of a corporation, its directors become vested with the title to its property and responsible for the value thereof. Peo. v. O'Brien, 111 N. Y. 1 (1888); City of N. Y. v. Bryan, 130 A. D. 658 (1909).

This section expressly limits the liability of directors as trustees to the extent of the property and effects that come into their hands. Hoffman v. Van Nostrand, 42 Barb. 174 (1864).

The Legislature intended that corporate property should be held and administered by the directors, where other persons were not appointed, for the purpose of distribution in settlement of all existing claims upon it, whether the claimant was a creditor in the legal sense or not. The term "creditor," in view of the evident purpose of this act, includes persons to whom the corporation was under any enforceable obligation, as well as those to whom it was indebted. Marstaller v. Mills, 143 N. Y. 398 (1894).

The assets of a corporation, upon dissolution, become a fund for the payment of its debts, both matured and unmatured, and all open and subsisting engagements entered into by the corporation. Peo. v. National Trust Co., 82 N. Y. 283 (1880).

Duties and Liability of Directors on Voluntary Dissolution.

As trustees of the creditors of the corporation upon dissolution, it is the duty of directors to settle its affairs, collect the assets, pay the debts, and divide among the persons entitled thereto the money and other property remaining. They have authority to sue for and recover the debts and property of the corporation as such trustees and they are jointly and severally, personally, liable to the corporate creditors to the extent of the property which came into their hands. However, even upon an illegal distribution of the assets, a receiver pendente lite will not be appointed, for in that case the defendant corporation itself has no property. Tapley Co. v. Keller, 133 A. D. 54; 117 N. Y. Supp. 817 (1909).

Parties Defendant in Suits Against Dissolved Corporation.

Upon the dissolution of a corporation under section 221 of the General Corporation Law the directors become trustees for the benefit of all who may be entitled to share in its assets and, to this end, are entitled to take possession of the assets and distribute them among its creditors, pro rata, and they become accountable for only what they receive. In the case of contested claims which can be established and liquidated only by a judgment, the action should be against the corporation, which is expressly continued in existence for that purpose by section 221 of this law (formerly § 57, Stock Corp. L.). Whether or not the trustees can properly be joined as defendants in such an action in order to conclude them as to the existence of a debt

and its amount is a question which has not been determined; but the action in any event should be against the corporation, and does not lie against the trustees alone. Cunningham v. Gauber, 133 A. D. 10; 117 N. Y. Supp. 866 (1909).

Effect of Dissolution on Causes of Action.

A cause of action for injuries caused by negligence of a corporation survives dissolution, and the action may be maintained against its directors. Marstaller v. Mills, 143 N. Y. 398 (1894).

An action for libel, which has abated because of the dissolution of the corporate defendant, may be continued and revived against the directors of the defunct corporation, in order to reach the assets in their hands as the trustees under this section. Shayne v. Even'g Post Pubg. Co., 168 N. Y. 70 (1901), revsg. 56 A. D. 426.

A cause of action for tort does not survive the subsequent dissolution of a corporation and the appointment of a receiver unless the corporation was formed under an act containing provisions similar to section 5 of the Business Corporations Law. Matter of Yuengling Brewing Co., 24 A. D. 223 (1897), distg. Marstaller v. Mills, supra.

§ 36. Forfeiture for non-user. If any corporation, except a railroad, turnpike, plank-road or bridge corporation, shall not organize and commence the transaction of its business or undertake the discharge of its corporate duties within two years from the date of its incorporation, its corporate powers shall cease.

Formerly L. 1890, ch. 563, § 21, as am'd by L. 1892, ch. 687, § 30.

By L. 1892, ch. 687, the period within which a corporation is compelled to exercise a user of its corporate rights and franchises was changed from one year to two years.

Discussion of Appellate Division Decision Declaring Forfeiture to be Self-Executing.

In an action brought by the Attorney General in the name of the people of the State under the Code, section 1948, subdivision 3, against several defendants, as officers and directors of a corporation, which had not undertaken the discharge of its corporate duties within two years after the date of its incorporation, it was held that the provisions of the foregoing section being a condition precedent to the right to exercise any corporate powers whatever, were self-executing and that no action or judicial proceeding was necessary to declare or complete the loss of corporate powers by a corporation which had not transacted business until after the expiration of the period specified. People v. Stillwell, 157 A. D. 839 (1913), affg. 78 Misc. 96. In reaching the result in this case that this section is self-executing, the court, the opinion of which was unanimous, cited and relied upon cases relating to railroad corporations which were declared to be dissolved under self-executing clauses materially different in phraseology from the one under consideration in the foregoing case. While it is to be conceded that it is entirely competent for the Legislature to provide by statutory enactment for the absolute dissolution and extinction of a corporation automatically and without a judicial decree for ignoring a duty imposed by law, yet if it is to be deprived of corporate life in such a summary manner and without any opportunity whatsoever to be heard in court in defense of its existence, the language must be

Montana.

On extension of life of a corporation. Chapter 7, Montana Laws of 1931, makes provision for the extension of the term of existence of a Montana corporation whose term "has expired or is about to expire." Chapter 38 of the Laws of 1931, relates in part to the amendment of a corporation's articles of incorporation which includes "extending its term of existence within the limits provided by law"; this later act, in terms, repeals "all Acts and parts of Acts in conflict herewith." This is a statutory action by the State in *quo warranto* against a corporation which had taken the steps necessary to extend its corporate existence under the provisions of Chapter 7, challenging the legal existence of the corporation—after the extension—on ground that Chapter 7 is unconstitutional—because of alleged inadequate or defective title, and, additionally, is void and of no force and effect, as it was repealed by Chapter 38 because in conflict therewith. The Supreme Court of Montana finds the title to Act No. 7 sufficient, and holds that Act No. 7 was not repealed by Act No. 38, there being no conflict between the two. *State ex rel. Nagle, Atty. Gen. v. The Leader Company et al.*, decided October 19, 1934, Commerce Clearing House Court Decisions Reporting Service, Requisition No. 124221. R. T. Nagle, Atty. Gen. and Oscar A. Provost, Spec. Asst. Atty. Gen., for plaintiff. Freeman, Thelen & Freeman, of Great Falls, and Cooper, Stephenson & Hoover, of Great Falls, for defendant.

New Jersey.

Power of New Jersey corporation to purchase its own stock. The United States District Court, District of New Jersey, says: "Under the New Jersey Corporation Act (2 Comp. St. N. J. 1910, p. 1595 et seq., Sec. 1 et seq. and Comp. St. Supp. N. J. Sec. 47-3 et seq.), there is an implied grant of power to corporations to purchase shares

issue, if is believed, because they related to the interpretation of statutes in which the forfeiture clause was embodied in language much stronger and more forceful than that contained in this case; for instance, in the Matter of Brooklyn, Winfield & Newton R. R. Co., 72 N. Y. 245, the clause was in these words, to wit, "its corporate existence and powers shall cease," and in another case, Brooklyn Steam Transit Co. v. Brooklyn, 78 N. Y. 518, the language was, "this act and all the powers, rights and franchises herein and hereby granted shall be deemed forfeited and terminated." In those cases the language was properly deemed sufficient to constitute self-executing forfeiture clauses; however, in the foregoing section the phraseology employed is not of the same force and effect and it might almost be inferred that the court in reaching its determination had read into this statute language of the character above quoted because only in that manner could the cited cases have been applicable.

In 78 N. Y. 518, above cited, it was declared to be a "general principle, not disputed, that a corporation by omitting to perform a duty imposed by its charter or to comply with its provisions does not ipso facto lose its corporate character or cease to be a corporation, but simply exposes itself to the hazard of being deprived of its corporate character and franchises by the judgment of the court in an action instituted for that purpose by the Attorney General in behalf of the people," and this doctrine was approved in Day v. Ogdensburg & Lake Champlain R. R. Co., 107 N. Y. 129.

Under a statute in which the forfeiture clause read, "this act and all rights and privileges granted hereby shall be null and void," it was held that the quoted words did not constitute a self-executing forfeiture clause. Matter

Suits by and against dissolved corporation. Section 29 of the New York General Corporation Law prior to its amendment by Chapter 552, Laws of 1932, provided that on the dissolution of a corporation its directors, unless other persons were designated by law or by a court of competent jurisdiction, were to be trustees for the purpose of administering and marshalling its property for the benefit of creditors and stockholders, and for those purposes "such trustees shall have power in the corporate name by one or more of their number thereunto designated to transfer and convey its property, and may sue and be sued in such name." As amended, and as now written, the section provides that "Upon the dissolution of a corporation for any cause and whether voluntary or involuntary its corporate existence shall continue for the purpose of paying, satisfying and discharging any existing liabilities or obligations, collecting and distributing its assets and doing all other acts required to adjust and wind up its business and affairs, and it may sue and be sued in its corporate name." The New York Supreme Court, Appellate Division, Third Department, in affirming the order below, says: "If the amendment provides a remedy for the redress of a wrong or the enforcement of a right where none before existed, it is prospective. If the right to recover existed before and the amendment relates to procedure and merely prescribes a remedy, it is retroactive." And the court holds that "the change is in procedure only and is retroactive" and so, that the corporation for which MacAffer is designated as receiver and successor trustee may be joined with him as one of the plaintiffs in this action though in 1916 it was decided, under the old law, that then the corporation was without capacity to sue. *MacAffer, as Receiver and Successor Trustee, et al. v. Boston & M. R. R.*, 274 N. Y. S. 246. Whalen, McNamee, Creble & Nichols, of Albany (Robert E. Whalen, of Albany, of counsel), for appellant. Frank L. Wiswall, of Albany, for respondents.

By L. 1892, ch. 687, the period within which a corporation [illegible] pelled to exercise a user of its corporate rights and franchises was changed from one year to two years.

Discussion of Appellate Division Decision Declaring Forfeiture to be Self-Executing.

In an action brought by the Attorney General in the name of the people of the State under the Code, section 1948, subdivision 3, against several defendants, as officers and directors of a corporation, which had not undertaken the discharge of its corporate duties within two years after the date of its incorporation, it was held that the provisions of the foregoing section being a condition precedent to the right to exercise any corporate powers whatever, were self-executing and that no action or judicial proceeding was necessary to declare or complete the loss of corporate powers by a corporation which had not transacted business until after the expiration of the period specified. People v. Stillwell, 157 A. D. 839 (1913), affg. 78 Misc. 96. In reaching the result in this case that this section is self-executing, the court, the opinion of which was unanimous, cited and relied upon cases relating to railroad corporations which were declared to be dissolved under self-executing clauses materially different in phraseology from the one under consideration in the foregoing case. While it is to be conceded that it is entirely competent for the Legislature to provide by statutory enactment for the absolute dissolution and extinction of a corporation automatically and without a judicial decree for ignoring a duty imposed by law, yet if it is to be deprived of corporate life in such a summary manner and without any opportunity whatsoever to be heard in court in defense of its existence, the language must be

clear and unmistakable so as to leave no room for doubt. The penalty of corporate death involved in forfeiture provisions represents the extreme rigor of the law and its infliction, without summoning the offender before a properly constituted tribunal should rest upon no uncertain or doubtful expressions of the lawmakers, but on the other hand should be inflicted only by virtue of language which may reasonably lead to no other conclusion as to the legislative intent. The statute under discussion required the corporation to organize and commence doing business within two years. What act by the corporation is necessary to comply with the mandate to organize? It seems there can be no contention on this point. If the members of the corporation were regularly convened, and elected the corporate officers and organization would thereby be effected. The next question that would arise under the statute would be, what constitutes the transaction of corporate business? There are no decisions that would apply to that particular situation with reference to this statute. As to what particular act, however slight or however extensive, shall be necessary in order to constitute a compliance with this condition must inevitably be governed by the circumstances in each case; in other words a question of fact would be presented for determination. If this were not so the whole question would be undetermined as to whether there existed a breach of the statutory condition and whether the corporation was still existent or had become non-existent. The legal status of the corporate franchise and the rights of the defendants attempting to exercise the same should be determined judicially in a litigation between the people of the State, from whom the franchise sprang, and the defendants, wherein a determination would be binding and conclusive upon everybody.

The corporation should have its day in court and an opportunity to show that there had been no breach of the conditions imposed upon it sufficient to warrant the infliction of the statutory penalty.

Some of the cases cited by the court in its opinion were irrelevant to the issue, it is believed, because they related to the interpretation of statutes in which the forfeiture clause was embodied in language much stronger and more forceful than that contained in this case; for instance, in the Matter of Brooklyn, Winfield & Newton R. R. Co., 72 N. Y. 245, the clause was in these words, to wit, "its corporate existence and powers shall cease," and in another case, Brooklyn Steam Transit Co. v. Brooklyn, 78 N. Y. 518, the language was, "this act and all the powers, rights and franchises herein and hereby granted shall be deemed forfeited and terminated." In those cases the language was properly deemed sufficient to constitute self-executing forfeiture clauses; however, in the foregoing section the phraseology employed is not of the same force and effect and it might almost be inferred that the court in reaching its determination had read into this statute language of the character above quoted because only in that manner could the cited cases have been applicable.

In 78 N. Y. 518, above cited, it was declared to be a "general principle, not disputed, that a corporation by omitting to perform a duty imposed by its charter or to comply with its provisions does not ipso facto lose its corporate character or cease to be a corporation, but simply exposes itself to the hazard of being deprived of its corporate character and franchises by the judgment of the court in an action instituted for that purpose by the Attorney General in behalf of the people," and this doctrine was approved in Day v. Ogdensburg & Lake Champlain R. R. Co., 107 N. Y. 129.

Under a statute in which the forfeiture clause read, "this act and all rights and privileges granted hereby shall be null and void," it was held that the quoted words did not constitute a self-executing forfeiture clause. Matter

of N. Y. and Long Island Bridge Co. v. Smith, 148 N. Y. 540 (1896); yet the language used in this instance was far stronger than the forfeiture clause in the section under consideration. In a statute where it was provided that the corporation would "forfeit the rights acquired by it" it was held that these particular words simply exposed the corporation to proceedings on behalf of the State to establish and enforce the forfeiture thereby provided for. In this case, Matter of Brooklyn Elevated Railroad Company, 125 N. Y. 434 (1890), the court distinguished the cases in 72 N. Y. 245 and in 78 N. Y. 524, which are two of the cases cited by the court in construing the provisions of section 36 supra. In another case, that of Sturgess v. Vanderbilt, 73 N. Y. 384 (1898), the court said that in case of dissolution in consequence of insolvency or non-user or misuser of the corporate franchises it is well settled that the dissolution does not take effect until judicially declared. In each case in which a forfeiture clause has been held by the courts to be self-executing the expressions used were so forceful and unmistakable that the determination of the court could not have been otherwise except by doing violence to the manifest intent of the statute.

A statute of the State of Oregon provides that "if any corporation shall neglect and cease to carry on its business for a period of six months, its corporate powers shall cease." The language of this provision, respecting the forfeiture, is in precisely the same words as the New York statute, and in construing the Oregon statute in the case of Wallamet Falls Coal & Lock Co. v. Kittridge, 5 Sawyer (U. S. Circuit Court), 44, the court said that the words quoted are the substantial equivalent of the phrase, "its corporate powers shall be forfeited," and that in either case the statute does not execute itself. The court cited, to the same effect, Lessee of Frost v. Frostburg Coal Co., 65 U. S. 283; People v. Manhattan Co., 9 Wend. 382; Bradt v. Benedict, 17 N. Y. 93. In 65 U. S. 283 the words "the corporate powers and privileges shall cease and determine" were held ineffectual to work an ipso facto dissolution. In the Sawyer case the court said, "it must first be judicially ascertained and declared on the complaint of the state whether there has been a forfeiture by reason of non-user." Where the corporation expires by lapse of time no action by the State is necessary. People v. Manhattan Co., 9 Wend. 382.

It should be borne in mind that in the cases cited in 72 New York Reports and also in 78 New York Reports the controversies were in relation to railroad corporations and also the fact that the language used by the legislature could justify no other conclusion. It would be quite difficult to conceive how public interests were injuriously affected by reason of the fact that an ordinary business or trading corporation had for two years omitted or been unable for some reason to engage in the pursuit for which it was organized. The legislature has evidently intended to apply a more rigorous rule respecting railroads and to inflict upon such corporations the penalty of capital punishment without the necessity of applying to the court for the pronouncement of the death penalty. Railroad corporations are endowed with the right of eminent domain, the extraordinary privilege of acquiring in condemnation proceedings property in derogation of the rights of private ownership, an attribute of sovereignty itself. They have public functions to perform. They receive grants of franchises monopolistic in character and it is highly important for the public welfare that they should not be permitted to hold in abeyance the franchises and powers granted to them thereby precluding other corporations from entering the field and furnishing to the public the facilities which the delinquent corporations have failed to afford by refusing or omitting to perform the public duties involved in the exclusive grant conferred upon them.

The decision in the Stillwell case is not in harmony with the interpretation by the courts of the forfeiture clauses contained in other statutes whereby a like result is sought to be accomplished. It is a well settled rule of law that the courts do not look with favor upon forfeitures and they move cautiously in taking from corporations their charter grant of franchises. 10 Cyc. 1280. It is a matter of regret that the Stillwell case was not carried to the Court of Appeals so that a final determination might be had, as the decision of the Appellate Division does not appear to be supported by authority and reason.

Forfeiture Must be Adjudicated.

The fact that for a long period of time the corporation omitted to make use of its franchises; that from 1886 to 1894 no meetings of stockholders or directors were held and that all its tangible property was sold under execution does not destroy corporate existence. Geneva Mineral Spring Co. v. Coursey, 45 A. D. 268 (1899).

Although a business corporation had not exercised corporate functions in thirty-seven years, yet neither it nor its property rights can be attacked or adjudicated upon collaterally. The privileges and franchises granted to a private corporation are vested rights, and cannot be divested or altered without either the consent of the corporation or by virtue of forfeiture declared by the proper tribunal. Boyer v. Village of Little Falls, 5 A. D. 1 (1896).

Actions by Attorney-General.

An action against a corporation to obtain an adjudication that its corporate powers have ceased, as provided in this section, may be maintained by the Attorney-General under the Code, § 1798 (now Gen. Corp. Law, § 131). Peo. ex rel. Hearst v. Ramapo Water Co., 51 A. D. 145 (1900).

It is purely a people's action and may be brought with or without a relator. Peo. v. B. S. & C. Co., 131 N. Y. 140 (1892).

If a cause of forfeiture exists, there is nothing in the conduct of any of the stockholders or officers of the corporation which can defeat the rights of the people to enforce it. Peo. v. B. S. & C. Co., 131 N. Y. 144 (1892); Application of B. E. R. R. Co., 125 N. Y. 434 (1891); Peo. v. Atlantic Ave. R. R. Co., 125 N. Y. 513 (1891).

Where it appears that a corporation has never exercised its powers or franchises and that such non-user is willful and without justification, and, also, that it has conspired, through its officers, to do illegal acts, the Attorney-General may maintain an action for its dissolution. Peo. v. Milk Exchange, Ltd., 133 N. Y. 565 (1892).

Construction of Forfeiture Clauses in General.

The question whether a forfeiture clause is or is not self-executing depends wholly upon the language employed by the Legislature. Matter of New York & Long Island Bridge Co. v. Smith, 148 N. Y. 540 (1896).

A forfeiture clause which provides that in case of default by the corporation, "its corporate existence and powers shall cease," is self-executing, and the corporate powers cease without judicial proceedings. In re Brooklyn, Winfield & Newtown R. R. Co., 72 N. Y. 245 (1878).

The corporate existence ceased by the mere fact of failure of a corporation to perform certain acts imposed by the charter, in which the words of forfeiture were, "this act and all the powers, rights and franchises herein and hereby granted shall be deemed forfeited and terminated." Brooklyn Steam Transit Co. v. Brooklyn, 78 N. Y. 524 (1879).

Where it was provided that in case of default the company should "forfeit the rights acquired by it," it was held that the provision did not ex proprio vigore put an end to the corporate life in case of default, but simply exposed the company to proceedings on behalf of the State to establish and enforce the forfeiture. In re Brooklyn Elevated R. R. Co., 125 N. Y. 434 (1891); Kent v. Common Council, 94 A. D. 522 (1904).

Where the words of forfeiture were, "the corporation shall be dissolved" the default did not work a dissolution ipso facto, but proceedings were necessary to accomplish an actual dissolution. Peo. v. Buffalo Stone & Cement Co., 131 N. Y. 140 (1892); Peo. v. Manhattan Co., 9 Wend. 351 (1832).

The words "all rights and privileges granted hereby shall be null and void" do not render a forfeiture clause self-executing. Matter of New York & Long Island Bridge Co. v. Smith, 148 N. Y. 540 (1896).

Waiver of Forfeiture.

While it is true that corporate powers or franchises may be transferred to an individual only by legislative sanction, yet the property of a business corporation merely can be vested in an individual by his purchase of all the stock of a corporation, to such an extent, at least, that it cannot be assailed collaterally. Boyer v. Village of Little Falls, 5 A. D. 1 (1896).

A forfeiture incurred by non-compliance with the terms of a condition contained in its charter is waived by subsequent legislative acts recognizing the continued existence of the corporation, unless by the terms of the grant or charter the existence absolutely determines upon failure to perform the condition. Peo. v. Manhattan Co., 9 Wend. 351 (1832). Where it is provided that on failure to perform the specified condition the corporation shall be dissolved, judicial proceedings must be resorted to in order to effect a dissolution. Id.

The State may, by legislative enactment, waive forfeitures and recognize the existence of a corporation and may also grant it other and further powers. Bohmer v. Haffen, 22 Misc. 565, affd., 35 A. D. 381, affd., 161 N. Y. 390; Matter of N. Y. El. R. R. Co., 70 N. Y. 327 (1877). But see Matter of Brooklyn, Queens County & Suburban R. R. Co., 185 N. Y. 171, 185 (1906).

Conduct Justifying Action for Forfeiture.

Incorporation for the purpose of preventing the adoption of a trade name by competitors rather than for the purpose of carrying on business when supplemented by an express intention not to carry on business in the future will justify the Attorney-General in bringing a dissolution action, particularly after the lapse of a period of two years. Opinion of Atty. Genl., Feb. 14, 1913.

Amd.

§ 37. Extension of corporate existence. Any domestic corporation at any time before the expiration thereof, may extend the term of its existence beyond the time specified in its original certificate of incorporation, or by law, or in any certificate of extension of corporate existence, by the consent of the stockholders owning two-thirds in amount of its capital stock, or if not a stock corporation, by the consent of two-thirds of its members, which consent shall be given either in writing or by vote at a special meeting of the stockholders called for that purpose, upon

the same notice as that required for the annual meetings of the corporation; and a certificate under the seal of the corporation that such consent was given by the stockholders in writing, or that it was given by vote at a meeting as aforesaid, shall be subscribed and acknowledged by the president or a vice-president, and by the secretary or an assistant secretary of the corporation, and if a corporation formed under or subject to the banking law shall be filed in the office of the superintendent of banks, if an insurance corporation, in the office of the superintendent of insurance, and otherwise in the office of the secretary of state, and shall by such officer be duly recorded and indexed in a book specially provided therefor, and a certified copy of such certificate, with a certificate of such officer of such filing and record, or a duplicate original of such certificate, shall be filed and similarly recorded and indexed in the office of the clerk of the county wherein the corporation has its principal place of business, and shall be noted in the margin of the record of the original certificates of such corporation, if any, in such offices, and thereafter the term of the existence of such corporation shall be extended as designated in such certificate.

The certificate of incorporation of any corporation whose duration is limited by such certificate or by law, may require that the consent of the stockholders owning a greater percentage than two-thirds of the stock, if a stock corporation, or of more than two-thirds of the members, if a non-stock corporation, shall be requisite to effect an extension of corporate existence as authorized by this section.

Part of former § 32, as am'd by L. 1892, ch. 687; L. 1900, ch. 177; L. 1901, ch. 355; L. 1905, ch. 256. The other parts of former § 32 are now §§ 38, 39, 40, and 41.

Thus further amended by L. 1913, ch. 306, by which certificates of extension of banking and insurance corporations are required to be filed in the respective offices having supervision over such corporations.

For form of certificate of extension of existence, see Form No. 305.

Consolidators' Note.

This section has been repeatedly amended. (L. 1892, Ch. 687; L. 1900, Ch. 177; L. 1901, Ch. 359 and L. 1905, Ch. 256.) As a consequence it has become very long, involved and difficult to understand. In order to obviate this difficulty the section has been divided into five sections with appropriate headings. Section 37 contains the matter heretofore included in the first sentence of § 32, together with the matter added to the section by the amendment of 1905 (Ch. 256), which constitutes the second paragraph of the section. This change works no change of substance and is made so that the section may be more easily understood.

As amended in 1901, this section provides that the extension of existence may be made at any time before the expiration of the charter, and that the consent may be in writing, or may be given at a special meeting of the stockholders called for that purpose. These two alternative methods are in lieu of the former provision whereby the extension could only be effected by the filing of a written consent, within three years before the expiration of the corporate existence.

§ 38. Revival of corporate existence. If the term of existence of any domestic corporation shall have expired and it shall be made satisfactorily to appear to the supreme court that such corporation was legally organized pursuant to any law of this state, and that it shall have issued its bonds payable at a date beyond the date fixed in its charter or certificate of incorporation for the expiration of its corporate existence, and such bonds shall be unmatured and unpaid, or, if a bank, incorporated under a general law of this state, that shall have issued any other obligations or shall have incurred any other indebtedness which at the date of the application shall be unsatisfied or unpaid, the supreme court may, upon the application of any person interested and upon such notice to such other parties as the court may require, by order, authorize the filing and recording of a certificate reviving the existence of such corporation, upon such conditions and with such limitations as such order shall specify, and extending such corporate existence for a term not exceeding the term for which it was originally incorporated. Upon filing and recording such certificate in the same manner as certificates of extension of corporate existence duly issued before the expiration of the existence of a domestic corporation are authorized by law to be filed and recorded, such corporate existence shall be revived and extended in pursuance of the terms of such order, but such revival and extension shall not affect any litigation commenced after such expiration and pending at the time of such revival.

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Thus further amended by L. 1911, ch. 63, by which the provision relating to banks was inserted.

Consolidators' Note to Sections 38-41.

This section is taken without change from § 32, "old" General Corporation Law. The matter contained in it was introduced into this section by L. 1892, Ch. 687, and relates to the revival of a corporation after corporate existence has expired.

Section 39 is also taken from § 32, "old" General Corporation Law, without change except necessary change of phraseology in order to fit the language into a separate section.

The matter contained in section 40 is also taken from § 32, "old" General Corporation Law without change.

The matter contained in section 41 is also taken from § 32, "old" General Corporation Law, without change.

A possessor corporation, owning all the stock of another corporation may not file in the office of the secretary of state a certificate extending the term of corporate existence of the latter corporation when it appears that such corporate existence has already expired. Opinion of Atty. Genl., Feb. 14, 1913.

§ 39. Approval of certificates of extension or revival; when required. In the case of a corporation formed under or subject to the banking law, no certificate of extension or revival shall be filed or recorded unless it shall have indorsed thereon the written approval of the superintendent of banks; or, if an insurance corporation, unless it shall have indorsed thereon the written approval of the superintendent of insurance; and, if a turnpike or bridge corporation, it shall not be filed unless it shall have indorsed thereon or annexed thereto a certified copy of a resolution of the board of supervisors of each county in which such turnpike or bridge is located, approving of and authorizing such extension.

Part of former § 32, as am'd by L. 1892, ch. 687; L. 1900, ch. 177; L. 1901, ch. 355; L. 1905, ch. 256. The other parts of former § 32 are now §§ 37, 38, 40, and 41.

§ 40. Extension when stock is owned by another corporation. If all the stock of a corporation other than a corporation formed under or subject to the banking law, or an insurance corporation, or a turnpike, plank-road or bridge corporation shall be lawfully owned by another stock corporation entitled by law to take a surrender and merger thereof, the corporate existence of such corporation whose stock is so owned may be extended at any time for the term of the corporate existence of the possessor corporation, by filing in the office or offices in which the original certificate or certificates of incorporation of the first-mentioned corporation were filed a certificate of such extension executed by its president and secretary and by such corporation owning all the shares of its capital stock.

Part of former § 32, as am'd by L. 1892, ch. 687; L. 1900, ch. 177; L. 1901, ch. 355; L. 1905, ch. 256. The other parts of former § 32 are now §§ 37, 38, 39, and 41.

§ 41. Effect of extension. Every corporation extending its corporate existence under this chapter or under any general law of the state shall thereafter be subject to the provisions of this chapter and of such general law, notwithstanding any special provisions in its charter, and shall thereafter be deemed to be incorporated under the general laws of the state relating to the incorporation of a corporation for the purpose of carrying on the business in which it is engaged, and shall be subject to the provisions of such law.

Part of former § 32, as am'd by L. 1892, ch. 687; L. 1900, ch. 177; L. 1901, ch. 355; L. 1905, ch. 256. The other parts of former § 32 are now §§ 37, 38, 39, and 40.

Am'd.

§ 42. When notice of lapse of time unnecessary. Whenever under the provisions of any of the corporate laws a corporation is authorized to take any action after notice to its members or after the lapse of a prescribed period of time, such action may be taken without notice and without the lapse of any period of time, if such action be authorized or approved, and such requirements be waived in writing by every member of such corporation, or by his attorney thereunto authorized.

Formerly § 38, added by L. 1895, ch. 672.

The right to notice of a corporate meeting may be waived. Kenton Furnace R. & Mfg. Co. v. McAlpin, 5 Fed. 737 (1880). And notice will be deemed to have been waived if each stockholder attends and participates in the action of the meeting. In such case they are estopped from denying its legality for want of notice. Id.

Action at a stockholders' meeting is valid, though the statutory requirements as to notice and lapse of time are not complied with, if a waiver of such requirements is authorized in writing by every member of the corporation. Hallett v. Metropolitan Messenger Co., 69 A. D. 258 (1902).

For forms of waiver of notice by stockholders, see post, Forms Nos. 222, 366.

For form of reference to waiver for insertion in certificate of proceedings, see post, Form No. 367.

Waiver of Notice.

Where the provision of section 25 of the Stock Corporation Law, requiring publication of notice, was disregarded in an election of directors, but said notice was served on all stockholders, either personally or by mail, and the meeting was in all other respects legal, a waiver signed by each stockholder approving the vote taken pursuant to this section renders such election valid. Opinion of Atty. Genl., Feb. 2, 1910.

This section does not refer to statutory provisions requiring notice to be given by newspaper publication in such manner as to reach parties not interested in the corporation itself; therefore, the requirement under section 62 of this law for notice of presentation of a petition for a change of name may not be waived. Opinion of Atty. Genl., Jan. 24, 1913.

§ 43. As to acts of directors. Whenever, under the provisions of any of the corporate laws, a corporation is authorized to take any action by the agreement or action of its directors, managers or trustees, such agreement or action may be taken by such directors, regularly convened as a board, and acting by a majority of a quorum, except when otherwise expressly required by law or by the by-laws of the corporation and any such agreement shall be executed in behalf of the corporation by such officers as shall be designated by the board of directors, managers or trustees. At any meeting at which every member of the board of directors shall be present, though held without notice, any business may be transacted which might have been transacted if the meeting had been duly called. Except when otherwise required by law or the by-laws of the corporation, special meetings of the members of the corporation may be called in the same manner as the annual meeting thereof.

Formerly § 39, added by L. 1895, ch. 672, as am'd by L. 1901, ch. 355.

The amendment of 1901, ch. 355, consisted of the addition of the last two sentences.

Adjournment of Directors' Meeting by Less Than a Quorum.

Where the by-laws of a corporation having nine directors provided that whenever, at a regular meeting of the board, there should attend less than a quorum, three or more directors present should have power to adjourn to such time and place as they should deem proper, not passing over the next regular meeting, and pursuant to such by-law, at a regular meeting at which only three directors were present, on motion they adjourned to a future day, when there were five directors present, and at that meeting a resolution was adopted authorizing the issue of a bond, such a by-law is reasonable and valid and the resolution adopted thereat was binding upon the corporation. Smith v. Law, 21 N. Y. 296 (1860).

§ 44. Political contributions prohibited; penalty. No corporation or joint-stock association doing business in this state, except a corporation or association organized or maintained for political purposes only, shall directly or indirectly pay or use or offer, consent or agree to pay or use any money or property for or in aid of any political party, committee or organization, or for, or in aid of, any corporation, joint-stock or other association organized or maintained for political purposes, or for, or in aid of, any candidate for political office or for nomination for such office, or for any political purpose whatever, or for the reimbursement or indemnification of any person for moneys or property so used. Any officer, director, stockholder, attorney or agent of

any corporation or joint-stock association which violates any of the provisions of this section, who participates in, aids, abets or advises or consents to any such violation, and any person who solicits or knowingly receives any money or property in violation of this section, shall be guilty of a misdemeanor and punishable by imprisonment in a penitentiary or county jail for not more than one year and a fine of not more than one thousand dollars. No person shall be excused from attending and testifying, or producing any books, papers or other documents before any court or magistrate, upon any investigation, proceeding or trial, for a violation of any of the provisions of this section, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding.

Formerly § 41, added by L. 1906, ch. 239.

Immunity From Criminal Prosecution.

Persons testifying upon investigations under section 39 of the Insurance Law by examiners of the insurance department, are not entitled to immunity from criminal prosecution under the provisions of this section. Opinion of Atty. Genl. (1908), p. 426.

Sec. 45 added, Apr. 9, 1923, ch. 190.

ARTICLE 3

* Change of Name

SECTION 60. Petition by corporation to change name.
61. Contents of petition.
62. Notice of presentation of petition.
63. Order authorizing change.
64. When change to take effect.
65. Substitution of new name in pending action or proceeding.

Amd.

§ 60. Petition by corporation to change name. A petition to assume another corporate name may be made by a domestic corporation, whether incorporated by a general or special law, to

* CONSOLIDATORS' NOTE.—Code Civ. Pro., §§ 2411 to 2416 have been consolidated in this article so far as they relate to change of name of a corporation. The portions of these sections relating to the change of the name of an individual have been left in the Code of Civil Procedure. The last sentence has been omitted from section 63 because consolidated in County Law, § 161, subd. 6.

the supreme court at a special term thereof, held in the judicial district in which its principal business office shall be situated, or, if it be other than a stock corporation, at a special term held in the judicial district in which its certificate of incorporation is filed or recorded, or in which its principal property is situated, or in which its principal operations are or theretofore have been conducted. If it be a banking, insurance or railroad corporation, the petition must be authorized by a resolution of the directors of the corporation, and approved, if a banking corporation, by the superintendent of banks; if an insurance corporation, by the superintendent of insurance, and if a railroad corporation, by the public service commission. The petition to change the name of any other corporation must have annexed thereto a certificate of the secretary of state, that the name which such corporation proposes to assume is not the name of any other domestic corporation or a name which he deems so nearly resembling it, as to be calculated to deceive.

Formerly § 2411, Code Civ. Pro., as am'd by L. 1910, ch. 296.

Thus am'd by L. 1910, ch. 296.

For forms of papers relative to change of name, see Forms Nos. 328–331.

The clause empowering the court to dispense with publication of notice in the case of religious or membership corporations was added in 1910.

A corporation cannot, in legal proceedings, be designated by two names, and cannot, except as authorized by law, change its name, either directly or by user, nor can the public give it a name other than that of its creation, by which it can be recognized in judicial proceedings. Matter of U. S. Mortgage Co., 83 Hun 572 (1895).

Compliance With Section 6.

Where a corporation changes its name pursuant to this section the new name selected must comply with Gen. Corp. Law, § 6, as amended by L. 1911, ch. 638. Matter of Wilmerding Hand Co., Spec. Term, N. Y. Co., N. Y. Law Journal, March 1, 1912.

Order of Court Not Reviewable.

An order denying an application of a corporation to change its corporate name is not reviewable by the Court of Appeals where no abuse of discretion has been shown. Matter of U. S. Mercantile Reporting & Collection Agency, Ltd., 115 N. Y. 176 (1889).

Change of Name of Educational Corporation.

Changes of name of corporations subject to the provisions of the Education Law are to be effected under section 62 of said law.

Denial of Application.

Where an application is made by a corporation for a change of its name, which is opposed by another corporation on the ground that the proposed

new name of the petitioner will result in confusion, the absence of any element of fraud is not controlling, as the court, apart from any question of fraud or fraudulent intent, will interfere where there is reasonable ground to conclude that the granting of the application will result in injury to the complaining corporation, or in imposition or deceit upon the public, by destroying the identity of such corporations. Matter of U. S. Mortgage Co., 83 Hun. 572 (1895).

Repealed.

§ 61. Contents of petition. The petition must be in writing, signed by the petitioner and verified in like manner as a pleading in a court of record, and must specify the grounds of the application, its present name, and the name it proposes to assume, which must not be the name of any other corporation, or a name so nearly resembling it as to be calculated to deceive; and if it be a railroad corporation, a corporation having banking powers or the power to make loans upon pledges or deposits, or to make insurances, that the petition has been duly authorized by a resolution of the directors of the corporation and approved by the proper officer.

Formerly part of § 2412, Code Civ. Pro. The other part of said section remains in the Code.

Repealed.

§ 62. Notice of presentation of petition. If the petition be made by a corporation located elsewhere than in the city and county of New York, notice of the presentation thereof shall be published once in each week for three successive weeks in a newspaper of every county in which such corporation shall have a business office, or if it has no business office, of the county in which its principal corporate property is situated, or in which its operations are or theretofore have been principally conducted, which newspaper, if it be a banking corporation, shall be designated by the superintendent of banks, if an insurance corporation, by the superintendent of insurance, or if a railroad corporation, by the public service commission. In the city and county of New York such notice shall be published once in each week for three successive weeks in two daily newspapers published in such county. If the petition be made by a domestic corporation organized under or subject to the religious or membership corporations law the court may dispense with the publication of the notice of the presentation of such petition or require notice of such presentation to be given to such persons and in such manner as the court thinks proper. A copy of the petition and notice of motion shall be filed with the secretary of state, and the proposed name shall thereupon be reserved for said corporation until three weeks after the

date of such motion, and until three weeks after the date of any adjournment of such motion if notice of such adjournment shall be filed with the secretary of state, and no certificate of incorporation of a proposed corporation, having the same name as the name proposed in such petition, or a name so nearly resembling it as to be calculated to deceive, shall be filed in any office for the purpose of effecting its incorporation, and no corporation formed without the state of New York having the same name or a name so nearly resembling it as to be calculated to deceive shall be given authority to do business in this state.

Formerly § 2413, Code Civ. Pro., as am'd by L. 1894, ch. 264; L. 1904, ch. 110; L. 1909, ch. 28; L. 1910, ch. 296.

The clause empowering the court to dispense with publication of notice in the case of religious or membership corporations was added in 1910.

Waiver of Notice.

The requirement that notice of the presentation of a petition for a change of name be given by newspaper publication may not be waived by the consent of the stockholders and directors of the corporation, under Gen. Corpn. L., § 42, as that section does not refer to statutory provisions requiring notice to be given by newspaper publication in such manner as to reach parties not interested in the corporation itself. Opinion of Atty. Genl., Jan. 24, 1913.

Prior to the enactment of the Consolidated Laws of 1909, section 2413 of the Code (now Gen. Corp. Law, § 62, supra) provided that notice should be published in the State paper, but this provision has been omitted in the enactment of the foregoing section because the State paper was abolished by the Executive Law, § 74 (now 83), added by L. 1893, ch. 248.

§ 63. Order authorizing change. If the court to which the petition is presented is satisfied thereby, or by the affidavit and certificate presented therewith, that the petition is true, and that there is no reasonable objection to the change of name proposed and that the petition has been duly authorized and that notice of the presentation of the petition, if required by law, has been made, the courts shall make an order authorizing the petitioner to assume the name proposed on a day specified therein, not less than thirty days after the entry of the order. The order shall be directed to be entered and the papers on which it was granted to be filed within ten days thereafter in the office of the clerk of the county in which its certificate of incorporation, if any, shall be filed, or if there be none filed, in which its principal office shall be located, or if it has no business office in the county in which its principal property is situated, or in which its operations are or theretofore have been principally conducted, or in the office of the

Repealed.

clerk of the county in which the special term granting the order is held; and that a certified copy of such order shall, within ten days after the entry thereof, be filed in the office of the secretary of state; and also, if it be a banking corporation, in the office of the superintendent of banks, or if it be an insurance corporation in the office of the superintendent of insurance, or if it be a railroad corporation, in the offices of the public service commissions. Such order shall also direct the publication, within ten days after the entry thereof, of a copy thereof, in a designated newspaper, in the county in which the order is directed to be entered, once in each week for four successive weeks. The court may dispense with the publication of a copy of such order and require notice to be given to such persons and in such manner as it thinks proper if the petition be made by a domestic corporation organized under or subject to the religious or membership corporations law.

Formerly § 2414, Code Civ. Pro., as am'd by L. 1895, ch. 946; L. 1910, ch. 296.

Am'd.

§ 64. When change to take effect. If the order shall be fully complied with, and within forty days after the making of the order, an affidavit of the publication thereof shall be filed and recorded in the office in which the order is entered, and in each office in which certified copies thereof are required to be filed, if any, the petitioner shall, on and after the day specified for that purpose in the order, be known by the name which is thereby authorized to be assumed, and by no other name. No proceedings had prior to April fourth, eighteen hundred and ninety-four, under sections two thousand four hundred and fourteen and two thousand four hundred and fifteen of the code of civil procedure for the change of the name of a corporation, shall be invalid by reason of the non-filing of an affidavit of the publication of the order changing such name within twenty days from the date thereof.

And no proceedings heretofore had under the provisions of article three, chapter twenty-three, consolidated laws, for the change of the name of a corporation, shall be invalid by reason of the non-filing and recording of such affidavit of the publication of the order changing such name within forty days from the making of such order.

Formerly § 2415, Code Civ. Pro., as am'd by L. 1894, ch. 264; L. 1913, ch. 721.

The last paragraph is new, added in 1913.

Am'd.

§ 65. Substitution of new name in pending action or proceeding. An action or special proceeding, civil or criminal, commenced by or against a corporation whose name is so changed shall not abate, nor shall any relief, recovery or other proceeding therein be prevented, impeded or impaired in consequence of such change of name. The plaintiff in the action or the party instituting the special proceeding, or the people, as the case requires, may at any time, obtain an order amending any of the papers or proceedings therein, by the substitution of the new name, without costs and without prejudice to the action or proceeding.

Formerly § 2416, Code Civ. Pro.

Sec. 66. Added, 1917. Am'd., 1919. Repealed, 1923.

ARTICLE 4

* Sale of Corporate Real Property

SECTION 70. Application of this article.
71. Petition.
72. Hearing on application.
73. Order to sell, mortgage or lease.
74. Insolvent corporation.
75. Service of notices.
76. Practice in cases not herein provided for.

§ 70. Application of this article. Whenever any corporation is required by law to make application to the court for leave to mortgage, lease or sell its real estate, the proceeding therefor shall be had pursuant to the provisions of this article.

Formerly part of § 3390, Code Civ. Pro. The other part of former § 3390 is now in Joint-Stock Association Law, § 8.

The provisions of this article are applicable only to non-stock corporations. There are no provisions requiring a stock corporation to apply to the court for leave to mortgage, lease, or sell its real estate.

For the statutes, decisions and forms of procedure respecting non-stock corporations, see "White & Goldmark on Non-Stock Corporations."

§ 71. Petition. The proceeding shall be instituted by the presentation to the supreme court of the district or the county court of the county where the real property, or some part of it, is situated, by the corporation applicant, of a petition setting forth the following facts:

* CONSOLIDATORS' NOTE.—Code Civ. Pro., §§ 3390–3396, so far as they relate to proceedings for the sale of the real property of a corporation, have been consolidated in this article, and the portion relating to the sale of the real property of a joint-stock association has been consolidated in Joint-Stock Association Law, § 9.

1. The name of the corporation and of its directors, trustees or managers, and of its principal officers, and their places of residence.

2. The business of the corporation or the object or purpose of its incorporation and a reference to the statute under which it was incorporated.

3. A description of the real property to be sold, mortgaged or leased, by metes and bounds, with reasonable certainty.

4. That the interests of the corporation will be promoted by the sale, mortgage or lease, of the real property specified, and a concise statement of the reasons therefor.

5. That such sale, mortgage or lease has been authorized, by a vote of at least two-thirds of the directors, trustees or managers of the corporation at a meeting thereof, duly called and held, and a copy of the resolution granting such authority.

6. The market value of the remaining real property of the corporation and the cash value of its personal assets, and the total amount of its debts and liabilities, and how secured, if at all.

7. The application proposed to be made of the moneys realized from such sale, mortgage or lease.

8. Where the consent of the shareholders, stockholders or members of the corporation is required by law to be first obtained, a statement that such consent has been given, and a copy of the consent, or a certified transcript of the record of the meeting at which it was given, shall be annexed to the petition.

9. A demand for leave to mortgage, lease or sell the real estate described.

The petition shall be verified in the same manner as a verified pleading in an action in a court of record.

Formerly § 3391, Code Civ. Pro.

§ 72. Hearing on application. Upon presentation of the petition, the court may immediately proceed to hear the application, or it may, in its discretion, direct that notice of the application shall be given to any person interested therein, as a member, stockholder, officer or creditor of the corporation or otherwise, in which case the application shall be heard at the time and place specified in such notice, and the court may in any case appoint a referee to take the proofs and report the same to the court, with his opinion thereon. Any person, whose interests may be affected by

the proceeding, may appear upon the hearing and show cause why the application should not be granted.

Formerly § 3392 and part of § 3393, Code Civ. Pro. The other part of § 3393 is in the next section.

§ 73. Order to sell, mortgage or lease. Upon the hearing of the application, if it shall appear, to the satisfaction of the court, that the interests of the corporation will be promoted thereby, an order may be granted authorizing it to sell, mortgage or lease the real property described in the petition, or any part thereof, for such sum, and upon such terms as the court may prescribe, and directing what disposition shall be made of the proceeds of such sale, mortgage or lease.

Formerly part of § 3393, Code Civ. Pro.

§ 74. Insolvent corporation. If the corporation is insolvent, or its property and assets are insufficient to fully liquidate its debts and liabilities, the application shall not be granted, unless all the creditors of the corporation have been served with a notice of the time and place at which the application will be heard.

Formerly § 3394, Code Civ. Pro.

§ 75. Service of notices. Service of notices, provided for in this article, may be made either personally or, in case of absence, by leaving the same at the place of residence of the person to be served, with some person of mature age and discretion, at least eight days before the hearing of the application, or by mailing the same, duly enveloped and addressed and postage paid, at least sixteen days before such hearing.

Formerly § 3395, Code Civ. Pro.

§ 76. Practice in cases not herein provided for. In all applications made under this article, where the mode or manner of conducting any or all of the proceedings thereon is not expressly provided for, the court before whom such application may be pending, shall have the power to make all the necessary orders and give the proper directions to carry into effect the object and intent of this article, or of any act authorizing the sale of corporate real property, and the practice in such cases shall conform, as near as may be, to the ordinary practice in such court.

Formerly § 3396, Code Civ. Pro.

ARTICLE 5

Judicial Supervision of Corporation and of the Officers and Members Thereof

SECTION 90. Action against officers of corporation for misconduct.
91. Who may bring such an action.
92. Visitatorial power over corporation not affected by this article.

§ 90. Action against officers of corporation for misconduct. An action may be maintained against one or more trustees, directors, managers, or other officers of a corporation, to procure a judgment for the following purposes, or so much thereof as the case requires:

1. Compelling the defendants to account for their official conduct, including any neglect of or failure to perform their duties, in the management and disposition of the funds and property, committed to their charge.

2. Compelling them to pay to the corporation, which they represent, or to its creditors, any money, and the value of any property, which they have acquired to themselves, or transferred to others, or lost, or wasted, by or through any neglect of or failure to perform or by other violation of their duties.

3. Suspending a defendant from exercising his office, where it appears that he has abused his trust.

4. Removing a defendant from his office, upon proof or conviction of misconduct, and directing a new election to be held by the body or board duly authorized to hold the same, in order to supply the vacancy created by the removal; or, where there is no such body or board, or where all the members thereof are removed, directing the removal to be reported to the governor, who may, with the advice and consent of the senate, fill the vacancies.

5. Setting aside an alienation of property, made by one or more trustees, directors, managers or other officers of a corporation, contrary to a provision of law, or for a purpose foreign to the lawful business and objects of the corporation, where the alienee knew the purpose of the alienation.

6. Restraining and preventing such an alienation, where it is threatened, or where there is good reason to apprehend that it will be made.

7. The court must, upon the application of either party, make

an order directing the trial by a jury of the issue of neglect or failure of defendants to perform their duties; and for that purpose the questions to be tried must be prepared and settled as prescribed in section nine hundred and seventy of the code of civil procedure.

As to any litigation pending prior to September one, nineteen hundred and seven, the provisions of this section as they existed prior to that date shall apply.

Formerly Code Civ. Pro. § 1781. Last paragraph was L. 1907, ch. 157, § 2.

Cross-References.

Authority to maintain a single action in equity for an accounting and for damages. Gen. Corp. Law, § 91-a, post.

Penal Law provisions imposing liabilities upon directors and officers. Penal Law, §§ 664, 665, 667, 668, 669, post.

Liability of directors for paying unlawful dividends. Stock Corp. Law, § 28, post. Liability for loans to stockholders. Stock Corp. Law, § 29, post. Liability of certain officers for failure to file annual report upon written request. Stock Corp. Law, § 34, post. Liability of officers or directors for false certificates, reports or public notices. Stock Corp. Law, § 35, post. Liability of directors and officers for making certain prohibited transfers of corporate property. Stock Corp. Law, § 66, post.

Corporate officers not excused from testifying in actions brought under this section relative to the management of the corporation, etc. Gen. Corp. Law, § 301, post.

Injunction staying action by creditors in certain actions. Gen. Corp. Law, § 302, post.

This article of the General Corporation Law does not apply to religious and certain other corporations. Gen. Corp. Law, § 300, post.

When Attorney-General May Bring Action.

See provisions of sections 91 and 304 of this law.

Director's Concealment of Knowledge of Misapplication of Corporate Funds.

A director of a corporation which owns practically the entire issue of stock of a subsidiary corporation, who knows that an employee of the latter corporation is misapplying the funds of the subsidiary corporation and who conceals that fact from his co-directors in the parent corporation, is liable for so much of such loss as would have been prevented by a disclosure of the facts to his co-directors, and this is especially true where the misapplication of the funds of the subsidiary corporation is for the benefit of a third corporation in which such director is financially interested. General Rubber Co. v. Benedict, Appellate Division, N. Y. Law Journal, Nov. 27, 1914.

Each Director Liable Only for His Own Misconduct.

If A. and B., directors in a corporation, waste its funds during one year and B. and C., directors, by some act not connected with the first offense, waste the corporate funds in another year, the three cannot be joined as

defendants in an equitable action brought by or in behalf of the corporation to compel them to account for and pay the damages sustained by reason of these independent wrongful acts. Wasting the property of a corporation by its directors is a tort. A. is not liable for the acts of B. and C., and C. is not liable for the acts of A. and B., and these independent, tortious acts constitute distinct causes of action which cannot be united in one complaint. Nash v. Hall Signal Co., 90 Hun 354 (1895); Peo. v. Equitable Life Assur. Soc., 124 A. D. 714 (1908).

Each director is liable only for his own acts or omissions. One director is not liable for the acts or omissions of another unless he participated therein to the injury of the corporation, or had some knowledge by which in the exercise of reasonable care he could have prevented the loss or unless he connived at it or failed to perform his duty of exercising the authority he possessed to prevent loss which could in the exercise of reasonable care and skill have been foreseen and guarded against. Peo. v. Equitable Life Assur. Soc., 124 A. D. 714 (1908).

In a stockholder's action, in the right of the corporation, the directors having refused to bring it, to compel an accounting to the corporation, which is also made a party defendant, for the proceeds of stock converted by the individual defendants to their own use, a director who was not connected with the conversion nor with the corporation until after the wrongful act, is not a proper party. Mulheran v. Gebhardt, 93 A. D. 98 (1904); see also Hay v. Brookfield, 160 A. D. 277, 279 (1914).

Proceedings may be against one Director or More; Individual Liability is Several.

The individual liability of directors to creditors, under sections 90 and 91, is several, hence the plaintiff may proceed against one or more of them without joining all. If any equities between directors can be enforced as against each other the plaintiff is not required to take part in that litigation or proceed against all the directors in order to adjust such equities in his suit. Buckley v. Stansfield, 155 A. D. 735, 743 (1913); Bartlett v. Drew, 57 N. Y. 587, 589 (1874); see also, German American Coffee Co. v. Diehl, 86 Misc., 547 (1914).

Liability of Directors after Resignation.

An action is maintainable for an accounting not only against directors elected upon the resignation of the former directors but also against those who have ceased to be directors. The object of the statute was to authorize an action to prevent waste and injury to the corporate property and to recover property of the corporation wrongfully and unlawfully disposed of and damages of and an accounting by the wrongdoer, because the efficiency of the statute would be seriously impaired if it were held that an action could only be maintained against directors while in office. Jacobus v. Diamond Soda Water Mfg. Co., 94 A. D. 366, 379 (1904).

When the directors and officers acting in pursuance of a conspiracy resigned their positions and elected in their places persons whom they knew to be irresponsible and untrustworthy and placed in their possession and under their management the corporate property in consideration of certain unlawful payments to be made and contracts to be performed for their benefit by such new directors, and the corporate assets were in consequence wasted thereby and by unnecessary expenses and improvident contracts made by the substituted

directors, an action in equity for an accounting may be maintained against the directors, who resigned pursuant to such conspiracy, to discover and fix the value of assets improperly withheld and of all property lost and damages caused by their wrongful acts, and to compel them jointly and severally to pay the agregate amount thereof over to the corporation or to a receiver thereof, and, since it was part of the fraudulent confederation into which they all entered and part of the wrong intended and accomplished by them, to also set aside a written contract between one of them and the corporation whereby corporate assets were to be wrongfully diverted to him. Bosworth v. Allen, 168 N. Y. 157 (1901).

Rights of Purchaser of Stock Respecting Prior Misconduct of Directors.

See the above topical heading under section 34 of the General Corporation Law, ante, and authorities there cited.

Judgment against Corporation as Evidence against Directors.

See the above heading under section 34 of the General Corporation Law, ante, and collection of authorities thereunder.

Corporate Books as Evidence Against Directors.

See the above heading under section 34 of the General Corporation Law, ante, and collection of authorities thereunder.

Abatement of Action Against a Director.

The right of action by a director against his codirectors under sections 90 and 91, for mismanagement, etc., exists only by virtue of his incumbency of the office of director and abates when he ceases to be a director by reason of the fact that he is not re-elected to office. The action does not survive merely because the former director continues to be a stockholder, nor by virtue of sections 755 and 756 of the Code, providing that in case of transfer of interest or a devolution of liability the action may be continued by or against the original party unless the court directs a substitution. Another director may bring another action on the same facts. Hamilton v. Gibson, 145 A. D. 825 (1911).

Judicial Suspension or Removal of a Director or Officer.

Actions for the above purpose may be brought by the Attorney-General. Gen. Corp. L., § 307, post.

The certificate of incorporation may provide for the suspension or removal of directors from office. Peo. ex rel. Manice v. Powell, 201 N. Y. 194 (1911); however, if it does not so provide the suspension or removal of directors can be had only in judicial proceedings brought by the Attorney-General pursuant to sections 90, 91 and 307 of the General Corporation Law. Welcke v. Tragreser, 131 A. D. 731 (1909).

See also, "Removal or Suspension of a Director," under section 34 of the General Corporation Law, ante, and collection of authorities thereunder.

The provisions of this article do not create any new cause of action excepting with respect to the removal or suspension of directors; the Legislature, in the interest and for the protection of creditors, including policyholders and stockholders, merely authorized the enforcement by the officers and individuals specified of causes of action which have accrued to the corporation. Peo. v. Equitable Life Assurance Society, 124 A. D. 714 (1908).

Subdivision 4 should not be so construed as to prevent the removal of

directors for their misconduct as officers, for one who is at the same time a director and an executive officer and is guilty of misconduct in one capacity cannot remain in partial control in the other capacity. The re-election of the defendants after the alleged misconduct does not prevent their removal as their tenure of office must be treated as continuous. Peo. v. Lyon, 119 A. D. 361 (1907); affd., 189 N. Y. 544 (1907); and see Flanagan v. Lyon, 54 Misc. 372 (1907).

Director Accountable for Money Received for Transferring Control of Corporation.

Money received from an outsider by a director and president of a corporation for procuring the outsider and his friends to be elected directors and given the control and management together with the property and effects of the corporation, is money obtained by virtue of his office for which he must account to the corporation. As an officer he had the right to resign, but the money was not paid to him for his resignation. It was paid over upon condition that he procure the other parties to be elected directors and given control of the corporation. He was bound to account to the corporation for all moneys that came into his hands by virtue of his official acts, and he cannot be permitted to shield himself from such liability under the claim that his acts were illegal and unauthorized. McClure v. Law, 161 N. Y. 78 (1899).

Transfer of Property Without Providing for Payment of Creditors.

Directors who transfer all the corporate property to another corporation which assumes payment of all the debts of the vendor are liable to account to the judgment creditors of the latter for the property so transferred. The fact that the directors did not know of the claim is immaterial for they should have provided for unknown claims. If they undertake to divest the corporation of all its property and practically dissolve it without taking the proceedings for a voluntary dissolution which are prescribed by law they are bound to give some notice to creditors of the proposed transfer. Darcy v. Bklyn. & N. Y. Ferry Co., 196 N. Y. 99 (1909), affg. 127 A. D. 167. The agreement of the vendee corporation to assume payment of the debts of the vendor is not binding upon a creditor unless he accepts the substituted debtor. Id. Creditors cannot be deprived of their equitable lien upon the corporate assets by such agreement. They are entitled to a reasonable opportunity to present and enforce their claims before the transfer shall become effective, and such action renders the directors liable for the amount of a claim established against a corporation as having accrued before the transfer. The motives which induce such an omission by the directors are immaterial. Their omission to make adequate provision for the protection of the creditors is proof of their dereliction and good faith constitutes no defense. Id., distg. Stokes v. Stokes, 23 A. D. 552.

In an individual action by one judgment creditor against a director, on account of transfer of corporate assets without providing for the payment of debts, the recovery is properly limited to such proportion of the value of the property transferred as the creditor's claim, in connection with claims of other existing creditors, bears to the value of the property transferred. Buckley v. Stansfield, 155 A. D. 735, 743 (1913).

Directors cannot effect a voluntary dissolution of a corporation by selling and transferring all of its assets and distributing the proceeds among the stockholders without providing for the payment of creditors, even though the purchaser assumes the payment of the corporate debts. Directors who so

dispose of the corporate property are liable under this section in a suit by creditors to compel payment of any money or the value of any property so misapplied. Flaum v. Kaiser Bros. Co., 66 Misc. 586 (1910), citing Darcy v. Bklyn. & N. Y. Ferry Co., 196 N. Y. 199; Cole v. Millerton Iron Co., 133 N. Y. 167.

Transfer of Property Without Providing for Payment of Creditors.

Corporate assets constitute a trust fund for the payment of the corporate debts, and if two directors transfer all the corporate property to a third director for a nominal consideration, they commit a breach of duty toward creditors and become personally liable for existing claims. Cullen v. Friedland, 152 A. D. 124 (1912), on the authority of Darcy v. Bklyn. & N. Y. Ferry Co., 196 N. Y. 99. Such third director is also liable to a creditor, on the additional ground that he received, with notice and without consideration, corporate property which was impressed with a trust for the payment of corporate debts. Id.

Recovery of Funds Corruptly Expended by Officers.

Funds corruptly expended by officers to enable the corporation to conduct its business on Sunday must be repaid to the corporation by such officers at the suit of a stockholder. Roth v. Robertson, 64 Misc. 343 (1909).

Fraudulent Transfer of Stock and Bonds.

In an action by stockholders to compel an accounting on the ground of a fraudulent transfer of stock and bonds by directors, it is not necessary for plaintiffs to offer to return the stock and bonds claimed to have been so transferred, as the court can preserve and adjust the equities of the parties. Continental Securities Co. v. Belmont, 206 N. Y. 7 (1912), affg. 150 A. D. 298, distg. Hawes v. Oakland, 104 U. S. 450.

Sale of Property when Rights of Creditors or Stockholders are not Prejudiced.

A director cannot maintain an action to set aside the alienation of corporate property made by the majority of the directors to themselves in good faith where no creditors or shareholders have been injured thereby. Such transactions are not void but voidable only at the election of those affected. Public policy does not condemn contracts between a corporation and its trustees if made in good faith in case no public or private interest is harmed. Skinner v. Smith, 134 N. Y. 240 (1892).

Sale of Property when Rights of Creditors or Stockholders are not Prejudiced.

Relative to a contract whereby a corporation sold out its business to another corporation and ceased operations, it was held that where such contract was made in good faith and all the creditors have been provided for it will be sustained. In a review of the decisions upon agreements in which corporations transfer their business and assets and cease operations three different rules have been recognized, to wit: first, that a hopelessly insolvent corporation must wind up its affairs in the manner prescribed by law; second, that a corporation doing a profitable and paying business owes some duty to the public to continue to exercise the functions conferred upon it; third, where a corporation is not insolvent, but is doing a losing

business and unable to continue without further loss, it has the right to sell out its business to another corporation and to cease operations, and that a contract to that effect, made in good faith and for the best interests of the creditors and stockholders, is valid and binding. Raymond v. Security Trust & Life Ins. Co., 111 A. D. 191 (1906); Skinner v. Smith, 134 N. Y. 240 (1892); Jameson v. Hartford Fire Ins. Co., 14 A. D. 380 (1897).

At common law neither the directors nor a majority of the stockholders have power to sell or otherwise transfer all the property of a going, prosperous corporation as against the dissent of a single stockholder; but, where the corporation is without available capital and without the means of procuring it and with its de jure corporate existence at an end, where the further transaction of its business would be unprofitable, if not impracticable, the closing of its business and the sale of its corporate property is justified. Under such circumstances, no rights of creditors interfering, it was in furtherance of the interests of the corporation to pay its debts and close its affairs on terms deemed most advantageous. Hoag v. Edwards, 69 Misc. 237 (1910), citing Skinner v. Smith, 134 N. Y. 240, 250 (1892).

The rule that a hopelessly insolvent corporation must wind up its affairs in the manner prescribed by law, and the other rule that a corporation doing a profitable and paying business owes some duty to the public to continue to exercise the functions conferred upon it, are both recognized; but another rule exists, not in conflict with either of the others, and that is, that where a corporation is not insolvent, but is doing a losing business and unable to continue without further loss, it has the right to sell out its business to another corporation and to cease operations, and a contract to that effect, in the absence of fraud or bad faith, where the assets were not sacrificed or sold for less than their value, is valid and binding. Levin v. Mayer, 86 Misc. 116 (1914), and cases there cited.

Distribution of Profits as Salaries.

See also "Compensation of Directors," under section 34 of the General Corporation Law, ante.

Where directors distributed surplus earnings among themselves and certain employee stockholders under the guise of additional salaries, but on a uniform basis of the capital stock held by each and not according to the services rendered by them, such a distribution of assets is without consideration, and a stockholder who did not share in the distribution may maintain a representative action to compel the corporate officers to account for the wrongful diversion of the property. Godley v. Crandall & Godley Co., 212 N. Y. 121 (1914).

An agreement between corporate officers, that each shall have a salary for a term of years, and that the profits shall be distributed in a certain manner irrespective of the amount of stock held by them, is void as against public policy, being an attempt by the officers to use the corporation for their own benefit and not for that of the stockholders. Abbott v. Harbeson Textile Co., 162 A. D. 405 (1914).

The payment of large salaries irrespective of earnings in disregard of the rights of creditors will justify an action for an accounting against the directors and officers by a trustee in bankruptcy of the corporation. Williams v. McClave, 85 Misc. 184 (1914).

Secret Profits of Officers; Accounting and Restoration.

Where the vice-president and general manager of a corporation makes secret profits out of a contract with it, which contract was authorized by

resolution of his co-directors who had no knowledge of such profits at the time but who subsequently accepted from such officer an interest in such secret profits, they become liable as trustees to account in equity for their official misconduct and to restore to the corporation the entire sum which they participated in diverting, irrespective of the share which each received. Asphalt Const. Co. v. Bouker, 150 A. D. 691 (1912). Such directors were guilty not merely of non-feasance in failing to prevent the wrong, but of misfeasance by actively participating in it. Id.

Powers, Duties and Liabilities of Directors.

For collection of authorities on the powers, duties and liabilities of directors, see the General Corporation Law, section 34, ante, under the following topical headings, viz.:

Duty of Directors; Diligence and Care Required.
Powers of Directors in General.
Power of Directors to Sell Corporate Assets.
Delegation of Powers of Directors to Other Persons.
Dummy Directors.
Right of Director Holding Claim against the Corporation.
Directors; Relation of, to the Corporation and Others.
Liabilities of Directors Generally.
Liability of Directors for Sale of Corporate Property at Inadequate Price.
Liability of Directors for Expense of Litigation.
Directors Not Liable for Errors of Judgment.
Liability of Directors under Penal Statute of Another State.
Good Will: Conduct of Directors Relative Thereto.
Actions Against Directors by Bondholders.
Creditor's Actions against Directors.
Director; When Chargeable with Knowledge of Corporate Affairs.
Knowledge of Director Imputable to Corporation.
Forfeiture of Office of Director.
Directors Dealing with Themselves.
Contracts of Directors with the Corporation.
Dealings between Corporations Having Common Directors.
Ratification of Unauthorized Acts of Directors.
Ratification of Void Acts Not Permissible.
Misconduct of Directors Generally.
Frauds of Directors in Inducing Purchases or Sales of Stock.
Rights of Stockholders.
Action to Rescind Corporate Contract.

Appointment of a Receiver.

A judgment requiring a stockholder to surrender his certificates for cancellation upon the ground that they were illegally issued, appointing a receiver without authority to carry on the corporate business, and requiring that copies of secret formulae used by the corporation in its business be delivered to the receiver, and which were originally transferred to the corporation in consideration of the transfer of said stock, is reversible where there is no finding that those in control of the corporation have been guilty of waste, mismanagement or misconduct, and where prior to the judgment the stockholder had returned the stock to the corporation, which had rescinded the resolution authorizing its issue. Brewster v. Brewster Co., 145 A. D. 812 (1911), modfd. 204 N. Y. 687. Such receivership would be destructive of the corporation where the receiver has no authority to carry

on the business and the only limit placed upon his tenure of office is vague and indefinite. Id.

A receiver cannot be given possession of the property of a corporation without security. Brewster v. Brewster Co., 145 A. D. 812 (1911), affd. 204 N. Y. 687.

The court has power to appoint a receiver in an action brought under the provisions of sections 90 and 91, and this power carries with it by implication the right to enjoin the officers and directors from interfering with the property or doing any acts which interfere in any way with the receiver. Goss v. Warp Twisting In Machine Co., 133 A. D. 122 (1909); 117 N. Y. Supp. 228. That the complaint in the action does not ask for an injunction, but merely for the appointment of a temporary receiver is immaterial in considering the action of the court to preserve by injunction the status of the corporate property. Id. An order to show cause why an injunction should not be granted is a sufficient notice of the application for such injunction as required by section 305, post. Id.

While the suspension or removal of directors can only be had in an action brought by the Attorney General, it is competent for a court of equity at the suit of a stockholder to enjoin threatened acts of mismanagement or waste or to appoint a receiver of the corporate property to hold and manage it until a new election of directors where it satisfactorily appears that the directors are acting fraudulently or in bad faith and in their own interests and contrary to the plain interests of the corporation, and that such relief is necessary to the protection of the rights of the stockholders in the interim, but the appointment of a receiver for such purpose as distinguished from a receiver of the corporation itself would be justified only in an extreme case. Welcke v. Trageser, 131 A. D. 731 (1909).

The court has power, pursuant to Gen. Corp. Law, section 306, to appoint a receiver and by its judgment to compel a defaulting trustee to account to such receiver for the property which he has misappropriated or lost by his breach of duty. Gildersleeve v. Lester, 68 Hun 532, affd. on op. below, 139 N. Y. 608 (1893), the judgment directing payment to such receiver may be enforced by contempt proceedings under Code, section 1241, subd. 4, as the receiver so appointed is an officer of the court. Gildersleeve v. Lester, 68 Hun 535 (1893).

In a representative action brought by a stockholder on behalf of the corporation against the officers and directors to compel them to account for official misconduct and misapplication of corporate assets, a receiver will not be appointed where the corporation is a going, solvent concern, unless a very clear case be made out. Fenn v. Ostrander, Inc., 132 A. D. 311 (1909). Mere misconduct will not justify the appointment of a receiver, unless such an appointment be necessary to preserve the property or rights of creditors or stockholders. Philips v. Sonora Copper Co., 90 A. D. 140 (1904).

Mere misconduct on the part of officers and directors will not justify the appointment of a receiver unless it be necessary to preserve the property or the rights of creditors or stockholders. Such appointment will not be made on general allegations of fraud and maladministration on information and belief, unsupported by legal proof. Fenn v. Ostrander, Inc., 132 A. D. 311 (1909).

In an action brought by the people against the corporation and its directors for neglect and waste and for an accounting, the court may upon proof of sufficient facts appoint a temporary receiver pursuant to General Corporation Law, section 306. Peo. v. Hasbrouck, 57 Misc. 130 (1907);

but the receiver should not be continued after final judgment nor creditors restrained from enforcing their rights where it appears that the offending directors have resigned and others have been elected in their places. Halpin v. Mutual Brewing Co., 91 Hun 220 (1895).

Laches in Bringing Suit.

Where dividends are being paid both upon the preferred and common stock of a corporation, a receiver will not be appointed on the application of a minority stockholder who claims that the president is violating a contract made by it, especially where it appears that such minority stockholder had known of such violation for several years and did not begin his suit until the president had refused to purchase his stock or give him a position with the corporation. Metzger v. Knox, 77 Misc. 271 (1912).

Decisions Generally.

Under the provisions of this article an action may be brought by the Attorney-General in the name of the people, without a relator, against a domestic business corporation and its directors to remove the latter from their position, for misconduct, and to compel them to account for and pay over to the corporation the value of property belonging to it transferred by them to others in violation of their duty, whenever he deems that the action can be maintained and that the interests of the public will be promoted thereby. Peo. v. Ballard, 134 N. Y. 269 (1892).

A corporation cannot cease to exist of its own will; its life continues until either the charter period has expired or the court has decreed a dissolution. While a corporation may sell property to pay debts or to carry on its business, it cannot sell all its property in order to deprive itself of existence. Peo. v Ballard, 134 N. Y. 269 (1892), and cases cited; reargument denied, 136 N. Y. 639.

The action, although brought and prosecuted in the name of the people, is in the right of the corporation and for its benefit. Peo. v. Equitable Life Assurance Society, 124 A. D. 714 (1908).

Where the complaint in an action, brought by the Attorney-General in the name of the people under this article against directors to require them to account for their official conduct and repay property of the corporation converted or lost from neglect of duty, embraces both equitable and legal causes of action in one or more of which some of the defendants are not interested, the causes of action have been improperly united in violation of the Code, § 484, and a demurrer to the complaint will be sustained. Peo. v. Equitable Life Assurance Society, 124 A. D. 714 (1908).

The plaintiff in an action brought under this article must allege the *facts* constituting the negligence or misconduct, acts of misfeasance, or malfeasance for which it is sought to hold the directors. Peo. v. Equitable Life Assurance Society, 124 A. D. 714 (1908).

It seems that prior to the enactment of chapter 157 of the Laws of 1907 amending section 1781, subdivisions 1 and 2 of the Code (now subdivisions 1 and 2, supra), no action could be maintained for damages caused by the mere neglect of directors to properly perform their duties. Peo. v. Equitable Life Assurance Society, 124 A. D. 714 (1908). And see Stokes v. Stokes, 23 A. D. 552 (1897), and s. c., 91 Hun 605 and 87 Hun 152 so holding.

The term "violation of their duties" in subd. 2 means violation of their duties as officers and an action cannot be brought by creditors of a dissolved insolvent corporation in behalf of themselves and other creditors against

a former director and treasurer upon his promise to pay all the debts of the corporation in case he should be allowed to acquire its property at a judicial sale for less than its real value. The plaintiffs, however, are entitled to a judgment in equity that the defendant holds the property thus acquired impressed with a trust for the payment of the just claims against the corporation; the discharged receiver in the voluntary dissolution proceedings is not a necessary party plaintiff or defendant. Lilienthal v. Betz, 185 N. Y. 153 (1906).

Where the persons controlling the majority of stock and also the directors of a lessor and of a lessee corporation, for the purpose of wrecking the lessee, fraudulently procure the cancellation of a lease and take possession of the property in the name of the lessor, a resident stockholder of the lessee company may maintain an action against both companies to set aside the cancellation of the lease although both are foreign corporations. Such action, however, cannot be maintained under the above section because neither officers or directors are parties. Jacobs v. The Mex. Sugar Refining Co., Ltd., 104 A. D. 242 (1905).

If the complaint of a director against a co-director to compel restitution, for an accounting, a receiver and an injunction, states facts showing the plaintiff to be entitled to part of the relief demanded, the court may in its discretion grant a preliminary injunction if it is necessary to preserve the present status, and may also appoint a temporary receiver. Piza v. Butler, 90 Hun 254 (1895).

As to what will be deemed acquiescence by a creditor in a transfer to trustees and a mortgage made to secure creditors, see New Britain Bk. v. Cleveland Co., 91 Hun 447 (1895); affd., no op. 158 N. Y. 722 (1899).

Applicable to Foreign Corporations.

While the courts of this State will, under certain circumstances, appoint a receiver of a foreign corporation when necessary for the protection of the stockholders or creditors, they will not appoint a receiver of a foreign corporation simply because of general allegations of misconduct on the part of the directors or officers thereof. Philips v. Sonora Copper Co., 90 A. D. 140 (1904).

Section 91-a, post, applies to foreign corporations. German American Coffee Co. v. Diehl, 86 Misc. 547 (1914).

A director of a foreign corporation transacting business and having its principal office in this State may maintain an action against individuals who were formerly directors for an accounting and restoration of money belonging to the corporation alleged to have been misappropriated and wasted by them in violation of their duties; the contention, that these provisions apply to domestic corporations only and restrict the maintenance of such an action to directors thereof, is not only unauthorized by the general language of the statute but is contrary to justice and sound policy and would render impossible any other form of redress in cases of this character. Miller v. Quincy, 179 N. Y. 295 (1904); Acken v. Coughlin, 103 A. D. 1 (1905).

§ 91. Who may bring such an action. An action may be brought, as prescribed in the last section, by the attorney-general in behalf of the people of the state, or, except where the action is brought for the purpose specified in subdivision third or fourth

of that section, by a creditor of the corporation, or by a trustee, director, manager, or other officer of the corporation, having a general superintendence of its concerns.

Formerly Code Civ. Pro. § 1782.

For actions by receivers against delinquent directors see Gen. Corp. Law, § 231.

This article it seems was not intended to warrant the Attorney-General in bringing the action if only private interests were involved as is evident from the provisions of Gen. Corp. Law, § 304, which limit his authority to cases where in his opinion public interests require such an action. But it may be said to indicate a policy of the law that the public interests may be concerned, and when they appear to be, that then the action should be within the control of the Attorney-General. Swan v. Mutual Reserve Fund Life Assn., 155 N. Y. 9, 19 (1898).

A director of a domestic corporation may, where he seeks no receiver, maintain an action to prevent his co-directors from making a threatened unlawful alienation of the corporate property detrimental to it and its stockholders and he need not join the corporation as a party defendant. Green v. Compton, 41 Misc. 21 (1903).

A judgment creditor and not a creditor at large is meant. Belknap v. North Am. Life Ins. Co., 11 Hun 282 (1877); Cole v. Knickerbocker Life Ins. Co., 23 Hun 255 (1880); appeal dismissed by consent, 91 N. Y. 641; Paulsen v. Van Steenbergh, 65 How. 342 (1883); Swan v. Mut. Res. Fund Life Assn., 20 A. D. 255 (1897), affd., 155 N. Y. 9, on other grounds but containing dictum in accord; McKee v. City Garbage Co., 140 Mich. 497 (1905), construing the same statute in Michigan; but see Miller v. Barlow, 78 A. D. 331 (1903), where the court leaves undecided the question whether this section has changed the rule obtaining under the revised statutes.

The cause of action given to the respective officers and persons named in the section is not joint but several, and may be maintained by each as a party without joining the other parties named. Miller v. Barlow, 78 A. D. 331 (1903), and cases cited; the plaintiff director stands in the position of a trustee with respect to the creditors and others entitled to share in the assets. Id. Nor is it essential that the corporation should have been made a party plaintiff; nor is it necessary to aver as an essential element of the cause of action that the corporation has been applied to and has refused to bring the action or that such demand would be fruitless. Id.

The action may be maintained by a duly elected director and officer although he in no manner signified his acceptance of his election, acceptance in such case being presumed. Halpen v. Mutual Brewing Co., 20 A. D. 583 (1897).

The acquiescence of all the stockholders in the acts of the directors in so dealing with the assets as to deprive future creditors of the payment of their just claims will not avail as a defense to an action brought by an officer. Id.

An action to compel an accounting and to restrain the alienation of corporate property under the two foregoing sections does not contemplate the distribution of the corporate assets among creditors nor a dissolution of the corporation. Halpin v. Mutual Brewing Co., 91 Hun 220 (1895).

The power given the Attorney-General by this section does not, it seems, affect or take away his duty to proceed to protect the interests of the people and enforce a charitable trust, where the corporation beneficiaries who are made defendants take no steps to do so. An action under this section would lie to charge the officers with the consequences of their failure to enforce the

trust, but it could not reach the fund or compel distribution. Peo. v. Powers, 83 Hun 449 (1894), revsd., 147 N. Y. 104 (1895), on ground that the attempted trust was unenforceable, the court refusing to consider the right of the Attorney-General to enforce the trust.

If the plaintiff stockholder in an action to set aside a transfer also demands a suspension of the directors, although such suspension can only be at the suit of the Attorney-General, such demand will not prevent the maintenance of the action where plaintiff is otherwise entitled to equitable relief. Whitman v. Holmes Publishing Co., 33 Misc. 47 (1900).

A person employed to manage the affairs of a company for a year upon a salary may within the year maintain an action to set side an alleged unlawful alienation of the property made by the officers and trustees. Beecher v. Schieffelin, 4 Civ. Pro. 230 (1883).

Actions by Stockholders.

See also, "Stockholders' Actions," under section 34 of the General Corporation Law, ante.

In a representative action brought by a stockholder on his own behalf and also on behalf of all the other stockholders against the directors for their alleged negligent and wrongful acts in wasting assets, where the right of action belongs to the corporation and it has failed on demand to bring the action, the complaint should set forth but two things: first, the cause of action in favor of the corporation, which should be stated in exactly the same manner and with the same detail of facts as would be proper in case the corporation itself had brought the action; second, the facts which entitle the plaintiff to maintain the action in place of the corporation, that he is a stockholder therein, and that the corporation itself has either refused or unreasonably failed to bring the action. Kavanaugh v. Commonwealth Trust Co., 181 N. Y. 121 (1905); O'Connor v. Virginia Passenger & Power Co., 184 N. Y. 46 (1906); Continental Securities Co. v. Belmont, 206 N. Y. 7, 15 (1912), affg. 150 A. D. 298; Flynn v. Brooklyn City R. R. Co., 158 N. Y. 493 (1899); Clubb v. Cook, 161 A. D. 775 (1914); Weingreen v. Michelbacher, 139 A. D. 931 (1910); Kolb v. Mortimer, 135 A. D. 542 (1909); Sage v. Culver, 147 N. Y. 241 (1895). Ordinarily no other allegations are necessary or material. The amount of the corporate moneys or assets lost or wasted by the negligent or wrongful acts of the directors would be the measure of the amount of the recovery; allegations, therefore, as to the depreciation in the market value of plaintiff's stock is immaterial; neither would it be defense or mitigation that despite such wrongful acts the market value of the stock had been greatly enhanced. To justify a judgment there must be proof of some actual or threatened wrongdoing on the part of the defendants. 181 N. Y. 121, supra.

An action by directors is not a bar to an action brought by the stockholders for substantially the same relief, for the former is a statutory action and the latter one founded upon an equitable right which authorizes the stockholders to maintain an action in the right of the corporation. Loewenstein v. Diamond Soda Water M. Co., 94 A. D. 383 (1904).

It is only after the refusal of the corporation or its legal representatives to commence an action that stockholders, as the equitable owners of an undivided share of the corporate assets, may enforce the rights of the corporation against the directors or any others who have depleted, wasted or misappropriated the corporate property, and to this end they may prosecute any cause of action, legal or equitable. Where they have been forced to come into a court of equity for relief, their action against directors to

compel them to answer for negligence and breach of duty will be sustained under the allegations of the complaint, though the corporation itself might have maintained an action at law for the same relief. Moran v. Vreeland, 81 Misc. 664 (1913).

Complaint not Stating a Cause of Action.

A complaint in the suit of a stockholder and officer of a corporation against it and other stockholders and officers, asking (1) that the defendants account as directors and officers; (2) that they be required to pay to the corporation such sums as shall be found due; (3) that the defendants be enjoined from acting as directors or officers, and from disposing of the corporate assets or interfering with its affairs; (4) for the appointment of a receiver and the distribution of the corporate assets, fails to state a cause of action either in law or equity, there being no allegation that a demand has been made upon the corporate officers to bring suit or that if such demand had been made it would have been fruitless, and no statement of facts showing that corporate assets have been or are being wasted, or that the corporation is insolvent or in danger of becoming so, or that any reason exists for the appointment of a receiver and a distribution of the assets. Abbott v. Harbeson Textile Co., 162 A. D. 405 (1914).

When a director's complaint merely alleges that through a conspiracy certain of the defendants threaten to remove the directors including plaintiff from office, and have called a meeting of stockholders for that purpose and that the corporation has collected moneys from the shareholders and is paying it out without order and direction of the directors, and has called a meeting at which an assessment is to be levied so that moneys can be paid out for a purpose unknown to the plaintiff, it fails to state the cause of action under this section. Shulman v. Star Suburban Realty Co., 113 A. D. 759 (1906).

In an action in equity by a creditor to compel corporate directors and officers to account to the corporation for their transactions, a complaint which does not allege that the corporation is insolvent, and either that the plaintiff is a judgment creditor or facts showing that it would be impossible or useless to obtain a judgment against the corporation, is fatally defective. Steele v. Isman, 164 A. D. 146 (1914).

Distinction between Actions in Law and in Equity.

There is a distinction between an action in equity against a director for an accounting with respect to corporate property that has actually come into its hands and an action at law for damages sustained by the corporation in consequence of his willful or negligent acts falling within the terms misfeasance or non-feasance. Asphalt Const. Co. v. Bouker, 150 A. D. 691, 696 (1912).

Judgment Creditor May Bring Individual Action.

An individual action may be maintained by a judgment creditor against directors who have transferred the corporate assets, without providing for payment of plaintiff's claim, if rights of other creditors are not involved, and defendant directors on appeal cannot question the judgment on the theory that plaintiff should have sued in a representative capacity in behalf of either the corporation or all the creditors where no such issue was raised by the pleadings or at the trial and there was no proof as to other creditors entitled to recover. Buckley v. Stansfield, 155 A. D. 735 (1913), distg. Davis v. Wilson, 150 A. D. 704. The word "creditor" means judgment creditor. Id.

Only creditors whose claims have been reduced to judgment may maintain an individual action against directors. Buckley v. Stansfield, 155 A. D. 735, 742 (1913); Steele v. Isman, 164 A. D. 146 (1914).

A judgment creditor and not a creditor at large is meant. Belknap v. North Am. Life Ins. Co., 11 Hun 282 (1877); Cole v. Knickerbocker Life Ins. Co., 23 Hun 255 (1880); appeal dismissed by consent, 91 N. Y. 641; Bewley v. Equitable Life Assur. Soc., 61 How. Pr. 342; Paulsen v. Van Steenbergh, 65 How. 342 (1883); Swan v. Mut. Res. Fund Life Assn., 20 A. D. 255 (1897), affd., 155 N. Y. 9, on other grounds but containing dictum in accord; McKee v. City Garbage Co., 140 Mich. 497 (1905), construing the same statute in Michigan; but see Miller v. Barlow, 78 A. D. 331 (1903), where the court leaves undecided the question whether this section has changed the rule obtaining under the revised statutes.

Misjoinder of Causes of Action.

In a suit by a bondholder against a corporation and its directors, setting forth against the corporation a cause of action to recover proceeds of a mortgage foreclosure sale, and against the directors one to recover moneys claimed as wasted because of their wrong, the complaint is demurrable because of misjoinder of causes of action and that there was no cause of action against directors, for, under the circumstances, the action was derivative and plaintiff was not qualified to sue the directors not having exhausted his remedies against the corporation. Cass v. Realty Securities Co., 148 A. D. 96 (1911), affd., 206 N. Y. 649.

Stockholder May Sue in His Own Name when Corporation Refuses to Prosecute.

Where a corporation is exclusively under the control of the directors and officers whose acts and management are questioned, equity permits a stockholder to bring an action for an accounting in his own name. Sage v. Culver, 147 N. Y. 241 (1895).

Where a corporation refuses to prosecute individual directors for an alleged abuse of their trust, or a misapplication of corporate funds, and such directors are still in control, stockholders are entitled to sue for redress in their own name. In such cases a demand upon the corporation to bring the suit would be futile and unnecessary. Nash v. Hall Signal Co., 90 Hun 354 (1895), citing Brinckerhoff v. Bostwick, 88 N. Y. 52.

Demand Upon Directors to Sue.

See the above topical heading under section 34 of the General Corporation Law, ante, and authorities there cited.

Treasurer May Not Bring Action.

The treasurer is not a manager or other officer of the corporation "having a general superintendence of its concerns" within the meaning of this section, and, therefore, may not bring suit against a former treasurer for an accounting. Loughlin v. Wocker, 152 A. D. 466 (1912).

§ 91-a. Actions against officers by corporation, or receiver or trustee. The supreme court shall also have and exercise jurisdiction in equity, at the suit of a corporation, or of a receiver, or trustee in bankruptcy thereof, to compel one or more trustees,

directors, managers or other officers of the corporation to account for injury to or losses of the funds, assets or property of the corporation, caused by or through any neglect or failure of the defendants to perform, or for violation of, their duties. The court must, upon the application of either party, make an order directing the trial by jury of the issue of negligence, and for that purpose the questions to be tried must be prepared and settled as prescribed in section nine hundred and seventy of the code of civil procedure.

New section, added by L. 1913, ch. 633.

The effect of this section is to do away with the distinction between strict actions for an accounting of property actually received and for wrongful acts, and to authorize a single comprehensive action in equity in which the directors or officers of a corporation may be called to account for all of their acts while in office, whether the said acts consisted of actual misappropriation of funds or were negligence or neglect of duty resulting in damage. German American Coffee Co. v. Diehl, 86 Misc. 547 (1914).

This section authorizes an action against a single guilty director without joining his co-directors. 86 Misc. 547, supra.

§ 92. Visitatorial power over corporation not affected by this article. This article does not divest or impair any visitatorial power over a corporation, which is vested by statute in a corporate body, or a public officer.

Formerly Code Civ. Pro. § 1783.

ARTICLE 6

Action for Sequestration, Action for Dissolution and Action to Enforce Individual Liability of Officer and Member of Corporation

SECTION 100. Action by judgment creditor for sequestration.
101. Action to dissolve a corporation.
102. Who may bring action to dissolve a corporation.
103. Temporary injunction in action authorized by this article.
104. Temporary receiver.
105. Additional powers and duties of temporary receiver.
106. Permanent receiver.
107. Additional duties and liabilities of permanent receiver.
108. Application for appointment of receiver.
109. Officers and stockholders may be made parties in action brought by creditor.
110. Separate action may be brought against officers and stockholders.
111. Proceedings in such actions.
112. Distribution of property of corporation by judgment in actions under this article.

SECTION 113. Recovery of stosk subscriptions.
114. Liability of directors and stockholders.
115. Effect of this article.

§ 100. Action by judgment creditor for sequestration. Where final judgment for a sum of money has been rendered against a corporation created by or under the laws of the state, and an execution issued thereupon to the sheriff of the county, where the corporation transacts its general business, or where its principal office is located, has been returned wholly or partly unsatisfied, the judgment creditor may maintain an action to procure a judgment sequestrating the property of the corporation, and providing for a distribution thereof, as prescribed in section one hundred and twelve of this chapter.

Formerly Code Civ. Pro. § 1784.

Cross-References.

Motions for the sequestration of corporate property, or for the appointment of receivers thereof, must be made in the judicial district in which the principal place of business of the corporation is situated, except in certain actions brought by the Attorney-General. Gen. rules of practice, No. 80. A receiver may be appointed. Gen. Corp. Law, §§ 104, 106, 112, 306, post. Powers of receivers. Id., §§ 230–278, post. Provisions regulating action. Id., §§ 300–316, post. Provisions regulating creditors' actions generally. Code Civ. Pro., §§ 1871–1879. This article does not apply to religious and certain other corporations. Gen. Corp. Law, § 300, post.

Consolidators' Note.

This article consists of chapter 15, title 2, article 3 of the Code of Civil Procedure, entitled "Actions to procure the dissolution of a corporation and actions to enforce the individual liability of the officers or members of a corporation with or without a dissolution thereof." It has been inserted in the General Corporation Law without change. One or two provisions have been inserted in this article from other statutes, attention to which will be called by appropriate notes.

Assignment Pending Sequestration Proceedings.

When a general assignment for the benefit of creditors is made to the president of a corporation pending a motion for appointment of a temporary receiver, such assignee, having qualified, has a right to custody of the assets until the assignment is set aside, or the court stays his control over the funds, or substitutes another for him. Rump v. Van Rensselaer Realty Co., 138 A. D. 289 (1910).

Stockholder's Liability for Unpaid Stock.

A representative action in the right of the corporation may be maintained by a judgment creditor for sequestration of the corporate property and to recover on the personal liability of the subscribers to the capital stock, for the amounts unpaid thereon. Stevens v. Episcopal Church History Co., 140 A. D. 570 (1910); Beals v. Buffalo Expanded Metal Const. Co., 49 A. D. 589

(1900). Such liability may be enforced in an action brought pursuant to Gen. Corp. Law, §§ 100 et seq. (formerly Code, §§ 1784 et seq.), and the plaintiff is not required to seek his remedy under the Stock Corp. Law, § 56. 49 A. D. 589, supra. A receiver has no power to enforce such liability against stockholders. Farnsworth v. Wood, 91 N. Y. 308 (1883).

Receiver of Foreign Corporation; Jurisdiction of Court.

The provisions of sections 100, 106, 170, 191 and 230 are intended to regulate receivers of domestic corporations and not of foreign. An ancillary receiver appointed in this State, who is also receiver in the State of incorporation, may not have his accounts surcharged because he did not obtain an order of court authorizing him as ancillary receiver to turn over funds which came to him under his appointment in this State. Strauss v. Casey Mach. & Supply Co., 68 Misc. 474 (1910).

When an action is brought to dissolve a foreign corporation, and for appointment of a receiver to conserve the assets and admitted facts were sufficient to invoke jurisdiction of the court to preserve the assets within the State irrespective of the prayer for dissolution, the appointment of the receiver cannot be collaterally attacked, although the court has no jurisdiction to dissolve a foreign corporation. Horton v. McNally Co., 155 A. D. 322 (1913).

If an attaching creditor has consented to the appointment of a receiver in an action to dissolve a foreign corporation and marshal its assets, such creditor is estopped from thereafter claiming that the receivership should be vacated because the court has no jurisdiction of an action to dissolve a foreign corporation. Horton v. McNally Co., 155 A. D. 322 (1913).

The courts of this State have no jurisdiction to entertain an action to dissolve a foreign corporation upon the ground of insolvency, and to determine its existence and sequestrate its assets. Dreyfus & Co. v. Seale & Co., 37 A. D. 351 (1899); but the Supreme Court of this State has jurisdiction to appoint a receiver of the property of such corporation, situated within this State, for the benefit of the creditors. Horton v. McNally Co., 155 A. D. 322, 335 (1913), and cases cited.

The appointment in another State of receivers of a foreign corporation vests the corporate property in such receivers, subject, however, to the right of the courts of this State to control the corporate assets here for the benefit of domestic creditors. Courtright v. Vreeland, 64 Misc. 46 (1909); Hammond v. Nat'l Life Assn., 58 A. D. 453, 455; appeal dismissed, 168 N. Y. 262 (1901).

Decisions Generally.

The object of this section is to provide a summary mode of compelling the application of the property of a corporation which has allowed an execution to be returned unsatisfied, to the payment of its debts. Mann v. Pentz, 3 N. Y. 415 (1850).

The section is not applicable to a foreign corporation. Dreyfus v. Seale, 37 A. D. 351 (1899); Burgoyne v. Eastern & W. Ry. Co., 13 N. Y. Supp. 537 (1890).

The Supreme Court will not interfere with property of a foreign corporation at the instance of a judgment creditor by the appointment of a permanent receiver in the absence of proof that the corporation has fraudulently disposed of its property in the State, or that the corporation has property within this State to which the receivership might attach, and that equitable intervention was necessary. Dreyfus v. Seale, 37 A. D. 351 (1899), revsg. 18 Misc. 551.

A proceeding under this section is an equitable one and a judgment creditor seeking to sequestrate corporate property to satisfy his judgment may, if a fraudulent transfer of the property is alleged, join as parties defendant the persons who hold such property in their possession. Proctor v. Sidney Sash & Furniture Co., 8 A. D. 42 (1896); Bagley & Sewall Co. v. Lennig, 61 A. D. 26 (1901); Matter of Sayre, 70 A. D. 329 (1902).

The liability of a stockholder upon his unpaid subscription may be enforced in an action brought in pursuance of this section to which the stockholder is made a party defendant. Beals v. Buffalo Construction Co., 49 A. D. 589 (1900).

The remedy is limited to judgment creditors who have issued execution which has been returned unsatisfied. Mann v. Pentz, 2 Sandf. Ch. 257 (1845), revsd. on other grounds, 3 N. Y. 415 (1850); Dambman v. The Empire Mill, 12 Barb. 341 (1851); Radbourn v. Utica, etc., Ry. Co., 28 Hun 369 (1882).

If the judgment is opened and the defendant is allowed to defend, but the judgment is ordered to stand as security the sequestration proceedings fall because there is no final judgment. Radbourn v. Utica, etc., Ry. Co., 28 Hun 369 (1882).

Where executions have been issued but have not been returned, a judgment creditor of a corporation may bring an action in equity based upon the lien secured by the execution, to set aside an alleged fraudulent general assignment and a chattel mortgage and transfers of personal property, made in fraud of creditors, both before and after the general assignment. Home Bank v. Brewster & Co., 15 A. D. 338 (1897).

In such action however a receiver will not be appointed, and the relief granted must be limited to a judgment setting aside the assignment, mortgage and transfers only as to plaintiff and only so far as they affect the specific property upon which the executions were liens when the action was commenced. Home Bank v. Brewster & Co., 15 A. D. 338 (1897).

The action may be maintained by one creditor of the corporation without joining other creditors as plaintiffs or stating that it is for their benefit. Woodard v. Holland Medicine Co., 15 N. Y. Supp. 128 (1891).

The complaint need not set forth the facts upon which the original judgment was obtained. Woodard v. Holland Medicine Co., 15 N. Y. Supp. 128 (1891).

A proceeding by directors of a corporation for voluntary dissolution under article 9, post, does not take precedence over an action brought by a judgment creditor under this section. Matter of Hoagland, Robinson Co., 36 Misc. 28 (1901).

Where the court has appointed a permanent receiver in the sequestration proceeding and subsequently another person is appointed temporary receiver in the action brought by the directors for dissolution, the appointment of the latter will be vacated and the permanent receiver will be appointed temporary receiver in the directors' action. Matter of Hoagland, Robinson Co., 36 Misc. 28 (1901).

The entry of a judgment of sequestration and the appointment of a permanent receiver do not deprive the corporation of power thereafter to take and prosecute appeals from judgments recovered against it. Auburn Button Co. v. Sylvester, 68 Hun 401 (1893).

A final judgment appointing a receiver in an action brought under this section does not dissolve the corporation; it does not prevent the prosecutions of actions against the corporation. Mann v. Pentz, 3 N. Y. 415 (1850); Parry v. Am. Opera Co., 12 Civ. Pro. 194 (1887); Auburn Button Co. v. Sylvester, 68 Hun 401 (1893); People v. Troy Steel & Iron Co., 82 Hun 303 (1894);

Del Valle v. Navarro, 21 Abb. N. C. 136 (1887); nor does it supersede the right to maintain an action to dissolve the corporation. Dambman v. Empire Mill, 12 Barb. 341 (1851), but it does work a practical dissolution because of the distribution under the final judgment. Eddy v. Co-operative Dress Assn., 3 Civ. Pro. 442 (1883).

After the entry of judgment in favor of the plaintiff another creditor of the defendant corporation should not be allowed to become a party defendant unless it is shown that there is a reason for opening the judgment; that there is a defense to the action, and that the moving party has an interest in the subject of the action. Trowbridge v. Troy & N. E. Ry. Co., 113 A. D. 325 (1906).

Powers of receivers in sequestration proceedings considered in Bien v. Bixby, 18 Misc. 415 (1896).

A receiver has no absolute right to be substituted as plaintiff in an action previously brought by the corporation, and the granting or refusal is discretionary. Shaped S. S. Co. v. Snow, Church & Co., 20 Misc. 319 (1897).

A receiver of a gas company appointed upon foreclosure of a corporate mortgage on all property owned and to be acquired and all rents and tolls present and future, is entitled as against the receiver appointed in an action for sequestration to moneys due for manufactured gas and electricity sold before the appointment of either receiver. N. Y. Sec. & T. Co. v. Saratoga Gas & El. L. Co., 30 A. D. 89 (1898), appeal dismissed, 156 N. Y. 645 (1898).

A receiver may maintain an action to determine the validity of bonds claimed to be secured by a mortgage on corporate property. Hubbell v. Syracuse Iron Works, 42 Hun 182 (1886).

Where an action is brought by a judgment creditor to set aside a fraudulent transfer, and a receiver appointed in sequestration proceedings against the transferee is subsequently made a party defendant in said judgment creditor's action, and serves an answer upon his co-defendant admitting the allegations of the complaint and demanding affirmative judgment as prayed for in the complaint, the action will not be discontinued upon the payment of the plaintiff's claim as the receiver is entitled to an affirmative judgment irrespective of the right of the plaintiff to continue the action. Raymond v. Security Trust & Life Ins. Co., 101 A. D. 546 (1905).

Supplementary Proceedings Against Corporations.

Prior to September 1, 1908, an action under this section was the only remedy open to a creditor who had obtained a judgment against either a domestic corporation or a foreign corporation which was doing business within this State. Proceedings supplementary to execution which are usually employed by judgment creditors after return of execution unsatisfied were not available.

Section 2463 of the Code of Civil Procedure, which is the last section of the article relating to proceedings supplementary to execution against property (ch. 17, tit. 12, art. 1), reads as follows: "This article does not apply where the judgment debtor is a corporation created by or under the laws of the State, or a foreign corporation specified in section 1812 of this act, except in those actions or special proceedings brought by or against the people of the State."

The foreign corporation specified in section 1812 was one which "does business within the State or has within the State a business agency or a fiscal agency or an agency for the transfer of its stock." As the law stood prior to 1908, a foreign corporation which did *not* do business within the State could be proceeded against by supplementary proceedings as it was not

exempted by section 2463, supra. Logan v. McCall Publishing Co., 140 N. Y. 447 (1893).

By chapter 278 of the Laws of 1908 in effect September 1, 1908, that portion of section 2463 of the Code quoted above was repealed and thereby the exemption created in favor of a domestic corporation and certain foreign corporations was withdrawn. The result is that all limitations have now been removed and all of the sections of title 12, chapter 17 of the Code and the articles thereunder, apply to both domestic and all classes of foreign corporations. Rabbe v. Astor Trust Co., 61 Misc. 650 (1909); Meyer v. Consolidated Ice. Co., 116 N. Y. Supp. 906 (1909), 132 A. D. 265, affd. on another point, 196 N. Y. 471.

Service of an order directing appearance in supplementary proceedings against a foreign corporation is ineffectual if made on the person designated under the General Corporation Law, section 16. It must be served upon an officer pursuant to the Code, section 2452. Matter of Meyer v. Consolidated Ice Co., 196 N. Y. 471 (1909).

It appears therefore that the judgment creditor of a domestic corporation may proceed either under this section or by supplementary proceedings under the Code. The Code provisions, however, are much to the advantage of the vigilant creditor.

Section 112 of this article directs that the final judgment must provide for a fair distribution amongst the creditors in the same order as in the case of voluntary dissolution of the corporation. Under a distribution pursuant to section 261, post, the claims of judgment creditors are subordinate to debts due the United States and to fiduciaries and are preferred over other creditors only to the extent of the value of the real estate on which the judgments shall respectively be liens. As it is a condition precedent to the maintenance of an action for sequestration that execution be returned wholly or partly satisfied, there would be no preference whatever in favor of the judgment creditor. On the other hand if a proceeding supplementary to execution be instituted and a receiver appointed, the receiver must appropriate the property of the judgment debtor to the satisfaction of the judgment under which he is appointed. Goddard v. Stiles, 90 N. Y. 199 (1882), for he represents only the one judgment creditor. Price v. Price, 21 A. D. 597 (1897); Stephens v. Meriden Britannia Co., 160 N. Y. 178, 183, 184 (1899).

§ 101. Action to dissolve a corporation. In either of the following cases, an action to procure a judgment, dissolving a corporation, created by or under the laws of the state, and forfeiting its corporate rights, privileges and franchises, may be maintained, as prescribed in the next section:

1. Where the corporation has remained insolvent for at least one year.

2. Where it has neglected or refused, for at least one year, to pay and discharge its notes or other evidences of debt.

3. Where it has suspended its ordinary and lawful business for at least one year.

4. If it has banking powers, or power to make loans on pledges or deposits, or to make insurances, where it becomes insolvent or

unable to pay its debts, or has violated any provision of the act, by or under which it was incorporated, or of any other act binding upon it.

Formerly Code Civ. Pro. § 1785.

The court has no general jurisdiction of an action brought for dissolution; its power in that respect is derived solely from the statute and unless the complaint in an action brought to dissolve a corporation shows the jurisdictional facts, the court has no power to act, its decree is void and the corporation still exists. Osborn v. Montelac Park, 89 Hun 167 (1895), aff'd., 153 N. Y. 672 (1897); Bliven v. Peru Steel & I. Co., 9 Abb. N. C. 205 (1881); Denike v. N. Y. & R. Lime Co., 80 N. Y. 599 (1880), and cases therein cited.

The Supreme Court upon proof of the insolvency of a corporation, be it regularly or irregularly organized, has the power to terminate its existence, sell its assets and pay its creditors. Matter of N. Y., Westchester & Boston Ry. Co., 193 N. Y. 72 (1908).

The section refers to all corporations created by or under the laws of the State. Peo. v. Excelsior Gas L. Co., 8 Civ. Pro. 390 (1886).

In an action by the Attorney-General to procure a judgment of dissolution, a complaint is demurrable which merely alleges that in the opinion of the Superintendent of Banks and the Attorney-General it is unsafe and inexpedient for the defendant to continue to transact business. In order to justify an action by the Attorney-General under this section, one or more of the facts specified in the section should be alleged. Peo. v. Manhattan Real Estate & L. Co., 175 N. Y. 133 (1903).

After the State Superintendent of Banks has taken possession of the assets of an insolvent banking corporation with the intention of having an action brought by the Attorney-General to dissolve the same, the directors cannot anticipate such action on the part of the State by instituting a proceeding for voluntary dissolution. Matter of Murray Hill Bank, 153 N. Y. 199 (1897).

The proceedings taken by the Attorney-General have priority, the court at special term has no power to appoint a receiver in the proceedings commenced by the directors and the latter proceedings abate on the entry of a judgment dissolving the corporation in the action brought by the Attorney-General. Matter of Murray Hill Bank, 153 N. Y. 199 (1897).

When a foreign corporation is dissolved by a judicial decree in the State of its incorporation and a permanent receiver is appointed, it ceases to exist and a proceeding to adjudge an executrix to be in contempt for failure to obey a direction to pay moneys to said corporation abates upon proof of such dissolution being presented. Matter of Skelly, 109 A. D. 58 (1905).

Insolvency.

The mere fact that the assets of a corporation are less than its liabilities does not necessarily constitute insolvency. The test is a general inability to pay obligations as they become due in the regular course of business; but this proceeds upon the theory that the corporation is continuing in business and, therefore, has reason to expect changed conditions which will improve its financial standing and enable it to meet its debts as they mature, an honest expectation in the exercise of reasonable intelligence, entertained sincerely and in good faith, of going on with its business and paying all of its debts. Abrams v. Manhattan Consumers Brewg. Co., 142 A. D. 392 (1911), citing Curtis v. Leavitt, 15 N. Y. 9.

A corporation like an individual is insolvent when it is not able to pay its

debts. Insolvency means a general inability to answer in the course of business the liabilities existing and capable of being enforced. Brouwer v. Harbeck, 9 N. Y. 589, 594 (1854); Marsh v. Dunckel, 25 Hun 167 (1881); Peo. v. Excelsior Gas L. Co., 8 Civ. Pro. 390 (1886); Baker v. Emerson, 4 A. D. 348 (1896); Olney v. Baird, 7 A. D. 95 (1896); Matter of Lenox Corp., 57 A. D. 515 (1901); Horrocks Desk Co. v. Fangel, 71 A. D. 313 (1902).

It is not an absolute inability to pay one's debts at some future time upon a settlement and winding up of all a trader's concerns, but as not being in a condition to pay one's debts in the ordinary course as persons carrying on trade usually do. An inability to pay arising from unexpected and unforeseen contingencies would not alone be evidence of insolvency. Ferry v. Bank of Central N. Y., 15 How. Pr. 445 (1858).

The entry of judgments against the corporation and its inability to pay them and other obligations establishes insolvency. Nealis v. Am. Tube & Iron Co., 76 Hun 220 (1894), aff'd., 150 N. Y. 42 (1896).

As to sufficiency of allegations in complaint see Swords v. Northern Light Oil Co., 17 Abb. N. C. 115 (1883).

The Terms "Corporate Rights, Privileges and Franchises" Differentiated from Special Franchises.

The terms "corporate rights, privileges and franchises" in this section must be differentiated from the special franchise or right conferred by the action of a municipality in giving the right to lay and maintain a piping system in its streets. The provisions of this section relate solely to the right of corporate existence and the corporate rights given by the statutes, but do not relate to the property rights acquired independently thereof. The corporate existence may be terminated either by legislative action or judicial decree, but such proceedings do not impair property rights of the corporation dissolved, such as franchise rights in public streets. Vil. of Fredonia v. Fredonia Central Gas Lt. Co., 84 Misc. 150 (1914), citing People v. O'Brien, 111 N. Y. 1.

Forfeiture Enforcible Only by State.

A party other than the State may not in a collateral proceeding contend that a corporation by a failure to exercise its corporate powers has forfeited its existence; such a forfeiture can only be enforced in an action brought for that purpose by the Attorney-General in the name of the State under the provisions of this section. Vil. of Fredonia v. Fredonia Central Gas Lt. Co., 84 Misc. 150 (1914).

Failure to Pay Notes.

A corporation cannot be said to have neglected or refused to pay its obligations because its demand notes remain outstanding and unpaid until payment has been demanded. Denike v. N. Y. & R. Lime Co., 80 N. Y. 599 (1880).

A dissolution is proper where the corporate notes have not been paid for more than a year, although the corporation has been discharged in bankruptcy, because such discharge does not operate as a payment of the notes. Peo. v. Troy Chemical Co., 118 A. D. 437 (1907).

Suspension of Business.

The only remedy where there has been an abandonment and a non-user of corporate powers is an action by the people to vacate the charter or annul the existence of the corporation, and a like remedy is applicable when a rail-

road corporation abandons part of its road and continues to operate the remainder under its corporate franchise. People v. Albany & Vermont R. R. Co., 24 N. Y. 261 (1862).

The fact that a gas company had suspended its ordinary and lawful business for more than one year and for that reason was liable to a judgment of dissolution and the forfeiture of its corporate rights and privileges, under this section, does not affect its special franchise to maintain pipes in the streets, that being a property right which survives the dissolution of the corporation and belongs to its creditors and stockholders upon a distribution of its assets. Vil. of Fredonia v. Fredonia Central Gas Lt. Co., 84 Misc. 150 (1914).

Where a corporation whose ordinary business is to write insurance resolves to cease so doing, to cancel outstanding policies and to liquidate all liabilities and for more than a year had issued no new policy, its ordinary business was suspended. Matter of Jackson Marine Ins. Co., 4 Sandf. Ch. 559 (1847).

An election of trustees apparently made merely to keep the corporation in existence is not sufficient if a corporation suspends its operations. Briggs v. Penniman, 8 Cow. 387 (1826).

If insolvency and suspension of business are admitted, any excuse pleaded therefor will not raise an issue or prevent judgment of dissolution. Peo. v. Northern R. R. Co., 42 N. Y. 217 (1870).

Where the president and principal stockholders assume the use of the corporate property as their own for several years, there was a suspension of ordinary business sufficient to justify a decree of dissolution. Conroy v. Gray, 4 How. 166 (1849).

An allegation that the defendant never assumed the performance of what it claims to be its lawful business and that it has not commenced construction work, is equivalent to an allegation of suspension of ordinary business. Peo. v. N. Y. City U. R. Co., 50 St. Rep. 454 (1892), affd. on op. below, 137 N. Y. 606 (1893).

An allegation of "practical suspension to a great extent for the whole or greater part of the year" is not sufficient. Bliven v. Peru Steel & Iron Co., 9 Abb. N. C. 205 (1881).

Non-user or suspension for a period less than one year is not a ground for dissolution. Peo. v. Atlantic Ave. R. Co., 125 N. Y. 513 (1891); Peo. v. Oriental Bank, 124 A. D. 741 (1908).

A suspension for six years and the sale of all corporate real estate is sufficient ground. Peo. v. Seneca Lake Grape, etc., Co., 52 Hun 174 (1889). See other cases under Gen. Corp. Law, § 131.

A Decree Necessary.

Suspension of business for a year is not ipso facto a dissolution. There must be a decree of dissolution. Mickles v. Rochester City Bk., 11 Paige 118 (1844); affd., 11 Paige 129, note (1845); Cary v. Schoharie Valley Machine Co., 2 Hun 110 (1874); Ormsby v. Vermont Copper Co., 65 Barb. 360 (1873); revsd. on another point, 56 N. Y. 623 (1874); Clancey v. Onondaga F. & C. Mfg. Co., 62 Barb. 395 (1862); Nimmons v. Tappan, 2 Sweeny 652 (1870).

The appointment of a receiver does not dissolve the corporation so as to relieve a stockholder of his liability. Kincaid v. Dwinelle, 59 N. Y. 548 (1875).

Until judgment dissolving the corporation and ending its existence, an action may be maintained against the corporation upon contract as well after as before the appointment of a receiver. Pringle v. Woolworth, 90 N. Y. 502 (1882); Parry v. Am. Opera Co., 12 Civ. Pro. 194 (1887).

A forfeiture of the franchises of a corporation through abuse or neglect can

only be enforced by the sovereign power in some proceeding instituted in its behalf, unless there be special provisions by statute. Denike v. N. Y. & R. Lime, etc., Co., 80 N. Y. 599 (1880).

The ground for forfeiture cannot be taken advantage of against the corporation collaterally. Towar v. Hale, 46 Barb. 361 (1866).

Until the decree is made creditors may proceed to obtain satisfaction of their debts unless restrained by injunction and a sale of property under execution will transfer title to the purchaser. Mickles v. Rochester City Bk., 11 Paige 118 (1844), affd., 11 Paige 129, note (1845).

Result of Dissolution.

As to result in case of voluntary proceedings see Gen. Corp. Law, § 191.

See Gen. Corp. Law, § 110, as to enforcing liability of officer after dissolution.

As to result in case of dissolution without judicial proceedings see Gen. Corp. Law, § 221, subdiv. 3.

The dissolution of a corporation terminates an action pending against it and all subsequent proceedings therein are void unless the action be continued by order of court against the receiver. McCulloch v. Norwood, 58 N. Y. 562 (1874); Sturges v. Vanderbilt, 73 N. Y. 384 (1878); People v. Knickerbocker Life Ins. Co., 106 N. Y. 619 (1887); Peo. v. Troy Steel & Iron Co., 82 Hun 303 (1894); Town of Watervliet v. Town of Colonie, 27 A. D. 394 (1898); Matter of Murray Hill Bank, 153 N. Y. 199 (1897), affg. on this point 14 A. D. 318.

The power to continue the action is now vested in the Supreme Court pursuant to sections 755 and 756 of the Code, L. 1832, ch. 295 having been repealed. Peo. v. Troy Steel & Iron Co., 82 Hun 303 (1894).

Process to commence an action cannot be served on an officer of the corporation after its dissolution. Hetzel v. Tannehill Silver M. Co., 4 Abb. N. C. 40 (1877).

The rule of the common law that real estate held by a corporation at the time of its dissolution reverts to the grantor does not prevail in the State of New York. Where lands are conveyed absolutely to a corporation having stockholders, no reversion or possibility of a reverter remains in the grantor. Heath v. Barmore, 50 N. Y. 302 (1872).

Where a street railroad is dissolved by statute all its property, including street rights or franchises, also its mortgages and valid contracts survives its dissolution and the directors of the company then in office become vested with title to the property as directors for creditors and stockholders. Peo. v. O'Brien, 111 N. Y. 1 (1888).

A lease to the corporation is not terminated by its dissolution and its covenant to pay rent does not thereupon cease to be obligatory. The lease is an open and subsisting obligation and the lessors are entitled to payment of the rent as it accrues. Peo. v. National Trust Co., 82 N. Y. 283 (1880); but a contract for personal services is terminated. Peo. v. Globe Mut. Life Ins. Co., 91 N. Y. 174 (1883).

The dissolution of a corporation after an action has been commenced cannot be pleaded by an amended answer as a defense to the action. The authority of the attorney ceases on dissolution and until a representative of the corporation is brought in as a party all proceedings are suspended. Wamsley v. Horton & Co., 87 Hun 347 (1895).

If the directors continue to transact business after the expiration of the charter and give a promissory note neither they nor the stockholders can be

held liable as partners. The holder must look to the directors in their representative capacity. Central Savings Bk. v. Walker, 66 N. Y. 424 (1876).

The directors after dissolution have no power to invest the assets in the stock of another corporation without consent of all stockholders. Frothingham v. Barney, 6 Hun 366 (1876).

The creditors have an equitable lien upon the assets in the hands of another for the payment of their debts and it is immaterial how the person holding them acquired possession, the only question being whether he has acquired a better equity than the creditors. Tinkham v. Borst, 31 Barb. 407 (1860).

A creditor will not be permitted to recover for a breach of contract if he himself has instigated the action in behalf of the people which brought about the dissolution and was the responsible cause of it for he cannot assert that it was not a necessity. Lorillard v. Clyde, 142 N. Y. 456 (1894); where performance of a contract of guaranty depends upon the continued existence of a corporation which is assumed as the basis of the agreement, its dissolution terminates the obligation. Id.

§ 102. Who may bring action to dissolve a corporation. An action specified in the last section, may be maintained by the attorney-general, in the name and in behalf of the people. And whenever a creditor or stockholder of any corporation submits to the attorney-general a written statement of facts, verified by oath, showing grounds for an action under the provisions of the last section, and the attorney-general omits, for sixty days after this submission, to commence an action specified in the last section, then, and not otherwise, such creditor or stockholder may apply to the proper court for leave to commence such an action, and on obtaining leave may maintain the same accordingly; and if there be no person in existence upon whom service of the summons can be made under the provisions of section four hundred and thirty-one of the code of civil procedure, service of the summons in such action may be made in such manner as the court upon application by petition may direct.

Formerly § 1786, Code Civ. Pro., as am'd by L. 1912, ch. 204.

The last clause was added by the amendment of 1912.

See Gen. Corp. Law, § 304, post, as to duty of Attorney-General.

It seems that the action must be brought either in the name of the people or in the name of the party in interest and not in the name of the people on the relation of a party. Peo. ex rel. Hearst v. Ramapo Water Co., 51 A. D. 145 (1900).

If the action is solely to dissolve, the officers and directors are not, it seems, proper parties. Knickerbocker v. Groton Bridge & Mfg. Co., 111 A. D. 145 (1906).

The lessee of a portion of the road of a railroad corporation has such an interest in the subject of the action that it may under section 452 of the Code be made a defendant, in an action brought by the Attorney-General for a dissolution. Peo. v. Albany & Vermont R. R. Co., 77 N. Y. 232 (1879).

Where the directors of an insolvent company refuse to bring proceedings for its dissolution so that the rights of the creditors and stockholders may be protected and there is danger that all the assets will be wiped out by executions prior to the expiration of thirty days, the stockholders may maintain an action in equity to compel a distribution of the assets and the court has power to appoint a receiver to preserve the assets. Porter v. Industrial Information Co., 5 Misc. 262 (1893).

§ 103. Temporary injunction in action authorized by this article. In an action, brought as prescribed in this article, the court may, upon proof of the facts authorizing the action to be maintained, grant an injunction order, restraining the corporation, and its trustees, directors, managers and other officers, from collecting or receiving any debt or demand, and from paying out, or in any way transferring or delivering, to any person, any money, property, or effects of the corporation, during the pendency of the action; except by express permission of the court. Where the action is brought to procure the dissolution of the corporation, the injunction may also restrain the corporation, and its trustees, directors, managers and other officers, from exercising any of its corporate rights, privileges, or franchises, during the pendency of the action; except by express permission of the court. The provisions of title second of chapter seventh of the code of civil procedure, relating to the granting, vacating or modifying of an injunction order, apply to an injunction order, granted as prescribed in this section; except that it can be granted only by the court.

Formerly Code Civ. Pro. § 1787.

In an action under section 90, supra, to compel an officer of a foreign corporation to account, the court will enjoin only the defendant who has been personally served with process from disposing of or in any way interfering with the corporate property. Acken v. Coughlin, 103 A. D. 1 (1905).

The authority will only be exercised when necessary to protect the corporation or its stockholders against an unlawful disposition of the property, pendente lite. Acken v. Coughlin, 103 A. D. 1 (1905).

In an action brought for a receiver because there was no officer empowered to preserve the property, the court may enjoin the prosecution of a sequestration action when it appears from the facts to be for the best interests of all creditors. Smith v. Danzig, 3 Civ. Pro. 127 (1883).

Notice of an application to modify the injunction must be given to the Attorney-General pursuant to G. C. L., § 312, post. Dohn v. The Buffalo Am. Co., 66 A. D. 446 (1901).

§ 104. Temporary receiver. In such an action, the court may also, at any stage thereof, appoint one or more receivers of the property of the corporation. A receiver, so appointed, before final judgment is a temporary receiver, until final judgment is

entered. A temporary receiver has power to collect and receive the debts, demands, and other property of the corporation; to preserve the property, and the proceeds of the debts and demands collected; to sell or otherwise dispose of the property as directed by the court; to collect, receive and preserve the proceeds thereof; and to maintain any action or special proceeding, for either of those purposes. He must qualify as prescribed by law for the qualification of a permanent receiver. Unless additional powers are specially conferred upon him, as prescribed in the next section, a temporary receiver has only the powers specified in this section, and those which are incidental to the exercise thereof.

Formerly Code Civ. Pro. § 1788, in part. For remainder of section, see this article, § 106.

When Appointed.

A temporary receiver should be appointed only where it is essential to the protection of the plaintiff's rights prior to final judgment, and the facts and circumstances showing the necessity of the receivership pendente lite must be shown. The bare allegations of a verified complaint are insufficient as are unsupported statements on information and belief. Kieley v. Barron, etc., Co., 87 A. D. 317 (1903); Weber v. Wallerstein, 111 A. D. 700 (1906); Hastings v. Tousey, 121 A. D. 815 (1907); Peo. v. Oriental Bank, 124 A. D. 741 (1908); Federman v. Standard Churn Mfg. Co., 128 A. D. 493 (1908); Fenn v. Ostrander, 132 A. D. 311 (1909), 116 N. Y. Supp. 1083.

Receiver Pendente Lite.

Where, pending a stockholder's action against a foreign corporation and its officers to set aside certain alleged fraudulent transfers and to prevent other such transfers, a receiver is appointed by a court in the exercise of its equitable jurisdiction as a so-called common law receiver pendente lite of the corporate property to prevent unlawful disposition and waste thereof, such receiver does not take title to the property, nor does he possess authority to maintain an action or special proceeding for the purpose specified in this section. Matter of Howell v. German Theatre, Inc., 64 Misc. 110 (1909).

Notice to Defendant.

The defendant should have notice of the application. Code, § 714; Gen. Corp. Law, § 306; but see Gen. Corp. Law, § 150, post, as to moneyed corporations.

Title of Temporary Receiver.

The temporary receiver acquires no title but only the right of possession as the officer of the court. The title remains in those in whom it was vested when the appointment was made. Mutual Brewing Co. v. N. Y. & C. P. F. Co., 16 A. D. 149 (1897); Keeney v. Home Ins. Co., 71 N. Y. 396 (1877); Sigua Iron Co. v. Brown, 171 N. Y. 488 (1902), and cases cited.

The power of the Supreme Court as successor to the Court of Chancery to appoint temporary receivers is not dependent upon statute but is incidental to the jurisdiction of the court. Keeney v. Home Ins. Co., 71 N. Y. 396 (1877); Decker v. Gardner, 124 N. Y. 334 (1891); Stokes v. Hoffman House, 167 N. Y. 554 (1901); Prince v. Schlesinger, 116 A. D. 500 (1906).

He is a mere custodian and manager of the property under the direction of the court during the pendency of the action. Herring v. R. R. Co., 105 N. Y. 340 (1887); Sigua Iron Co. v. Brown, 171 N. Y. 488, 494 (1902).

Powers and Liabilities.

For discussion of powers and duties of both temporary and permanent receivers before the Code of Civil Procedure see Herring v. R. R. Co., 105 N. Y. 340 (1887).

Where a third party collects money under a judgment entered pursuant to an offer made in contemplation of insolvency, the temporary receiver having obtained leave may maintain an action to recover the moneys and without joining the corporation as a defendant. Nealis v. Am. Tube & Iron Co., 150 N. Y. 42 (1896).

The receiver has no powers except such as are conferred by the order of his appointment, by statutory provision and the course and practice of the court. Murray v. Cantor, as Receiver, 18 Misc. 389 (1896); 20 Am. & Eng. Ency. of Law, 111–113; Corey v. Long, 12 Abb. Pr. N. S. 427 (1872); Dickerson v. Van Tine, 1 Sandf. 724 (1848); Verplanck v. Mercantile Ins. Co., 2 Paige 438 (1831). A receiver cannot appoint a deputy without special order of the court. Id.

If not authorized to continue the business or dispose of the property, the estate is not liable for obligations incurred by the receiver. Meyer v. Lexow, 1 A. D. 116 (1896); Appleton v. Welch, 20 Misc. 343 (1897); in such case if the receiver is liable at all it is individually. Id.

He may by order be authorized to finish and complete outstanding contracts. Nason Mfg. Co. v. Garden, 52 A. D. 363 (1900).

When authorized to continue the business the receiver may purchase goods necessary to do so and is not individually liable where the vendor dealt with him upon faith of the receivership alone. Olpherts v. Smith, 54 A. D. 514 (1900), affd., 173 N. Y. 593 (1903).

He may apply to the court for instructions at any time. Peo. v. St. Nicholas Bank, 76 Hun 522 (1894).

The appointment does not prevent the prosecution of an action pending and there need be no substitution of the temporary receiver. U. S. Vinegar Co. v. Spamer, 143 N. Y. 676 (1894).

He is not the agent of the company of whom he is appointed receiver in the sense that he has authority to bind the party by any act or omission. Ahern v. Steele, 115 N. Y. 203–232 (1889); Stannard v. Reid & Co., 118 A. D. 304 (1907).

His relation to the parties is highly fiduciary and he cannot be interested in the purchase of the corporate property at foreclosure. Atkins v. Judson, 33 A. D. 42 (1898).

Decisions Generally.

A foreign judgment against a corporation, in an action in which it appeared, obtained after the appointment of a temporary receiver, is valid, and such judgment is competent evidence to establish before the referee, in this State, the existence of the indebtedness of the corporation. Peo. v. Commercial Alliance Life Ins. Co., 5 A. D. 273 (1896). Until the corporation is dissolved by the entry of final judgment its ability to sue and its liability to be sued remain, and are not affected by the order appointing a temporary receiver. Id. The appearance of the defendant may be established by an exemplified copy of the record in the action showing that the defendant did appear by an attorney of the court in which the action was pending. Id.

The title of a receiver in an action brought by the people to procure the dissolution of a corporation, to the corporate assets relates back to the commencement of the action, and the effect of the judgment of dissolution is to determine that the corporation was insolvent when the action was begun. Higgins, as Receiver, *v.* Worthington, 90 Hun 436 (1895).

Where a receiver brings an action he will not be required to file security for costs merely because the corporation is insolvent, or because he has no funds in his hands. It is necessary, in addition to the fact of insolvency, to show that the action was brought in bad faith or heedlessly, or that the plaintiff will not probably succeed. Hale v. Mason, 86 Hun 499 (1895).

An auxiliary receiver of a foreign corporation appointed in this State is merely the custodian of the property within the State for preserving the assets, that creditors may reach them without being compelled to go to a foreign jurisdiction to prove their claims, and has only the powers conferred by the order appointing him. In seeking to set aside a fraudulent transfer by a corporation, he acts, not for the corporation, but adversely to its interests and as representing the creditors, and, conceding that he might be authorized to maintain the action, would have to show a judgment and execution returned unsatisfied, as against the corporation, before he could maintain his suit. Buckley v. Harrison, 10 Misc. 683 (1895); and see further cases under Gen. Corp. Law, § 306, post: also s. c. in 1 Ann. Cas. 335 and note thereto.

Compensation of Temporary Receivers.

Where on a motion to discharge temporary receivers, for an accounting and for permission to resume business, all parties are before the court, it has jurisdiction to determine the compensation of the receivers as a part of the accounting. A separate proceeding for that purpose is not necessary or proper. The courts are not bound to allow the commissions agreed upon between the receivers and the directors of the corporation. Peo. v. Knickerbocker Trust Co., 127 A. D. 215 (1908); reargument denied, 127 A. D. 217.

It is the practice of the Supreme Court before passing upon the accounts of receivers to submit them to a referee where large sums must be accounted for. The fact that an order appointing the receivers has been vacated does not establish that they are not entitled to compensation as a matter of law if the order was vacated merely because improvidently granted and not because of lack of jurisdiction. If the order of appointment is vacated the accounts and objections should be referred, and the referee should report with an opinion covering the question of the receiver's right to compensation, and the amount thereof. Peo. v. Oriental Bank, 129 A. D. 865 (1909).

The amount of commissions is governed by Code, § 3320. Matter of Smith Co., 31 A. D. 39 (1898); Gen. Corp. Law, §§ 277 and 278 are by § 230 made applicable only to permanent receivers.

The commissions are not to be computed simply upon the cash which actually comes into his hands, but he may be entitled in an extreme case to two and one-half per cent. of the value of the property coming into his hands for receiving and protecting the same, such amount to be determined and allowed by the court. Matter of Smith Co., 31 A. D. 39 (1898).

§ 105. Additional powers and duties of temporary receiver. A temporary receiver, appointed as prescribed in the last section, is, in all respects, subject to the control of the court. In addition to the powers conferred upon him, by the provisions of the last

section, the court may, by the order or interlocutory judgment appointing him, or by an order subsequently made in the action, or by the final judgment, confer upon him the powers and authority, and subject him to the duties and liabilities, of a permanent receiver, or so much thereof as it thinks proper; except that he shall not make any distribution among the creditors or stockholders, before final judgment, unless he is specially directed so to do by the court.

Formerly Code Civ. Pro. § 1789.

It is the evident policy of the statute to vest in the temporary receiver many of the important powers that are exercised by a permanent receiver, and this for the very obvious reason that before final judgment in an action to procure the dissolution of a corporation it is of vital importance that the title of the corporate property should be vested in the officer of the court who has full authority to reduce it to possession wherever found and to maintain any action or special proceedings necessary in the premises. Nealis v. Am. Tube & Iron Co., 150 N. Y. 42 (1896).

In addition to the general authority conferred by the previous section the temporary receiver may obtain special authority under this section to conduct, institute and prosecute any and all proceedings that may be necessary to redeem property from which a corporation has been dispossessed. Bien v. Bixby, 18 Misc. 415 (1896); and to set aside fraudulent transfers. Stiefel v. N. Y. Novelty Co., 14 A. D. 371 (1897).

The court has power to authorize the receiver of a railroad to issue receiver's certificates to preserve the property. Rochester Trust, etc., Co. v. Oneonta, etc., Ry. Co., 122 A. D. 193 (1907).

Continued as Permanent Receiver.

Where a temporary receiver, appointed in an action to sequestrate the property of a corporation, has duly executed and filed the requisite bond, and thereafter, under the judgment in the action, is continued as permanent receiver, while a further bond may be exacted in the discretion of the court, he is under no obligation to furnish it until required to do so, and his failure to do so does not affect his power to act as permanent receiver. Jones v. Blun, 145 N. Y. 333 (1895).

State and Federal Jurisdiction.

An injunction order restraining the officers and directors of a corporation from acting as such is not a violation of the Federal statutes as preventing such officers from instituting bankruptcy proceedings, since the order merely restrains them pending the further order of the court, and can be modified upon a proper application. Goss v. Warp Twisting In Machine Co., 133 A. D. 122 (1909).

The fact that the Federal Court upon application of general creditors appoints receivers of a domestic street railway company will not preclude the State from maintaining an action for dissolution because of insolvency. Peo. v. N. Y. C. Ry. Co., 57 Misc. 114 (1907). The State receivers will be directed to apply to the Federal Court to relinquish control of the corporate property. Id.; but see Penn. Steel Co. v. N. Y. C. Ry. Co., 160 Fed. 224 (1908), and Re Met. Ry. Receivership, 208 U. S. 90 (1908).

Where receivers in an action in the Federal Court brought by policyholders of an insurance company charging insolvency have taken possession of the corporate assets and thereafter the Attorney-General brings an action in the State Court for dissolution and permanent receivers are appointed, the Federal Court will not surrender the property to the State receivers. The dissolution of the corporation does not oust the Federal Court of jurisdiction. Robinson v. Mutual Reserve Life Ins. Co., 162 Fed. 794 (1908).

When a State court has acquired jurisdiction over property before any application is made to the Federal Court, it has the right while lawfully exercising that jurisdiction to determine how far it will permit any other court to interfere therewith. The jurisdiction does not necessarily depend on possession, but is acquired as soon as the receiver has been appointed and has qualified. Palmer v. Texas, 212 U. S. 118 (1909).

§ 106. Permanent receiver. A receiver appointed by or pursuant to a final judgment in the action, or a temporary receiver who is continued by the final judgment, is a permanent receiver, and has all the powers and authority conferred, and is subject to all the duties and liabilities imposed upon a receiver in article eleven of this chapter.

Thus am'd by L. 1909, ch. 240. Formerly Code Civ. Pro. § 1788, in part. Remainder of said section in § 104.

Consolidators' Note.

This section was formerly a part of section 1788 of the Code of Civil Procedure. The original section provided that a permanent receiver should have all the powers, duties and liabilities of receivers appointed in proceedings for the voluntary dissolution of a corporation. The powers, duties and liabilities of such receivers have been consolidated in article 11 of this chapter and the reference in this section has been changed accordingly.

As to powers, duties and liabilities of permanent receivers, see article 11.

§ 107. Additional duties and liabilities of permanent receiver. A permanent receiver shall keep an account of all moneys received by him, and on the first days of January, April, July and October, in each and every year make and file a written statement, verified by his oath that such statement is correct and true, showing the amount of money received by such receiver, his agents or attorneys, the amount he has a right to retain and the items for which he claims to retain the same, and the distributive share due each person interested therein. He shall pay such distributive share to the person or persons entitled thereto, on demand, at any time after such statement. Such account, statement, and all the books and papers of the corporation in the hands of such receiver, shall at all reasonable times be open for the inspection of all persons having an interest therein. And in case

of neglect or refusal to comply with either of the above requirements, or any duty imposed upon him, the supreme court, at either an appellate division or special term, shall, on the application of the party aggrieved, unless such neglect or refusal shall be satisfactorily explained to the court, forthwith remove such receiver, and appoint some suitable person as receiver in his place. Such removal shall not vitiate or annul any legal proceedings had by such receiver; but such proceedings shall be continued by such successor as if no removal had been made. Such receiver shall also be liable to pay to the party interested, interest at the rate of ten per centum per annum on all moneys due to such party and retained by him more than one day after such demand made as aforesaid.

Formerly R. S., Pt. 3, Ch. 8, Tit. 4, Art. 2, § 42, as amended by L. 1858, ch. 348, § 1.

Consolidators' Note.

This section of the Revised Statutes was made applicable to proceedings for the voluntary dissolution of a corporation by Laws 1880, chapter 245, section 1, page 368, which preserved it from repeal and made it applicable in the following language: "§ 42 which is hereby made applicable to a permanent receiver appointed as prescribed in § 1788 of the Code of Civil Procedure." Section 42 of the Revised Statutes was amended by Laws 1858, chapter 348, by adding to the original section certain provisions relating to receivers. These provisions have been preserved in the text. It becomes no longer necessary to retain the first sentence of this section as the powers, duties and liabilities of receivers have been made a separate article in this chapter and by an appropriate reference these provisions have been made applicable to this article.

§ 108. Application for appointment of receiver. Applications made by the attorney-general for the appointment of a receiver of a corporation shall be made in the judicial district in which the action in which the appointment is sought is triable.

Formerly L. 1883, ch. 378, § 1, in part, as amended by L. 1896, ch. 282, § 1. See rule 80, General Rules of Practice, and Gen. Corp. Law, § 314.

This section relates exclusively to receivers appointed in proceedings in insolvency and not in foreclosure. U. S. Trust Co. v. N. Y. W. S., etc., R. R. Co., 101 N. Y. 478 (1886).

Consolidators' Note.

A more general provision than the one found in the text has been inserted as section 314 in article 12 relating to provisions applicable to two or more of the actions or proceedings incorporated in this chapter.

§ 109. Officers and stockholders may be made parties in action brought by creditor. Where the action is brought by a

creditor of a corporation, and the stockholders, directors, trustees, or other officers, or any of them, are made liable by law, in any event or contingency, for the payment of his debt, the persons, so made liable, may be made parties defendant, by the original or by a supplemental complaint; and their liability may be declared and enforced by the judgment in the action.

Formerly Code Civ. Pro. § 1790.

Where a judgment creditor brings an action for sequestration in behalf of himself and other creditors similarly situated, a personal judgment should not be entered against each defendant stockholder whose stock is not fully paid, for the full amount of plaintiff's claim, but the judgment should provide for an accounting and distribution to all creditors. Hallett v. Metropolitan Messenger Co., 69 A. D. 258 (1902). This section and the two following are to be construed together. Id.

The liability of a stockholder upon his unpaid subscription may be enforced in the action. Beals v. Buffalo Construction Co., 49 A. D. 589 (1900); Bagley & Sewall Co. v. Lennig, 61 A. D. 26 (1901).

Where the action is brought by the Attorney-General, stockholders cannot be made parties. Peo. v. Commercial Bank, 37 Misc. 16 (1902), affd. on op. below, 72 A. D. 633 (1902).

Where a corporation transfers all its assets to a new corporation having the same officers in control, the new corporation and the officers may be joined as defendants in an action for sequestration. Matter of Sayre, 70 A. D. 329 (1902).

Other fraudulent transferees may in equity also be made defendants. Proctor v. Sidney S. & F. Co., 8 A. D. 42 (1896).

§ 110. Separate action may be brought against officers and stockholders. Where the stockholders, directors, trustees, or other officers of a corporation, who are made liable, in any event or contingency, for the payment of a debt, are not made parties defendant, as prescribed in the last section, the plaintiff in the action may maintain a separate action against them, to procure a judgment, declaring, apportioning and enforcing their liability.

Formerly Code Civ. Pro. § 1791.

§ 111. Proceedings in such actions. In an action brought as prescribed in either of the last two sections, the court must, when it is necessary, cause an account to be taken of the property and of the debts of the corporation, and thereupon the defendant's liability must be apportioned accordingly; but, if it affirmatively appears, that the corporation is insolvent, and has no property to satisfy its creditors, the court may, without taking such an account, ascertain and determine the amount of each defendant's liability, and enforce the same accordingly.

Formerly Code Civ. Pro. § 1792.

§ 112. Distribution of property of corporation by judgment in actions under this article. A final judgment in an action, brought against a corporation, as prescribed in this article, either separately or in conjunction with its stockholders, directors, trustees, or other officers, must provide for a just and fair distribution of the property of the corporation, and of the proceeds thereof, among its fair and honest creditors, in the order and in the proportions prescribed by law, in case of the voluntary dissolution of a corporation.

Formerly Code Civ. Pro. § 1793.

For distribution in case of voluntary dissolution see Gen. Corp. Law, § 261.

§ 113. Recovery of stock subscriptions. Where the stockholders of the corporation are parties to the action, if the property of the corporation is not sufficient to discharge its debts, the interlocutory or final judgment, as the case requires, must adjudge that each stockholder pay into court the amount due and remaining unpaid, on the shares of stock held by him, or so much thereof as is necessary to satisfy the debts of the corporation.

Formerly Code Civ. Pro. § 1794.

See Stock Corp. Law, §§ 55, 56, and cases cited thereunder.

The liability of the stockholder need not be enforced under the Stock Corporation Law, but may be enforced in the sequestration action. Beals v. Buffalo Cons. Co., 49 A. D. 589 (1900).

The fact that a stockholder has had put to his credit a dividend paid from capital does not amount to a payment by him of such sum. Sagary v. Dubois, 3 Sandf. Ch. 466 (1846).

A person in whose name the stock stands on the books of the corporation is the stockholder for the purposes of the suit although he has in fact transferred the stock. Mann v. Currie, 2 Barb. 294 (1848); except where the corporation has recognized the transferee as the owner. Cutting v. Damerel, 88 N. Y. 410 (1882).

If the stockholder of record is not the true owner and he is obliged to pay, he can recover from the vendor the amount paid. Johnson v. Underhill, 52 N. Y. 203 (1873).

After the transfer on the books of the corporation the transferee becomes liable for the balance of the subscription price remaining unpaid at the time of the transfer. Sigua Iron Co. v. Brown, 171 N. Y. 488 (1902).

§ 114. Liability of directors and stockholders. If it appears, that the property of the corporation, and the sums collected or *collectable from the stockholders, upon their stock subscriptions, are or will be insufficient to pay the debts of the corporation, the court must ascertain the several sums, for which the directors,

* So in original law.

trustees, or other officers, or the stockholders of the corporation, being parties to the action, are liable; and must adjudge that the same be paid into court, to be applied, in such proportions and in such order as justice requires, to the payment of the debts of the corporation.

Formerly Code Civ. Pro. § 1795.

§ 115. Effect of this article. This article does not repeal or affect any special provision of law, prescribing that a particular kind of corporation shall cease to exist, or shall be dissolved, in a case or in a manner, not prescribed in this article; or any special provision of law, prescribing the mode of enforcing the liability of the stockholders of a particular kind of corporation.

Formerly Code Civ. Pro. § 1796.

ARTICLE 7

Action to Annul a Corporation

SECTION 130. Action by attorney-general to annul corporation when legislature directs.
131. Action by attorney-general to annul corporation by leave of court.
132. Notice of application for leave to commence action to annul corporation.
133. Jury trial.
134. Injunction and receiver in final judgment.
135. Temporary injunction.
136. Filing and publishing judgment.

§ 130. Action by attorney-general to annul corporation when legislature directs. The attorney-general, whenever he is so directed by the legislature, must bring an action against a corporation created by or under the laws of the state, to procure a judgment, vacating or annulling the act of incorporation, or any act renewing the corporation, or continuing its corporate existence, upon the ground that the act was procured upon a fraudulent suggestion, or the concealment of a material fact, made by or with the knowledge and consent of any of the persons incorporated.

Formerly Code Civ. Pro. § 1797.

§ 131. Action by attorney-general to annul corporation by leave of court. Upon leave being granted, as prescribed in the next section, the attorney-general may bring an action against a

corporation created by or under the laws of the state, to procure a judgment, vacating the charter or annulling the existence of the corporation, upon the ground that it has, either

1. Offended against any provision of an act, by or under which it was created, altered or renewed, or an act amending the same, and applicable to the corporation; or,

2. Violated any provision of law, whereby it has forfeited its charter, or become liable to be dissolved, by the abuse of its powers; or,

3. Forfeited its privileges or franchises, by a failure to exercise its power; or,

4. Done or omitted any act, which amounts to a surrender of its corporate rights, privileges, and franchises; or,

5. Exercised a privilege or franchise, not conferred upon it by law.

Formerly Code Civ. Pro. § 1798.

The Word "Franchises" Defined.

The word "franchises" in subdivision 3 means the general corporate franchises, and not the special or secondary franchises granted by the municipal authorities. People v. Bleecker St. & Fulton Ferry R. R. Co., 140 A. D. 611 (1910), affd., 201 N. Y. 594.

Scope of Section.

An action under this section is for the purpose of annulling the corporate charter and to terminate the corporate existence, and not to declare a special franchise, or a portion thereof, forfeited; therefore, the section does not authorize an action by the Attorney-General on behalf of the people to declare the franchise of a street railroad, or a portion thereof, granted by the municipal authorities, forfeited for abandonment and non-user, even where the consent of the court has been previously obtained. People v. Bleecker St. & Fulton Ferry R. R. Co., 140 A. D. 611 (1910), affd., 201 N. Y. 594. See, also, cases cited.

The Code, section 1948, subdivision 1, gives the Attorney-General power to forfeit a special franchise granted to a corporation, no leave of court being required, and this action is to be distinguished from one for annulment of the corporate charter. People v. Bleecker St. & Fulton Ferry R. R. Co., 140 A. D. 611 (1910), affd., 201 N. Y. 594.

This section contains no rule of liability whatever, but simply points out a mode of procedure to enforce duties or punish misconduct elsewhere and otherwise settled and determined and enumerates the classes of cases in which if liability does exist the Attorney-General may move, having first obtained the assent of the court. Peo. v. Atlantic Ave. R. R. Co., 125 N. Y. 513 (1891).

It appears to be settled that the State as prosecutor must show on the part of the corporation accused, some sin against the law of its being which has produced or tends to produce injury to the public. The transgression must not be merely formal or incidental, but material and serious; and

such as to harm or menace the public welfare. For the State does not concern itself with the quarrels of private litigants and intervenes as a party only where some public interest requires its action. Peo. v. North River S. R. Co., 121 N. Y. 582 (1890).

An action under this article is purely a public action and proceeds on public grounds. The simple question to be determined in such an action is whether the existence of the corporation shall be permitted to continue and it in no way concerns the rights and interests of persons interested in the corporation as between each other. Peo. v. Buffalo Stone & Cement Co., 131 N. Y. 140 (1892).

Upon the trial of an action it is incumbent upon the State to show that a cause of forfeiture has not only been incurred by the defendant, but that it continues to exist, that its existence involves some public interest and that the court has authorized the bringing of the action. Peo. v. Ulster & Delaware R. R. Co., 128 N. Y. 240 (1891).

Such an action is always within the control of the State, as the sole party interested, to prosecute or abandon at its will or pleasure, and it may, through its Legislature, not only discontinue the action, but waive or abolish causes of forfeiture, declare rights of action and limit the operation of the statute by forbidding the prosecution of such an action in specified cases. Peo. v. Ulster & Delaware R. R. Co., 128 N. Y. 240 (1891).

Liability to Forfeiture not Federal Question.

Whether a corporation has forfeited its charter by non-user or misuser does not involve a Federal question and a proceeding brought by the Attorney-General in accordance with a State statute constitutes due process of law. Delmar Jockey Club v. Missouri, 120 U. S. 324 (1908); New Orleans Waterworks v. Louisiana, 185 U. S. 336 (1902).

Surrender.

Until actual dissolution a creditor may proceed against the corporation as if non-user or insolvency has not occurred. Mickles v. Rochester City Bank, 11 Paige 118 (1844), affd., 11 Paige 129, note (1845).

Mere insolvency not shown to be continued or a suspension of business not shown to have been without reasonable cause, does not amount to a surrender of corporate rights. Peo. v. Bank of Hudson, 6 Cow. 217 (1826); Moran v. Lydecker, 27 Hun 582 (1882).

Where a corporation suffers an act to be done which destroys the object for which it was incorporated, such act must be regarded as equivalent to a surrender of its rights. Briggs v. Penniman, 8 Cow. 387 (1826); Slee v. Bloom, 19 Johns. 456 (1822); Bruce v. Platt, 80 N. Y. 379 (1880), and cases cited; Hollingshead v. Woodward, 107 N. Y. 96 (1887).

A corporation which has become lessee of a part of the road of another company is entitled to be made a defendant in an action brought to annul the charter of the latter company. Peo. v. Albany & Vt. R. R. Co., 77 N. Y. 232 (1879).

Where an action was brought to vacate the charter of a turnpike company fifty years after its incorporation on the ground of misuser in compliance with the provisions of the General Turnpike Law in the original construction of the road, and also in keeping the road in repair, it must be established not only that the statute has not been complied with in letter, but also that the road was thereby rendered injurious or inconvenient to the public and facts must be found which amount to a substantial breach. Peo. v. Williamsburg Turnpike, etc., Co., 47 N. Y. 586 (1872).

Where a corporation becomes an integral part and constituent element of a combination which possesses over it absolute control, which has absorbed most of its corporate functions and dictates the extent and manner and terms of its entire business activity, and where the corporation voluntarily declines to exercise the franchises conferred upon it and places itself in the situation in which it may be prevented from so doing, it has abused its powers and may be annulled in an action brought for that purpose by the people of the State. Peo. v. North River S. R. Co., 121 N. Y. 582 (1890).

Violation and Forfeiture.

For provisions creating liability for forfeiture for non-user, see Gen. Corp. Law, § 36.

Where a corporation is a combination inimical to trade and commerce and unlawful, the Attorney-General may maintain an action to annul the corporation's existence. Peo. v. Milk Exchange, 145 N. Y. 267 (1895).

A corporation cannot cease to exist of its own volition. It may become dormant but in the absence of some express statutory provision its life continues until its charter period has expired or the court has decreed a dissolution. Geneva Mineral Spring Co. v. Coursey, 45 A. D. 268 (1899); Peo. v. Manhattan Co., 9 Wend. 351 (1832); Towar v. Hale, 46 Barb. 361 (1866).

The mere omission to exercise certain powers given is not such an abuse of the corporation's powers or privileges as to work a forfeiture. Attorney-General v. Bank of Niagara, Hopkins Ch. 354 (1825).

Non-compliance with the requirements of an act of incorporation of a turnpike company as to the construction of the road is per se a misuser forfeiting the privileges and franchises conferred. Peo. ex rel. v. Kingston, etc., Road Co., 23 Wend 193 (1840); and the same rules is applicable in a case of non-user. Peo. v. Broadway R. R. Co. of Bklyn., 126 N. Y. 29 (1891). And see Peo. v. N. Y. U. Ry. Co., 50 St. Rep. 454; affd. on op. below 137 N. Y. 606 (1893).

The abandonment of part of a railroad company's road for a period of time does not determine or forfeit its franchise so as to prevent relaying the tracks. It is a cause for forfeiture of which the people alone can take advantage. Trelford v. Coney Island R. R. Co., 6 A. D. 204 (1896).

A cause for forfeiture cannot be taken advantage of or enforced collaterally; the government creating the corporation can alone institute the proceedings. Matter of N. Y. Elevated R. R. Co., 70 N. Y. 327 (1877); Trelford v. Coney Island R. R. Co., 5 A. D. 464 (1896); reargument, 6 A. D. 204 (1896); Wallace v. Walsh, 125 N. Y. 26 (1890); Matter of Trustees, etc., 131 N. Y. 1 (1892).

It is competent for the Legislature to waive a cause of forfeiture and this can be done expressly or by acts recognizing the continued existence of the corporation. Matter of N. Y. Elevated R. R. Co., 70 N. Y. 327 (1877).

An action may be maintained to enforce the forfeiture for non-user provided for by Gen. Corp. Law, § 36. Peo. ex rel. Hearst v. Ramapo Water Co., 51 A. D. 145 (1900).

The Attorney-General could it seems bring an action against a railroad company to vacate its charter for any violation of law of which it is guilty and a refusal to obey a statute to give transfers in certain cases would doubtless bring the defendant within the scope of this article. Peo. ex rel. Lehmaier v. Interurban Ry. Co., 177 N. Y. 296, 300 (1904).

An individual cannot maintain an action to restrain a street railroad from charging fare in excess of the lawful rate, the remedy is an action by the

Attorney-General to vacate or annul the company's charter. McNulty v. Bklyn. Heights R. R. Co., 31 Misc. 674 (1900).

No action can be maintained for the forfeiture of the defendant's franchise to operate a trolley system in a certain village. Peo. v. Westchester Traction Co., 123 A. D. 689 (1908). Such a franchise would on forfeiture of the company's charter pass to the directors in office at the time of the company's death. Id.

There is a dictum in a tax case to the effect that the statement of the location of its principal office or place of business is a condition precedent to the organization of a business corporation, and, should it appear that the location of its principal office was willfully misstated in the certificate, or in case the corporation should change its principal place of business, without effecting a legal change of residence, for the purpose of evading taxation, it might present a case under the foregoing section for the attention of the Attorney-General. Peo. ex rel. Knickerbocker Press v. Barker, 87 Hun 341 (1895), affd. on op. below, 147 N. Y. 715. At the time this proceeding was instituted section 3 of the General Corporation Law provided that "the office of a stock corporation shall be in the county, town or city in which its business is principally carried on," which provision has been eliminated from said statute by the amendment of 1895, chapter 672.

Incorporation for the purpose of preventing the adoption of a trade name by competitors rather than for the purpose of carrying on business when supplemented by an express intention not to carry on business in the future will justify the Attorney-General in bringing a dissolution action, particularly after the lapse of a period of two years. Opinion of Atty. Genl., Feb. 14, 1913.

Revocation of License of Foreign Corporation to do Business.

There seems to be no authority conferred upon the Secretary of State to revoke a certificate issued to a foreign corporation to do business in this State except for failure to designate a person upon whom process may be served; however, it is not necessary that a special act of the legislature be passed to annul the right of such corporation to do business in this State under certificate issued to it by Secretary of State. Since an action is authorized in behalf of the State to redress violations of our statutes by a foreign corporation having no right to do business within this State except by license from it which it may grant or revoke at will, the court may, on proof of willful, systematic and continuous violations of our laws annul or declare a forfeiture of the right of the corporation to do business here, following and adopting, by analogy, the remedy prescribed in actions against a domestic corporation for violation of its corporate rights or "any provision of law, whereby it has forfeited its charter, or become liable to be dissolved, by the abuse of its powers," as prescribed by the General Corporation Law, section 131. People v. Am. Ice Co., 135 A. D. 180, 184 (1909).

§ 132. Notice of application for leave to commence action to annul corporation. Before granting leave, the court may, in its discretion, require such previous notice of the application as it thinks proper, to be given to the corporation, or any officer thereof, and may hear the corporation in opposition thereto

Formerly Code Civ. Pro. § 1799.

As to when the Attorney-General must apply for leave see Gen. Corp. Law, § 304, post.

No individual need be present as a party to the action. The question is simply between the corporation and the people. Therefore, it is of no legal consequence that the person who instigates such an action or applies to the Attorney-General to have the action commenced has any interest in the questions involved in the action, so that anything done by him will not affect the rights of the people who maintain the action. Peo. v. Buffalo Stone & Cement Co., 131 N. Y. 140 (1892).

The policy of the law is to vest with the Attorney-General the administrative duty of determining whether the public interests are to be served by the institution of the action. The court should determine whether a prima facie case is alleged or a case of such gravity that it seems proper that the court should determine it upon a trial. Matter of Attorney-General, 50 Hun 511 (1888).

The order should not be granted except on the written application of the Attorney-General stating that in his opinion the action can and ought to be maintained for reasons given and this duty he cannot delegate to other counsel. Matter of Attorney-General, 79 Hun 369 (1894).

Whether or not leave should be given rests in each case in the sound discretion of the court and is not to be given as a matter of course. Matter of Attorney-General, 81 Hun 541 (1894); Matter of Attorney-General, 124 A. D. 401 (1908).

Weight undoubtedly is to be given to the fact that the Attorney-General has felt it to be his duty to apply for the required leave, but the court is also charged with the duty to consider whether upon the facts presented the public interests require that the action be brought. Matter of Attorney-General, 124 A. D. 401 (1908).

Where the application was for leave to bring an action to annul the charter of a gas company on the grounds that it had violated the anti-monopoly acts, and on the further ground that the franchises granted by the municipal authorities have expired, the application was denied on the ground that the anti-monopoly acts were not shown to have been violated and the exercise of franchises not conferred upon the company by law was a question for the consideration of the municipal authorities and of no concern to the State. Matter of Attorney-General, 124 A. D. 401 (1908), and see Matter of Interborough, etc., Co., 125 A. D. 804 (1908).

It rests in the discretion of the court to determine whether notice shall be given to the corporation of the application and the failure to require notice does not render the order made invalid. Peo. v. B. H. T. & W. Ry. Co., 27 Hun 528 (1882).

The complaint in the action should show that leave to sue has been granted to the Attorney-General. Peo. ex rel. Hearst v. Ramapo Water Co., 51 A. D. 145 (1900).

§ 133. Jury trial. An action, brought as prescribed in this article, is triable, of course and of right, by a jury, as if it was an action specified in section nine hundred and sixty-eight of the code of civil procedure and without procuring an order, as prescribed in section nine hundred and seventy of the code of civil procedure.

Formerly Code Civ. Pro. § 1800.

§ 134. Injunction and receiver in final judgment. Where any of the matters, specified in section one hundred and thirty or section one hundred and thirty-one of this article, are established in an action, brought as prescribed in either of those sections, the court may render final judgment that the corporation, and each officer thereof, be perpetually enjoined from exercising any of its corporate rights, privileges, and franchises; and that it be dissolved. The judgment must also provide for the appointment of a receiver, the taking of an account, and the distribution of the property of the corporation, among its creditors and stockholders, as where a corporation is dissolved upon its voluntary application, as prescribed in article nine of this chapter.

Formerly Code Civ. Pro. § 1801.

See Gen. Corp. Law, §§ 191 and 230 as to permanent receivers. There is no statutory provision in this article for the appointment of temporary receivers, but as to the inherent power of the court see cases under Gen. Corp. Law, § 104, supra.

Consolidators' Note.

This section which is in the language of section 1801 of the Code of Civil Procedure does not seem to confer upon the receiver appointed under the judgment in an action to annul a corporation the powers, duties and liabilities of receivers generally under the Revised Statutes and subsequent enactments as now found in article 11 of this chapter. Section 134 simply states that the judgment must provide for the appointment of a receiver, etc., as where a corporation is dissolved upon its voluntary application. The intention probably was to preserve the practice of the earlier statutes. Revised Statutes, part 3, chapter 9, title 2, article 1, section 27, provided that whenever a judgment should be rendered for the vacating and annulling any act of incorporation the court of chancery should have the same powers to appoint a receiver, etc., as were given in the proceedings for the voluntary dissolution of a corporation. This section was carried into the old Code of Procedure, section 444 of which provided that the court should have the same powers to appoint a receiver of the property of a corporation whose charter was annulled, and to take an account and to make distribution thereof among its creditors as were given in the proceedings for the voluntary dissolution of a corporation under the Revised Statutes. Whether or not these powers, duties and liabilities are conferred upon receivers in actions to annul a corporation the court in any event has the authority to confer them in a proper case.

§ 135. Temporary injunction. In an action, brought as prescribed in this article, an injunction order may be granted, at any stage of the action, restraining the corporation, and any or all of its directors, trustees and other officers, from exercising any of its corporate rights, privileges, or franchises; or from exercising certain of its corporate rights, privileges, or franchises, specified in the injunction order; or from exercising any franchise,

liberty, or privilege, or transacting any business, not allowed by law. Such an injunction is deemed one of those specified in section six hundred and three of the code of civil procedure, and all the provisions of title second of chapter seventh of the code of civil procedure applicable to an injunction specified in that section, apply to an injunction granted as prescribed in this section, except that it can be granted only by the court.

Formerly Code Civ. Pro. § 1802.
See Gen. Corp. Law, § 305, as to notice to corporation.
See Gen. Corp. Law, § 302, respecting injunctions restraining creditors.

§ 136. Filing and publishing judgment. Where final judgment is rendered against a corporation, in an action, brought as prescribed in this article, the attorney-general must cause a copy of the judgment-roll to be forthwith filed in the office of the secretary of state; who must cause a notice of the substance and effect of the judgment, to be published, for four weeks, in a newspaper printed in the county, wherein the principal place of business of the corporation was located.

Formerly Code Civ. Pro. § 1803.
Prior to the enactment of the Consolidated Laws of 1909, section 1803 of the Code (now Gen. Corp. Law, § 136, supra) provided that the notice should be published "in the newspaper printed at Albany in which legal notices are required to be published" but the quoted words were omitted in the enactment of § 136, supra, by L. 1909, ch. 28.

Publication of Notice of Judgment of Dissolution.

A publication of the substance and effect of a judgment of dissolution complies with the provision of this section requiring the publication of notices of judgments dissolving corporations in actions brought in the name of the people. Such publication is required to be made daily, except Sundays, for four weeks and the fees therefor are regulated by the Code, section 3317, as amended by Laws of 1914, chapter 185. Opinion of Atty. Genl., May 30, 1914.

ARTICLE 8

Action to Dissolve Moneyed Corporation

SECTION 150. Temporary injunction and receiver in action against moneyed corporation.
151. Order to show cause why injunction and receiver should not be permanent.
152. Inventory and appraisal by receiver.
153. Conversion of assets into cash by receiver.
154. Employment of counsel by receiver.

SECTION 155. Notice to creditors by receiver.
156. Allowance, rejection and adjustment of claims by receiver.
157. Final settlement and distribution by receiver.
158. Notice of account and accounting by receiver.
159. Proceedings upon accounting.
160. Claims barred after distribution of assets by receiver.
161. Application of article.

§ 150. Temporary injunction and receiver in action against moneyed corporation. Whenever the attorney-general shall commence an action against a moneyed corporation upon the information of either the superintendent of insurance, or the superintendent of banks, for the dissolution or sequestration of the property or annulment of the charter of a corporation formed under or subject to the banking or insurance law, and shall be satisfied that it is unsafe and inexpedient for such corporation to continue doing business, the supreme court may, on his application, in a case provided by law, appoint a receiver thereof, and may on such appointment grant an injunction restraining such corporation from carrying on its business until the further order of the court. The court may, in its discretion, dispense with notice of the application.

Formerly L. 1902, ch. 60, § 1.

Consolidators' Note.

This article embraces Laws 1902, chapter 60, entitled "An act to simplify the procedure, facilitate the settlement and reduce the expense of receivers on dissolution of a monied corporation," and Laws 1904, chapter 754, entitled "An act to simplify the settlement of accounts of receivers, on dissolution of a monied corporation." By its language, Laws 1902, chapter 60, superseded and repealed all provisions inconsistent. Both acts have been inserted in this chapter as article 8 in order to bring together in the chapter so far as possible all provisions relating to the dissolution of corporations which are now scattered in many independent acts and also to bring the acts mentioned in juxtaposition with other provisions applicable to the subject.

The Superintendent of Banks may, if he so elects, liquidate the affairs of corporations subject to the Banking Law without making an application to the Attorney-General (Banking Law, § 19, added by L. 1908, ch. 143).

As to temporary receivers generally see Gen. Corp. Law, § 104, supra.

Although the court may in its discretion dispense with notice of the application for appointment of receivers, nevertheless the law contemplates the giving of notice unless there be some emergency requiring immediate action. The discretion must be based on some proven facts showing necessity for instant action to prevent some impending wrong. Peo. v. Oriental Bank, 124 A. D. 741 (1908).

As this article affects procedure only, it was competent for the Legislature to make it applicable to accountings by receivers who had been appointed prior to its passage. Peo. v. Manhattan Fire Ins. Co., 77 A. D. 517 (1902).

§ 151. Order to show cause why injunction and receiver should not be permanent. The court, on granting an order without notice, either for the appointment of a receiver or for an injunction, or for both forms of relief, as herein provided, shall make an order that the corporation so proceeded against show cause at a term of the court to be held not more than thirty days thereafter, why such receiver and injunction should not be permanent. Such order shall be served not less than eight days before the date upon which the hearing thereon is to be had. Unless the court otherwise directs, the receiver appointed in the first instance shall be permanent receiver of such corporation, and the injunction shall be continued during the pendency of the litigation. Such receiver shall, unless otherwise ordered by the court, continue to act as such up to and after final judgment, and until the affairs of the corporation shall be finally settled and its property distributed by him according to law. The bond to be given by the receiver on his appointment shall be fixed at such sum and so conditioned that it shall continue in force and effect until the final discharge of such receiver, including any liability which may be incurred by said receiver by virtue of his appointment as such in the final judgment, in case he shall be so named therein.

Formerly L. 1902, ch. 60, § 2.

§ 152. Inventory and appraisal by receiver. It shall be the duty of the receiver to take an inventory and make an appraisal of the assets and property of the corporation. In case the corporation is subject to the banking law, two disinterested appraisers shall be appointed by the superintendent of banks to aid in this duty, and in case the corporation is subject to the insurance law, such appraisers shall be appointed by the superintendent of insurance. Ten days' notice of such inventory and appraisal shall be given to the corporation and such inventory and appraisal shall be completed and filed with the clerk of the supreme court in the county in which the trial is to be had, within ninety days after the appointment of such receiver, and a certified copy thereof in the office of the attorney-general, and in the office of the superintendent of banks, or in the office of the superintendent of insurance, as the case may be, unless for good cause shown the officer appointing such appraiser shall, in writing, extend the time for the completion thereof. Such appraisers shall receive as compensation a reasonable sum, not exceeding fifteen dollars per day and

actual and necessary expenses, to be paid by the receiver upon the approval of the officer by whom they were named. The receiver shall be chargeable with the amount of such inventory and shall be relieved therefrom to the same extent and upon the same grounds as in the like case of an executor.

Formerly L. 1902, ch. 60, § 3, in part. For remainder of § 3 see following section.

§ 153. Conversion of assets into cash by receiver. The receiver shall proceed, immediately upon his appointment, to convert the assets of the corporation into cash.

Formerly L. 1902, ch. 60, § 3, in part. For remainder of § 3 see preceding section.

Under this section the receiver is only expected to use reasonable diligence and to proceed with such speed as will accord with the circumstances. Peo. v. N. Y. Building L. B. Co., 41 Misc. 363 (1903).

§ 154. Employment of counsel by receiver. It shall not be lawful for any receiver to pay to any attorney or counsel any costs, fees or allowance until the amount thereof shall have been stated to the special term, as expenses incurred by such receiver and shall have been approved by that court by an order duly entered. Any such order shall be the subject of review by the appellate division and the court of appeals on appeal thereto taken by any party. The receiver may employ not to exceed one counsel unless the employment of additional counsel shall be authorized by the supreme court after notice to the attorney-general of an application therefor.

Formerly L. 1902, ch. 60, § 4, as amended by L. 1904, ch. 705, § 1.

By L. 1902, ch. 60, § 4, it was provided that no compensation should be allowed an attorney for a receiver unless an agreement had been made in writing upon the approval of the Attorney-General. In Matter of Candee v. Cunneen, 92 A. D. 71 (1904), doubt was expressed as to the constitutionality of this provision because interfering with the power of the Supreme Court. Thereafter the section was amended as above by L. 1904, ch. 705.

§ 155. Notice to creditors by receiver. 1. Within thirty days after a receiver qualifies he shall cause to be published once a week for twelve weeks in a newspaper published at the principal place of business of the corporation, a notice to all creditors of the corporation to present their claims to such receiver at his place of business within fifteen days after the last publication of such order. He shall also mail a copy of such

notice to all the creditors of the corporation known to him or as shown on the books of the company, at their last known place of residence. 2. The receiver of any title guaranty company heretofore or hereafter appointed, which company is authorized by law to issue policies of insurance or agreements of indemnity or guaranty, and which corporation has issued and outstanding at the time of the appointment of the receiver, policies of insurance or agreements of indemnity or guaranty, exceeding two thousand in number, shall not be required to mail to the holders or owners of said policies of insurance or of said agreements, the notice required by law to be given to creditors of an insolvent moneyed corporation; but such receiver shall cause a notice to be published twice a week, for four successive weeks, in two newspapers published in the county where said corporation has its principal place of business; which said notice shall require all creditors and owners and holders of outstanding policies of insurance or agreements of indemnity or guaranty, to exhibit and prove their claim, within sixty days; and, in default of so doing, shall be precluded from all benefit of the judgment and from any and all distribution which may be made thereunder, except that the creditor or holder or owner of any policy or agreement of indemnity or guaranty, who shall exhibit or prove his claim, with an affidavit that he had no notice or knowledge thereof, in time to comply with the provisions hereof, at any time before an order is made directing a final settlement and distribution of assets of such corporation, shall be entitled to have his claim received, and shall have the same rights and benefits thereon, so far as the assets of such corporation then remaining undistributed may be applied, as if his claim had been exhibited and proved within the time limited by such notice. This subdivision shall apply to receivers of all moneyed corporations.

Formerly L. 1902, ch. 60, § 5, in part; L. 1904, ch. 754, §§ 1 and 4, as amended by L. 1909, ch. 240.

§ 156. Allowance, rejection and adjustment of claims by receiver. The receiver shall have the same power and authority with reference to the allowance or rejection of claims as is given to executors, and no reference shall be had to pass upon claims except such as may be disputed by such receiver. In case any claim shall be disputed, the receiver shall immediately upon the expiration of the time for the presentation of claims, upon notice

to the parties whose claims have been rejected, apply to the court for the appointment of a referee to hear and determine as to the allowance thereof. Claims allowed by the receiver shall be subject to objection upon the final settlement and their validity may be determined as the validity of claims against estates are determined upon final settlement by a surrogate.

Formerly L. 1902, ch. 60, § 5, in part. For remainder of § 5 see preceding section.

See Code Civ. Pro. §§ 2718 and 2728, as to determination of claims by a surrogate.

The determination of the referee is not final and may be reviewed. The claimant may file and serve exceptions to the referee's report pursuant to Rule 30, G. R. P. and bring the same to a hearing at Special Term. Peo. v. Federal Bank, 122 A. D. 810 (1907).

If a claimant has had no notice of the referee's decision final distribution should not be ordered on the receiver's accounting until the validity of the claim is determined. If such order of distribution is made it does not conclude the claimant. Peo. v. Federal Bank, 122 A. D. 810 (1907).

The Attorney-General should have notice of the application for the appointment of the referee. Gen. Corp. Law, § 312; Matter of Eustace v. N. Y. Building L. Co., 98 A. D. 97 (1904).

§ 157. Final settlement and distribution by receiver. The receiver may apply for a final settlement of his accounts and an order for distribution at any time after the expiration of six months, and shall so apply within eighteen months after qualifying as such. The attorney-general or any creditor, or party interested, may apply for an order that the receiver show cause why an accounting and distribution should not be had at any time after the expiration of one year after the receiver qualifies; and it shall be the duty of the attorney-general, after the expiration of eighteen months from the time the receiver enters upon his duties, in case he has not applied for a final settlement of his accounts, to apply for such an order on notice to such receiver. In case of such application by a party other than the receiver, the court shall direct the receiver to take steps to account with all convenient speed. The receiver is not required or authorized to file any account, except as herein provided, except by special order of the court.

Formerly L. 1902, ch. 60, § 6.

This section cannot be construed as prohibiting the granting of fees to a receiver except upon an accounting; nor is it an abuse of discretion to direct their payment where the order reserves all question as to the right of the receiver to the commissions to be inquired into on the next accounting. Peo. v. Anglo-American S. & L. Assn., 107 A. D. 270 (1905).

The old practice of partial settlements by the receiver and the annual or semi-annual accounting under Special Term orders which prevailed under L. 1883, ch. 378, as am'd by L. 1885, ch. 40, is now unauthorized. Peo. v. Manhattan Fire Ins. Co., 77 A. D. 517 (1902).

§ 158. Notice of account and accounting by receiver. 1. The receiver shall file his account, together with a statement of the items and amounts claimed by his counsel, up to that date with the court and a duplicate thereof, together with the vouchers, with the attorney-general, at least thirty days before the time fixed for his final settlement and accounting, and the attorney-general shall serve upon the attorney for the receiver any objections he may have to the account, or to the statement as to the items and amounts claimed by counsel for compensation, appearing in such account on or before such hearing. The receiver shall also within ten days after the filing of the account, mail to each creditor of the corporation a notice of the time and place of the filing of his account, and a notice of the time and place of the presentation of the account to the court. Unless objection is made to the items of the account by a creditor or on behalf of the attorney-general, no referee shall be appointed to pass thereon, but the same shall be examined and settled by the court. In case objection is made a referee may be appointed to take the testimony and report the same to the court.

2. Prior to the final settlement of accounts of a receiver of any moneyed corporation, having in force, at the time of his appointment, outstanding policies of insurance or agreements of indemnity or guaranty, exceeding two thousand in number, said receiver shall give notice to all of the creditors and to the owners or holders of said policies of insurance or agreements of indemnity or guaranty, issued or entered into by such insolvent corporation, by publication of a notice published at least twice a week, for three successive weeks, immediately preceding the making of an application for a final settlement of his accounts and for an order for the distribution of the assets in his hands. Said notice shall state the fact that an application for a final settlement of his accounts and for an order for the distribution of the assets in hand will be made, and shall also state the time and place, when and where the application will be made. Upon the hearing of such application and motion, the court shall, unless objection is made to the items of the account by a creditor or by a holder or owner of a policy of insurance or

agreement of indemnity or guaranty, or on behalf of the attorney-general, examine and settle the said accounts, and make an order for the settlement, adjustment and distribution of the assets in the hands of the receiver. Where objection is made to the items of account, the court may refer the same to a referee to examine and pass thereon. This subdivision shall apply to receivers of all moneyed corporations heretofore or hereafter appointed.

Subd. 1, formerly L. 1902, ch. 60, § 8; subd. 2, formerly L. 1904, ch. 754, §§ 2, 4, thus am'd by L. 1909, ch. 240.

§ 159. Proceedings upon accounting. Upon any accounting by the receiver, after the expiration of the time for creditors to present claims, the court shall direct the receiver to immediately convert the entire assets of the corporation in his hands into cash, in case any of the assets have not been so converted, unless good and sufficient cause to the contrary shall appear to the satisfaction of the court, such as to authorize an order granting the receiver additional time for that purpose, and upon any such accounting the court shall direct the receiver to distribute the assets of the corporation in his hands to the persons entitled thereto, except so much thereof as may be necessary to be retained for the purpose of administering the trust and making payment upon contested claims, and upon such claims as may thereafter be presented and entitled to be paid. Whenever the attorney-general shall apply for an order to show cause why an accounting should not be had by a receiver by reason of his failure to so account within twelve months after his appointment, and shall deem it advisable to designate counsel to act on his behalf, the court may, upon the accounting, make a reasonable allowance by way of counsel fee to counsel so designated.

First sentence formerly L. 1902, ch. 60, § 7. Second sentence formerly L. 1902, ch. 60, § 10.

§ 160. Claims barred after distribution of assets by receiver. Upon the granting of the application and the making of the order of distribution, as provided in subdivision two of section one hundred and fifty-eight of this article, and the distribution of the assets in the hands of the receiver, in the manner directed by the order of the court, all claims of the creditors or of holders or owners of policies of insurance or agreements of indemnity or

guaranty, against such receiver, shall be barred. This section shall apply to receivers of all moneyed corporations.

Formerly L. 1904, ch. 754, § 3, as am'd by L. 1909, ch. 240.

§ 161. Application of article. Except as provided in sections one hundred and fifty-five, one hundred and fifty-eight, subdivision two, and one hundred and sixty of this article, this article shall apply to all actions for the appointment of receivers of moneyed corporations brought by the attorney-general, and to all receivers of such corporations heretofore or hereafter appointed, and to the settlement and adjustment of their accounts and distribution of assets in their hands, and all proceedings with reference thereto hereafter to be taken, and shall supersede and repeal all provisions of law inconsistent herewith, so far as the same relate to actions for the sequestration, annulment or dissolution of moneyed corporations. As to all other corporations and as to matters not affected by this article, provisions of law heretofore existing shall remain in full force and effect.

Formerly L. 1902, ch. 60, § 9.

ARTICLE 9

Proceedings for Voluntary Dissolution of Corporation

SECTION 170. Petition for voluntary dissolution of corporation.
171. Directors or trustees may be required to petition.
172. Petition when directors or trustees do not agree.
173. Corporations excepted from two preceding sections.
174. Contents of petition.
175. Affidavit to be annexed to petition.
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179. Publication of order to show cause why corporation should not be dissolved.
180. Service of order to show cause.
181. Entering and filing order and papers.
182. Temporary receiver.
183. Application for appointment of receiver.
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186. Hearing.
187. Decision.
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SECTION 190. Final order.
191. Permanent receiver.
192. Appointment of director, trustee or other officer or stockholder as receiver.
193. Certain sales, transfers and judgments void.
194. Omission, defect or default of receiver.
195. Exception of certain corporations.

§ 170. Petition for voluntary dissolution of corporation. If a majority of the directors, trustees, or other officers, having the management of the concerns of a corporation created by or under the laws of the state, discover that the stock, effects, and other property thereof are not sufficient to pay all just demands, for which it is liable, or to afford a reasonable security to those who may deal with it; or if, for any reason, they deem it beneficial to the interests of the stockholders that the corporation should be dissolved, they may present a petition to the supreme court praying for a final order dissolving the corporation, as prescribed in this article.

Formerly Code Civ. Pro. § 2419.

Consolidators' Note.

This article consists of chapter 17, title 11, of the Code of Civil Procedure, entitled "Proceedings for the voluntary dissolution of a corporation" It has been inserted in this chapter as article 9 without change but with the addition of one or two provisions not now found in the Code of Civil Procedure, but applicable to the subject.

For form of petition for voluntary dissolution of corporation under this section, see Form No. 458.

For form of schedule to be annexed to petition, see Form No. 459.

For form of notice of motion for order to show cause, see Form No. 460.

For form of order to show cause, see Form No. 461.

For form of report of referee, see Form No. 462.

For form of final order of dissolution, see Form No. 463.

For form of oath of receiver, see Form No. 464.

For form of notice of creditors' meeting, see Form No. 465.

For form of notice of presentation of final account, see Form No. 466.

The proceeding is a special proceeding and a final order is therefore reviewable as of right by the Court of Appeals. Matter of Hulbert Bros. & Co., 160 N. Y. 9 (1899).

The proceeding is purely statutory and the authority of the court must be found in the statute and not in its general equitable powers. Hitch v. Hawley, 132 N. Y. 212 (1892); Matter of Binghamton General Electric Co., 143 N. Y. 261 (1894); McGee v. Geneseo Academy, 17 St. Rep. 221 (1888); Chamberlain v. Rochester S. P. V. Co., 7 Hun 557 (1876); Matter of Boynton, etc., Co., 34 Hun 369 (1884); Matter of Malcom Brewing Co., 78 A. D. 592 (1903).

Where the decrease in the number of directors is not effected in accordance with the Stock Corporation Law, the court has no jurisdiction to entertain the petition because it is not signed by a majority of the directors. Matter of Dolgeville Electric L. & P. Co., 160 N. Y. 500 (1899).

An executor holding stock may become a de facto trustee and as such join in the petition. Matter of Santa Eulalia S. M. Co., 21 St. Rep. 89, aff'd. on op. below, 115 N. Y. 657 (1889).

Where stockholders elect directors with knowledge that they were not stockholders in fact but merely of record, such directors may join in a petition for the voluntary dissolution of a corporation. Matter of Manoca Temple Assn., 128 A. D. 796 (1908).

Where all the officers and directors of the corporation except the secretary resign with the express purpose of instituting an action to procure the appointment of a receiver on the ground that there is no officer empowered to hold the assets of the company, such resignations are not legal nor effective, for the officers of the corporation may ask for its dissolution and the appointment of a receiver under this article, in which case the officers are not required to resign, but the action is instituted in their official capacity. Zeltner v. Zeltner Brewing Co., 174 N. Y. 247 (1903).

The directors of the corporation who apply for dissolution are not personally liable to the attorney who acts for them in the matter, for the proceeding is that of the corporation. Drew v. Longwell, 81 Hun 144 (1894).

After the State Superintendent of Banks has taken possession of the assets of an insolvent banking corporation with the intention of having an action brought by the Attorney-General to dissolve the same, the directors cannot anticipate such action on the part of the State by instituting a proceeding for voluntary dissolution, and an action for involuntary dissolution instituted by the Attorney-General takes priority although begun after the special proceeding instituted by the directors. Matter of Murray Hill Bank, 153 N. Y. 199 (1897), disapproving same case, 9 A. D. 546, 14 A. D. 318, and also on this point, 52 Hun 546.

Newly elected directors have a right to stop voluntary proceedings for dissolution commenced by their predecessors in office. Matter of Jones, 67 Hun 360 (1893).

Notice to the Attorney-General.

Notice of an application for a voluntary dissolution under this section must be given to the Attorney-General, whether the corporation is solvent or insolvent, and an order to show cause why the corporation should not be dissolved, granted without such notice, may be vacated. Matter of Broadway Ins. Co., 23 A. D. 282 (1897).

No notice to the Attorney-General is required of an application for an order to show cause why petition for the voluntary dissolution of a corporation should not be dismissed. Matter of Geneva Basket Co., 71 Misc. 156 (1911).

Proceedings undertaken as herein provided are purely statutory, and noncompliance with the express requirements of the statute in connection with the institution and maintenance of such proceedings is jurisdictional; therefore, where no notice of the presentation of the petition and schedules, nor of the application for an order to show cause why a corporation should not be dissolved, nor any copy of the motion papers, nor of the proposed order, are served on the Attorney-General, the order to show cause and all proceedings under it are without jurisdiction and void. Knickerbocker Trust Co. v. Tarrytown, White Plains & M. Ry. Co., 133 A. D. 285 (1909), 117 N. Y. Supp. 871.

Although the proceedings to dissolve the corporation may be void because of the failure to give the notice of the application for the order to show cause to the Attorney-General pursuant to G. C. L. § 312, nevertheless the proceeding is commenced by the filing of the petition and after such filing the court acquires jurisdiction to forthwith appoint a temporary re-

ceiver provided the petition contains some evidence of insolvency. The sufficiency of the petition cannot be questioned collaterally nor can the appointment of the temporary receiver. Knickerbocker T. Co. v. Tarrytown, etc., Ry. Co., 117 N. Y. Supp. 871 (1909).

Qualification of Petitioning Director.

Where neither the certificate of incorporation nor the by-laws provide that a director need not be a stockholder, the title to the office of director cannot be predicated upon an alleged purchase of stock by another person in the interest of or as the representative of the claimant to office. Matter of Hassam Paving Co., 152 A. D. 610 (1912), citing Matter of Ringler & Co., 204 N. Y. 30.

De Facto Directors May Join in Petition.

Where a person acquires stock by a transfer, regular upon its face, although alleged to have been induced by fraud, and such person is elected a director, he becomes an apparent and a de facto director, and may join other directors in a petition for voluntary dissolution, thus conferring jurisdiction on the court to entertain the proceedings. MacMahon v. Stepney Spare Wheel Agency, 140 A. D. 554 (1910), citing Matter of Manoca Temple Assn., 128 A. D. 796.

Interests of Minority Stockholders.

Upon the question whether it is beneficial to the stockholders to have the corporation dissolved, the interests of the minority stockholders as well as those of the majority must be considered. Matter of Rateau Sales Co., 201 N. Y. 420 (1911).

When the minority stockholders had brought an action in equity against the petitioners who had apparently allowed a contract to be forfeited for the purpose of wrecking the corporation; and when a substantial controversy was involved, a dissolution should not precede final judgment in such an action. Matter of Rateau Sales Co., 201 N. Y. 420 (1911), revsg. 141 A. D. 931.

Court May Vacate Order for Dissolution.

The Supreme Court may set aside an order for voluntary dissolution, instituted under this section, where substantial justice requires it, and the order to show cause in such case need not be served on the stockholders and creditors who did not appear in the original action, where the Attorney-General and the receiver and the only stockholder who had appeared in the dissolution proceedings are before the court, and the directors, other than the moving party, have ceased to have any interest as stockholders, the creditors being protected by the moving party's bond. In re Automatic Chain Co., 134 A. D. 863 (1909); motion to dismiss appeal denied, 198 N. Y. 550, and decision affirmed, 198 N. Y. 618 (1910).

The court is not precluded from vacating an order for dissolution upon the theory that the corporation became forever legally dead on the entry of the order. Matter of Automatic Chain Co., 134 A. D. 863 (1909).

It is not necessary that an order in voluntary dissolution proceedings be tainted with fraud or irregularity in order to authorize the court to set it aside. It is sufficient that the order was improvidently granted. Matter of Automatic Chain Co., 134 A. D. 863 (1909).

Section not Applicable to Foreign Corporations.

The provisions of sections 100, 106, 170, 191 and 230, are intended to regulate the conduct of receiverships of domestic corporations and not of foreign corporations. Strauss v. Casey Mach. & Supply Co., 68 Misc. 474 (1910).

§ 171. Directors or trustees may be required to petition. It shall be the duty of a majority of the directors or trustees of every corporation created by or under the laws of this state to present a petition as prescribed in the last section whenever directed so to do by a majority in interest of its stockholders.

Formerly Code Civ. Pro. § 2420, in part. For remainder of section see §§ 172 and 173 of this article.

§ 172. Petition when directors or trustees do not agree. If a corporation, created under a general statute of the state for the formation of corporations or under any special act or charter has an even number of trustees or directors who are equally divided respecting the management of its affairs, or if the stock of such corporation is equally divided into not more than two independent ownerships or interests, or if the entire stock of the corporation is, at that time, owned by the trustees or directors who are even in number or equally divided representing the management of its affairs, or if the stock is so divided, that one-half thereof is owned or controlled by persons favoring the course of part of the trustees or directors and one-half thereof is owned by persons favoring the course of the other trustees or directors, the trustees or directors or the stockholders or one or more of them may present a petition as prescribed in section one hundred and seventy of this chapter.

Formerly Code Civ. Pro., § 2420, in part. For remainder of section see §§ 171 and 173 of this article.

If the petitioner in a proceeding under this section having an even number of trustees equally divided respecting its management, neglect or refuse after a referee has been appointed, to apply for a final order as contemplated by section 190 of this article, it is competent for the court on such appeal of any person interested to direct the petitioner to move so that the interests of all may be protected. Matter of Peekamose Fishing Club, 151 N. Y. 511 (1897).

§ 173. Corporations excepted from two preceding sections. Sections one hundred and seventy-one and one hundred and seventy-two of this chapter do not apply to a savings bank, a trust company, a safe deposit company, or a corporation formed to rent safes in burglar and fire-proof vaults, or for the construction or operation of a railroad, or for aiding in the construction thereof, or for carrying on the business of banking or insurance, or intended to derive a profit from the loan or use of money.

Formerly Code Civ. Pro. § 2420, in part. For remainder of section see §§ 171 and 172 of this article.

§ 174. Contents of petition. The petition must show that the case is one of those specified in sections one hundred and seventy and one hundred and seventy-two of this chapter, and must state the reasons, which induce the petitioner or petitioners to desire the dissolution of the corporation. A schedule must be annexed to the petition, containing the following matters, as far as the petitioner or petitioners know, or have the means of knowing the same:

1. A full and true account of all the creditors of the corporation, and of all unsatisfied engagements, entered into by, and subsisting against, the corporation.

2. A statement of the name and place of residence of each creditor, and of each person with whom such an engagement was made, and to whom it is to be performed, if known; or, if either is not known, a statement of that fact.

3. A statement of the sum owing to each creditor, or other person specified in the last subdivision, and the nature of each debt, demand, or other engagement.

4. A statement of the true cause and consideration of the indebtedness to each creditor.

5. A full, just, and true inventory of all the property of the corporation, and of all the books, vouchers, and securities, relating thereto.

6. A statement of each incumbrance upon the property of the corporation, by judgment, mortgage, pledge, or otherwise.

7. A full, just, and true account of the capital stock of the corporation, specifying the name of each stockholder; his residence, if it is known, or if it is not known, stating that fact; the number of shares belonging to him; the amount paid in upon his shares; and the amount still due thereupon.

Formerly Code Civ. Pro. § 2421, as am'd by L. 1909, ch. 240.

For forms under this article, see Forms Nos. 373–381.

If a technical and accidental omission in the schedules of some item of property or some other omission to comply with this section of the Code, does not show a lack of good faith on the part of the petitioner or afford evidence of any fraudulent purpose or any attempt to impose upon the court, an objection to the sufficiency of such schedule does not go to the jurisdiction of the court, and may be obviated by evidence. Matter of Murray Hill Bank, 9 A. D. 546 (1896); In re Santa Eulalia Silver Mining Co., 21 St. Rep. 89, aff'd. on op. below, 115 N. Y. 657 (1889).

When the petition prays for a dissolution on the ground of the insolvency of the corporation, and the schedule shows a surplus instead of a deficiency of assets, no case is made for the appointment of temporary receivers of the

property of the corporation. In re Hitchcock Manfg. Co., 1 A. D. 164 (1896). Upon a motion made to vacate the order appointing temporary receivers, it is not permissible to show by affidavits of certain directors, submitted in opposition to such motion, that the former valuation of assets shown by the schedule was erroneous, and that at the time when the directors made their affidavits, a period four months later, the corporation was insolvent. Id.

The petition must state facts showing that dissolution will be beneficial to the interests of the stockholders. It is not enough to allege that the parties differ as to management and that the petitioners owning one-half of the stock are convinced that if the methods and plans of the other parties in relation to the management of the company be carried into effect, the result will be the financial ruin of the corporation. Matter of Pyrolusite, etc., Co., 29 Hun 429 (1883).

A dissolution will not be ordered where it appears that although it might benefit a majority of the stockholders the best interests of the minority demand a continuation of the corporation's existence. Matter of Importers & Grocers' Exchange, 2 N. Y. Supp. 257 (1888); Matter of Livingston Sp. Assn., 17 St. Rep. 879 (1888).

The real property should be so described that the receiver can identify same and take possession; and the books, vouchers and securities should be fully stated so that the receiver can be certain that he has obtained all the property. Matter of Westchester Iron Co., 15 How. 7 (1857).

§ 175. Affidavit to be annexed to petition. An affidavit, made by each of the petitioners, to the effect that the matters of fact, stated in the petition and the schedule, are just and true, so far as the affiant knows or has the means of knowing the same, must be annexed to the petition and schedule.

Formerly Code Civ. Pro. § 2422.

§ 176. Presentation of petition. The papers must be presented at a special term of the supreme court, held within the judicial district, embracing the county wherein the principal office of the corporation is located.

Formerly Code Civ. Pro. § 2423, in part. For remainder of section see §§ 178, 181, 182, 184 of this article.

Where the certificate of incorporation states that the principal office for the management of the affairs of the company is in New York city, although other places are named in other counties where the business of the company is to be carried on, the order should be published and the hearing before the referee should be had in New York. Matter of Westchester Iron Co., 15 How. 7 (1857).

As to notice to the Attorney-General see Gen. Corp. Law, § 312, and cases there cited.

§ 177. Corporations without stockholders. In the case of corporations affected by the provisions of this article and not

having stockholders, it shall be sufficient for the purposes of this article to notify, name and refer to the "members" of such corporations, instead of "stockholders," as herein provided.

Formerly Code Civ. Pro. § 2431, in part. For remainder of section see § 195 of this article.

§ 178. Action by court upon petition for dissolution. In a case specified in sections one hundred and seventy-one and one hundred and seventy-two of this chapter the court may, in its discretion, entertain or dismiss the application. Where it entertains the application, or where the cause is one of those specified in section one hundred and seventy of this chapter, the court must make an order, requiring all persons interested in the corporation to show cause before it, or before a referee designated in the order, at a time and place therein specified, not less than six weeks after the granting of the order, why the corporation should not be dissolved.

Formerly Code Civ. Pro. § 2423, in part, as am'd by L. 1909, ch. 240. For remainder of section see §§ 176, 181, 182, 184 of this article.

If the order recites that the corporation was insolvent and requires all persons to show cause why the prayer of petitioner should not be granted, this is substantially a requirement to show cause "why the corporation should not be dissolved," where the petition prays for a dissolution and the order is entitled "in the matter of the application of the directors, etc., for a voluntary dissolution." Matter of Christian Jensen Co., 128 N. Y. 550 (1891).

If the order directs interested parties to show cause why the prayer of the petition should not be granted, instead of why the corporation should not be dissolved, and no copy of the petition is published or served, the court does not acquire jurisdiction, for the parties would not be informed that a dissolution was demanded or contemplated. Peo. v. Seneca Lake Grape & Wine Co., 52 Hun 174 (1889); Matter of Pyrolusite, etc., Co., 29 Hun 429 (1883).

Where the proceeding is brought to dissolve a solvent corporation and no receiver has been appointed the referee appointed may be authorized to determine the respective rights of preferred and common stockholders so that the final order may provide for distribution. Matter of Seneca Oil Co., 153 A. D. 594 (1912), affd., 208 N. Y. 545.

§ 179. Publication of order to show cause why corporation should not be dissolved. A copy of the order must be published, as prescribed therein, at least once in each of the three weeks immediately preceding the time fixed therein for showing cause, in one or more newspapers, specified in the order, published in the city or county wherein the order is entered.

Thus am'd by L. 1909, ch. 28. Formerly Code Civ. Pro. § 2424.

The note under § 136, supra, also applies to this section.

If the order did not direct publication and did not specify the newspapers in which it was to be published, the court having jurisdiction of the proceeding may correct the defect by making an order nunc pro tunc. Matter of Christian Jensen Co., 128 N. Y. 550 (1891).

§ 180. Service of order to show cause. A copy of the order must also be served upon each of the persons, specified in the schedule as a creditor or stockholder of the corporation, or as a person to whom an engagement of the corporation is to be performed, other than a person whose residence is stated to be unknown, or to be without the United States. The service must be made either personally, at least ten days before the time appointed for the hearing; or by depositing a copy of the order, at least twenty days before the time so appointed, in the post-office, inclosed in a postpaid wrapper, addressed to the person to be served, at his residence, as stated in the schedule.

Formerly Code Civ. Pro. § 2425.

By service of this order creditors are called into court simply on the question as to whether the corporation should be dissolved, and they are therefore not bound by an adjudication made on an accounting by the temporary receiver to himself as permanent receiver of which they have had no notice. Matter of Simonds Mfg. Co., 39 A. D. 576 (1899).

§ 181. Entering and filing order and papers. The order must be entered, and the papers must be filed, within ten days after the order is made, with the clerk of the county where the principal office of the corporation is located.

Formerly Code Civ. Pro. § 2423. For remainder of section see §§ 176, 178, 182, 184 of this article.

§ 182. Temporary receiver. If it shall be made to appear to the satisfaction of the court that the corporation is insolvent, the court may at any stage of the proceedings before the final order, on motion of the petitioners on notice to the attorney-general, or on motion of the attorney-general on notice to the corporation, appoint a temporary receiver of the property of the corporation, which receiver shall have all the powers and be subject to all the duties that are defined as belonging to temporary receivers appointed in an action, in section one hundred and four of this chapter. The court may also, in its discretion, at any stage in the proceeding after the appointment of a temporary receiver, upon like motion and notice, confer upon such temporary

receiver the powers and authority, and subject him to the duties and liabilities of a permanent receiver, or as much thereof as it thinks proper, except that he shall not make any final distribution among the creditors and stockholders, before final order in the proceedings, unless he is specially directed so to do by the court.

Formerly Code Civ. Pro. § 2423. For remainder of section see §§ 176, 178, 181, 184 of this article.

Consolidators' Note.

This section provides for the powers and duties of a temporary receiver and makes applicable to a temporary receiver appointed in proceedings for the voluntary dissolution of a corporation the powers and duties of a temporary receiver appointed in an action for sequestration and for the dissolution of a corporation. This was accomplished by the reference to section 1788 of the Code of Civil Procedure, which reference has been changed to section 105 of this chapter where section 1788 of the Code has been incorporated in this chapter. The powers and duties of a temporary receiver are not defined to any large extent by statute, but are mainly matters of judicial discretion. The powers, duties and liabilities of receivers consolidated in article 11 of this chapter apply only to permanent receivers. For a note on the subject, see 19 Abbott's New Cases, 359.

For additional cases see Gen. Corp. Law, § 104.

The court acquires jurisdiction when the petition is properly presented and by the appointment of a receiver the property of the corporation comes into its possession and it has power to preserve and protect it, and for this purpose it may prohibit any interference in any action thereafter instituted. While a receiver so appointed may not interfere with the property until he has filed his bond, when this is done his title relates back to the date of his appointment. Even if the corporation has wrongfully obtained possession of the property before the appointment of a receiver, the owner thereof may not without first obtaining leave of the court replevy in an action against the receiver. Matter of Christian Jensen Co., 128 N. Y. 550 (1891).

The sole authority for appointing a temporary receiver and granting an injunction enjoining creditors from prosecuting their claims at the commencement of the proceeding is that conferred by this article, and if the statutory authority is not followed strictly the order will be void. Matter of Lenox Corporation, 57 A. D. 515 (1901), affd., 167 N. Y. 623 (1901); the term "insolvency" is limited and defined by section 170 of this article. Id.; if there is any evidence tending to show the requisite facts the court has jurisdiction and the order will not be a nullity. Id.; Knickerbocker Trust Co. v. Tarrytown, etc., Ry. Co., 117 N. Y. Supp. 871 (1909).

Upon the filing of the temporary receiver's bond, his right relates back to the time the order was granted and entered, from which time the property is deemed custodia legis and a judgment creditor whose execution is delivered to the sheriff after the entry of the order but before the filing of the receiver's bond acquires no lien upon the property of the corporation. Matter of Lenox Corporation, 57 A. D. 515 (1901), affd., 167 N. Y. 623 (1901). Contra, if levy is made before appointment of receiver. Matter of Muehlfeld & Haynes Piano Co., 12 A. D. 492 (1896); or, if the execution is delivered to the sheriff prior to the filing of the order appointing the temporary receiver. In re Gies Lithographing Co., 7 A. D. 550 (1896).

Where the order appointing the receivers is signed by a judge out of court, it does not become operative until it is entered in the county clerk's office, and therefore if a bank with whom the corporation has a deposit applies the balance standing on its books to the credit of the corporation upon a note made by the corporation and held by the bank, which note falls due on the day after the order is made, but before the same is entered, the transaction is valid as against the receivers. Wilcox v. Nat'l Shoe & Leather Bank, 67 A. D. 466 (1902).

The court should not, except for the most cogent reason, authorize a sale of all the property of the corporation prior to the entry of the final order dissolving the corporation. Matter of Malcom Brewing Co., 78 A. D. 592 (1903); there should be a full hearing of persons representing the majority interests of stockholders and creditors. Matter of Manoca Temple Assn., 128 A. D. 796 (1908).

The appointment of a temporary receiver does not disable the corporation from moving to vacate an attachment against its property. Waverly Co. v. Worthington Co., 4 Misc. 447 (1893).

Where an action is pending to foreclose a mortgage and the real property is inadequate security for the payment of the indebtedness, thus entitling the mortgagee to the rents, and where a temporary receiver has been appointed because of the company's insolvency, who is in possession, the court may direct the temporary receiver to hold until the further order of the court funds derived from the continuation of the business which shall be equal to an amount adequate to pay a reasonable rent. Matter of Busch Brewing Co., 41 A. D. 204 (1899).

Conflict of Jurisdiction.

Where, after an order was made and filed appointing the temporary receiver and restraining creditors from bringing actions, and before the receiver had filed his bond, certain tug boats belonging to the company were seized by the United States marshal under a libel filed in the U. S. District Court to enforce a maritime lien, the State court has no power or jurisdiction to restrain the libellants from proceeding on their libels. The Federal court alone has jurisdiction to enforce maritime liens existing by operation of law. The rule that the receiver's title and possession relate back to the date of his appointment can only apply in courts of concurrent jurisdiction. Moran v. Sturges, 154 U. S. 256 (1894), revsg. s. c., sub nom. Matter of Schuylers, etc., Co., 136 N. Y. 169 (1892), and see Morrison v. Menhaden, 37 Hun 522 (1885).

If an attachment against real estate is filed in an action in the U. S. Circuit Court before the appointment of receivers in the State court. the latter court has no authority or jurisdiction on application of the State receiver to enjoin proceedings on the part of the attaching plaintiff and the United States marshal. The validity of the attachment must be determined in the Federal court. Beardslee v. Ingraham, 183 N. Y. 411 (1906).

Bankruptcy.

The Bankruptcy Law, § 3a(4), as amended by the Act of 1903, ch. 487, § 2, provides:

"Acts of bankruptcy by a person shall consist of his having * * * (4) made a general assignment for the benefit of his creditors, or, being

insolvent, applied for a receiver or trustee for his property, or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States."

The appointment of a temporary receiver in voluntary dissolution proceedings does not deprive the board of directors of their power to make written admission of their willingness to be adjudged an involuntary bankrupt. Matter of Moench & Sons Co., 130 Fed. 685 (1904), affg. 123 Fed. 965 (1903).

Under the Incorporation Act of New Jersey which provides that on a bill filed by a creditor or stockholder of a corporation charging its insolvency, the Court of Chancery being satisfied by affidavit or otherwise of the truth of the allegations and upon such notice as the court may direct, may grant an injunction and at the same time or any time thereafter may appoint a receiver, the appointment of a temporary receiver at the time of the filing of the bill with an order directing the giving of notice to the corporation, was an appointment under the general equity power of the court and did not constitute the appointment of a receiver under the insolvency laws of the State within the meaning of the above section. Zugalla v. Internat'l Mercantile Agency, 142 Fed. 927 (1906).

Petitioning creditors of a corporation are not debarred from having it adjudged a bankrupt by the fact that pending the proceedings in the Federal court a decree dissolving the corporation was entered by the State court which had taken possession of the corporation's property. Section 8 of the Bankruptcy Act relating to the death or insanity of the bankrupt is applicable to a corporation and the adjudication in bankruptcy would operate to render the preferences void and entitle all creditors to share ratably in the assets of the corporation. Scheuer et al. v. Smith & Montgomery Book & Stationery Co., 112 Fed. 407 (1901).

§ 183. Application for appointment of receiver. Every application made for the appointment of a receiver of a corporation other than applications made by the attorney-general on behalf of the people of the state, shall be made at a special term of the supreme court held in and for the judicial district in which the principal business office of the corporation is located.

Formerly L. 1883, ch. 378, § 1, in part, as am'd by L. 1896, ch. 282, § 1.

Consolidators' Note.

The statute of 1883, a portion of which is here consolidated, applies to proceedings for the voluntary dissolution of a corporation. People v. Seneca Lake Grape & Wine Co., 52 Hun 175. See, also, U. S. Trust Co. v. N. Y., W. S. & B. R. R. Co., 101 N. Y. 478; McNabb v. Porter Air Lighter Co., 44 A. D. 103; Matter of Broadway Insurance Co., 23 A. D. 282. A more general provision relating to applications for the appointment of receivers and otherwise will be found in section 314 under the head of provisions applicable to more than two of the actions or proceedings incorporated in this chapter.

See Gen. Corp. Law, §§ 108 and 314; also General Rules of Practice, Rule 80.

A receiver of a corporation may be appointed in the county in which the action is brought notwithstanding rule 80, which cannot prevent a party from suing in the county where he resides. Smith v. Danzig, 3 Civ. Pro. 127.

§ 184. Injunction. If a temporary receiver be appointed, the court may, in its discretion, on like motion and notice, with or without security, at any stage of the proceeding before the final order, grant an injunction, restraining the creditors of the corporation, from beginning any action against the said corporation for the recovery of a sum of money, or from taking any further proceedings in such an action theretofore commenced. Such injunction shall have the same effect and be subject to the same provisions of law as if each creditor upon whom it is served was named therein.

Formerly Code Civ. Pro. § 2423, in part. For remainder of section see §§ 176, 178, 181, 182 of this article.

A court has no power, in proceedings for the voluntary dissolution of a corporation, to order a general assignee of the corporation to deliver its assets to the receiver, where, although such proceedings were begun before the date of the general assignment, the receiver was appointed after that time, and where the general assignee was not a party to the proceedings in which the receiver was appointed. Matter of Muehlfeld, 16 A. D. 401 (1897).

The court has no power to restrain creditors of the corporation from disposing of its bonds, held as collateral to loans under lawful contracts empowering them to sell. In re Binghamton Gen. Elec. Co., 143 N. Y. 261 (1894).

When the order appointing the receiver does not restrain the judgment creditor from prosecuting his action against the corporation, his issue of an execution in such an action and a levy under it are proper acts and cannot be construed to be a contempt of court. Bennett v. Complete Elec. Const. Co., 8 A. D. 301 (1896).

Where a temporary receiver has been appointed, the court cannot, under the provision empowering it to grant an injunction restraining the creditors of the corporation, restrain a suit to foreclose a mortgage given by the corporation to a trust company to secure its bonds; such an action is not one for the "recovery of a sum of money" within the meaning of this section. Matter of Hamilton Park Co., 1 A. D. 375 (1896); In re Binghamton Gen. Elec. Co., 143 N. Y. 261 (1894); Matter of Busch Brewing Co., 41 A. D. 204 (1899); In re Tarrytown, etc., Ry. Co., 117 N. Y. Supp. 695 (1909).

An order enjoining proceedings by creditors does not prevent a sub-contractor from filing a mechanic's lien against the property of the owner for an amount due the sub-contractor from the contractor which latter is a corporation being dissolved. Matter of Simonds Furnace Co., 30 Misc. 209 (1900).

Prior to the amendment made by L. 1889, ch. 314, it was held that an injunction restraining creditors from enforcing their demands could not be granted at the same time with the order to show cause. Matter of French Mfg. Co., 12 Hun 488 (1878).

Under the present statute a temporary receiver may be appointed and an injunction granted at the commencement of the proceeding. Knickerbocker T. Co. v. Tarrytown, etc., Ry. Co., 117 N. Y. Supp. 871 (1909). But the injunction cannot be granted unless a receiver is appointed, although both may be appointed by the same order. In re Simonds Soap Co., 41 St. Rep. 355 (1891).

§ 185. Referee. If a referee was not designated in the order to show cause, the court may, in its discretion, appoint a referee when or after the order is returnable.

Formerly Code Civ. Pro. § 2426, in part. For remainder of section see §§ 186, 187 of this article.

§ 186. Hearing. At the time and place specified in the order, or at the time and place to which the hearing is adjourned, the court, or the referee, must hear the allegations and proofs of the parties, and determine the facts.

Formerly Code Civ. Pro. § 2426, in part. For remainder of section see §§ 185, 187 of this article.

§ 187. Decision. The decision of the court, or the report of the referee, must be in writing, and must be made and filed with all convenient speed. It must contain a statement of the effects, credits, and other property, and of the debts and other engagements, of the corporation, and of all other matters, pertaining to its affairs.

Formerly Code Civ. Pro. § 2426, in part. For remainder of section §§ 185, 186 of this article.

§ 188. Use of original papers on hearing. The court or the referee is entitled to use, upon the hearing, the original petition, and the schedules annexed thereto; and the clerk must transmit them accordingly, upon the written order of the judge, or of the referee. In that case, they must be returned with the decision or report.

Formerly Code Civ. Pro. § 2427, in part. For remainder of section see § 189 of this article.

§ 189. Amending papers. The court may, at any stage of the proceedings before final order, on the application of the petitioners, or a majority of them, or on the application of the temporary receiver, grant an order amending the schedules annexed to the original petition, by the insertion of additional items, or by making the statements or inventory fuller and in greater detail than as originally filed, with the like effect as though said petition and schedules had been originally presented and filed as amended.

Formerly Code Civ. Pro. § 2427, in part. For remainder of section see § 188 of this article.

§ 190. Final order. Where the hearing is before a referee, a motion for a final order must be made to the court, upon notice to each person who has made himself a party to the proceedings, by filing with the clerk, before the close of the hearing, a notice of his appearance, in person or by attorney, specifying a post-office within the state, where such a notice may be served. The notice may be served as prescribed in the code of civil procedure for the service of a paper upon an attorney in an action. Where the hearing was before the court, a motion for a final order may be made immediately, or at such a time and upon such a notice, as the court prescribes.

Formerly Code Civ. Pro. § 2428.

After filing notice of appearance, interested parties are entitled to notice of all applications made to the court. In re Wendler Machine Co., 2 A. D. 16 (1896).

§ 191. Permanent receiver. Upon an application for a final order, if it appear to the court in a case specified in section one hundred and seventy of this chapter that the corporation is insolvent, or, in a case specified either in that section, or in section* one hundred and seventy-one and one hundred and seventy-two of this chapter, that for any reason a dissolution of the corporation will be beneficial to the interests of the stockholders and not injurious to the public interests, the court must make a final order dissolving the corporation, and appointing one or more receivers of its property. But in the case of a solvent corporation, the court may, if there is no objection by creditors, dispense with a receiver and provide in the final order for the distribution of the assets. Upon the entry of the order the corporation is dissolved. A receiver appointed under this section shall have all the powers, duties and liabilities of receivers under article eleven of this chapter.

Formerly Code Civ. Pro. § 2429, in part, as am'd by L. 1909, ch. 240. For remainder of section see §§ 192, 194 of this article.

Consolidators' Note.

In the title in the Code of Civil Procedure relating to proceedings for the voluntary dissolution of a corporation there will be found no statement of the powers, duties and liabilities of receivers who may be appointed in such proceedings. There is not even a reference in the proceedings conferring upon the receivers appointed in the proceedings the powers, duties and liabilities of receivers. The omission, however, is supplied by Laws 1880, chapter 245,

* So in the original.

section 1, subdivision 3, page 369, which provides as follows: "§§ 66 to 89 (Revised Statutes, Pt. 3, ch. 8, Tit. 4, Art. 3), both inclusive, which are hereby made applicable to a receiver appointed as prescribed in § 2429 of the Code of Civil Procedure." These sections of the Revised Statutes comprise in themselves or by reference the provisions in the Revised Statutes relating to the powers, duties and liabilities of receivers. The provisions of the Revised Statutes referred to have been consolidated in article 11 of this chapter and have been incorporated in this article relating to proceedings for the voluntary dissolution of a corporation by a reference at the end of section 191 as follows: "A receiver appointed under this section shall have all the powers, duties and liabilities of receivers under Art. 11 of this chapter."

Section not Applicable to Foreign Corporations.

The provisions of sections 100, 106, 170, 191 and 230, are intended to regulate the conduct of receiverships of domestic corporations and not of foreign corporations. Strauss v. Casey Mach. & Supply Co., 68 Misc. 474 (1910).

As to survival of causes of action against trustees, see Gen. Corp. Law, § 35.

When the interests of stockholders are so discordant as to prevent efficient management and a large majority of both directors and members wish to wind up its affairs a dissolution thereof will be beneficial to the interests of the stockholders because the object of its corporate existence cannot be attained. Hitch v. Hawley, 132 N. Y. 212 (1892).

The court must be satisfied either that the corporation is insolvent or else that the dissolution is for the interest of the stockholders and not injurious to public interests. Matter of Sportsmen's Assn., 15 Civ. Pro. 215 (1888).

If there are violent dissensions between members of a benevolent society, the court will order dissolution, but not for mere differences of opinion or ordinary disputes. Fischer v. Raab, 57 How. 87 (1879).

A discrepancy in the number of books of the corporation appearing in the schedules and the referee's report is not ground for refusing the final order if the schedules were made in good faith. Matter of Santa Eulalia S. M. Co., 21 St. Rep. 89, affd. on op. below, 115 N. Y. 657 (1889).

Where the final order is made because the directors cannot agree, the court may order the sale and distribution of assets after payment of the liabilities and expenses of the receivership. Matter of Woven Tape Skirt Co., 8 Hun 508 (1876).

Where the directors of a corporation which has issued first mortgage bonds apply for a voluntary dissolution and appointment of a receiver in order to protect the corporate property, the expenses of the application may properly be made a charge to be first paid by the temporary receiver out of the funds in his hands, although he was not appointed in an action brought by the stockholders or their trustee. Matter of New Paltz, etc., Co., 27 Misc. 451 (1899).

The court has no power to grant the petitioners an extra allowance. In re Tarrytown, etc., Ry. Co., 117 N. Y. Supp. 695 (1909).

Result of Voluntary Dissolution.

See cases, Gen. Corp. Law, § 101, under "Result of Dissolution."

Where the defendant guaranteed to pay the dividend on stock certificates of another corporation as long as they should be outstanding, but not to exceed the present unexpired term for which the other corporation is incorporated, such guarantee contemplates the continued existence of the company issuing the certificate and upon its voluntary dissolution the defend-

ant could not be held on its guaranty. It seems there would be a cause of action if the dissolution was conceived and carried out for the purpose of relieving the defendant from its obligation of guaranty. Mason v. Standard Distilling Co., 85 A. D. 520 (1903).

In order to be relieved from its contracts because of voluntary dissolution the corporation must show in addition to the mere proof of dissolution, the fact that such dissolution was a necessity because of its financial condition. The company is not relieved where the temporary receiver, after obtaining leave to complete existing contracts, carries out only those advantageous to the company and thereafter obtains his discharge and returns the property to the corporation. Stannard v. Reid & Co., 114 A. D. 135 (1906); s. c., 118 A. D. 304 (1907), affd., no op., 88 N. E. 1132 (1909).

§ 192. Appointment of director, trustee or other officer or stockholder as receiver. The court may, in its discretion, appoint a director, trustee, or other officer, or a stockholder of the corporation, a receiver of its property.

Formerly Code Civ. Pro. § 2429, in part. For remainder of said section see §§ 191, 194 of this article.

Consolidators' Note.

This section is the same as the following provision in the Revised Statutes which latter provision, therefore, has been repealed:

"Any of the directors, trustees or other officers of such corporation, or any of its stockholders may be appointed receivers." R. S., pt. 3, ch. 8, tit. 4, art. 3, § 66.

See Judiciary Law, § 251 (Cons. L., ch. 30, L. 1909, ch. 35) prohibiting the appointment of court clerks in the county of New York except upon the consent of all parties.

§ 193. Certain sales, transfers and judgments void. A sale, assignment, mortgage, conveyance, or other transfer, of any property of a corporation, made after the filing of a petition as prescribed in this article, in payment of, or as security for, an existing or prior debt, or for any other consideration; or a judgment thereafter rendered against the corporation by confession, or upon the acceptance of an offer, is absolutely void, as against the receiver appointed in the special proceeding, and as against the creditors of the corporation.

Formerly Code Civ. Pro. § 2430.

Consolidators' Note.

This section is the same as the following section of the Revised Statutes which latter section, therefore, has been repealed:

"All sales, assignments, transfers, mortgages and conveyances of any part of the estate real or personal, including things in action, of every such corporation, made after the filing of the petition for a dissolution thereof, in payment of, or as a security for, any existing or prior debt, or for any other consideration, and all judgments confessed by such corporation after that

time, shall be absolutely void as against the receivers who may be appointed on such petition, and as against the creditors of such corporation." R. S., pt. 3, ch. 8, tit. 4, art. 3, § 71.

The word "transfer" means a passing over to another of an existing right to the thing transferred, which right shall survive the transfer. It does not include the extinguishment or satisfaction of a chose in action either by payment in full or part payment taken in full satisfaction. Sands v. Hill, 55 N. Y. 18 (1873).

Where the maker of a premium note paid an assessment thereon to a mutual insurance company and surrendered his policy under an agreement that the payment and surrender should be in full for the note, the transaction was not invalidated by this section and the receiver could not maintain an action on the note. Sands v. Hill, 55 N. Y. 18 (1873).

Where a just debt exists against an insolvent corporation, upon which an action is brought, the fact that the corporation fails to defend is not alone sufficient to justify the inference that the judgment was suffered with intent to give a preference, and a judgment so entered is not invalid under this section. Matter of Dissolution of Muehlfeld & Haynes Piano Co., 12 A. D. 492 (1896).

§ 194. Omission, defect or default of receiver. In a proceeding for the voluntary dissolution of a corporation, the court may, in the furtherance of justice, upon notice to the attorney-general, and the attorney-general not objecting, and upon such further notice to creditors or others interested as the court shall direct, which notice may be made by mail upon all persons and corporations not residing or existing within the state, relieve a receiver from any omission, defect or default, in any proceeding or act required by law to be taken or done, or in the giving of any notice required by law to be given, and the court may upon like notice, confirm any act of a receiver, and any decision, report, order or judgment made in such proceeding.

Formerly Code Civ. Pro. § 2429, in part. For remainder of section see §§ 191, 192 of this article.

The failure of receivers to give the Attorney-General notice of an application for an order directing the sale of corporate property may be cured by an order on notice directing the entry of the order authorizing the sale nunc pro tunc. Johnson v. Rayner, 25 A. D. 598 (1898).

As to the result of the failure of others than receiver to give notice see Gen. Corp. Law, § 312, post, and cases cited.

§ 195. Exception of certain corporations. This article does not apply to an incorporated library society, to a religious corporation, or to a select school or academy, incorporated by the regents of the university or by the legislature, or to a municipal or other political corporation.

Formerly Code Civ. Pro. § 2431, in part. For remainder of section see § 177 of this article.

ARTICLE 10

Dissolution of Stock Corporation without Judicial Proceedings

SECTION 220. Dissolution of stock corporation before beginning business.
221. Dissolution of stock corporation before expiration of time limit.

§ 220. Dissolution of stock corporation before beginning business. The incorporators named in any certificate of incorporation filed for the purpose of creating a domestic stock corporation, other than a monied or transportation corporation, may, before the payment of any part of the capital, and before beginning business, surrender all corporate rights and franchises, by signing, verifying and filing in the office of the secretary of state and the clerk of the county where the certificate of incorporation is filed, a certificate setting forth the names of the incorporators, that no part of the capital has been paid, that there are no liabilities, that such business has not been begun, and surrendering all rights and franchises; and proof of the facts set forth in such certificate to the satisfaction of the secretary of state; and thereupon the said corporation shall be dissolved, and its corporate existence and power shall cease. In case any incorporator of such a corporation shall be deceased, then the aforesaid certificate may be made by the surviving incorporators providing two years shall have elapsed since the date of its incorporation, but in such case the certificate shall set forth the fact that one or more of said incorporators is deceased.

Formerly Stock Corp. Law, § 61, as added by L. 1904, ch. 296, § 1.
For form of certificate, see post, Form No. 441.

§ 221. Dissolution of stock corporation before expiration of time limit. Any stock corporation, except a moneyed or a railroad corporation, may be dissolved before the expiration of the time limited in its certificate of incorporation or in its charter as follows:

1. The board of directors of any such corporation may at a meeting called for that purpose, upon at least three days' notice to each director, by a vote of a majority of the whole board, adopt a resolution that it is in their opinion advisable to dissolve such corporation forthwith, and thereupon shall call a meeting of the

stockholders for the purpose of voting upon a proposition that such corporation be forthwith dissolved. Such meeting of the stockholders shall be held not less than thirty nor more than sixty days after the adoption of such resolution, and the notice of the time and place of such meeting so called by the directors shall be published in one or more newspapers published and circulating in the county wherein such corporation has its principal office, at least once a week for three weeks successively next preceding the time appointed for holding such meeting, and on or before the day of the first publication of such notice, a copy thereof shall be served personally on each stockholder, or mailed to him at his last known post-office address. Such meeting shall be held in the city, town or village in which the last preceding annual meeting of the corporation was held, and said meeting may, on the day so appointed, by the consent of a majority in interest of the stockholders present, be adjourned from time to time, and notice of such adjournment shall be published in the newspapers in which the notice of the meeting is published. If at any such meeting the holders of two-thirds in amount of the stock of the corporation, then outstanding, shall, in person or by attorney, consent that such dissolution shall take place and signify such consent, in writing, then such corporation shall file such consent, attested by its secretary or treasurer, and its president or vice-president, together with the powers of attorney signed by such stockholders executing such consent by attorney, with a statement of the names and residences of the then existing board of directors of said corporation, and the names and residences of its officers duly verified by the secretary or treasurer or president of said corporation, in the office of the secretary of state.

2. The secretary of state shall thereupon issue to such corporation, in duplicate, a certificate of the filing of such papers and that it appears therefrom that such corporation has complied with this section in order to be dissolved, and one of such duplicate certificates shall be filed by such corporation in the office of the clerk of the county in which such corporation has its principal office; and thereupon such corporation shall be dissolved and shall cease to carry on business, except for the purpose of adjusting and winding up its business. The board of directors shall cause a copy of such certificate to be published at least once a week for two weeks in one or more newspapers published and circulating

in the county in which the principal office of such corporation is located, and at the expiration of such publication, the said corporation by its board of directors shall proceed to adjust and wind up its business and affairs with power to carry out its contracts and to sell its assets at public or private sale, and to apply the same in discharge of debts and obligations of such corporation, and, after paying and adequately providing for the payment of such debts and obligations, to distribute the balance of assets among the stockholders of said corporation, according to their respective rights and interests.

3. Said corporation shall nevertheless continue in existence for the purpose of paying, satisfying and discharging any existing debts or obligations, collecting and distributing its assets and doing all other acts required in order to adjust and wind up its business and affairs, and may sue and be sued for the purpose of enforcing such debts or obligations, until its business and affairs are fully adjusted and wound up.

V. p. 127(n): directors as trustees.

4. After paying or adequately providing for the debts and obligations of the corporation the directors may, with the written consent of the holders of two-thirds in amount of the capital stock, sell the remaining assets or any part thereof to a corporation organized under the laws of this or any other state, and engaged in a business of the same general character, and take in payment therefor the stock or bonds or both of such corporation and distribute them among the stockholders, in lieu of money, in proportion to their interest therein, but no such sale shall be valid as against any stockholder, who, within sixty days after the mailing of notice to him of such sale, shall apply to the supreme court in the manner provided by section seventeen of the stock corporation law, for an appraisal of the value of his interest in the assets so sold; unless within thirty days after such appraisal the stockholders consenting to such sale, or some of them, shall pay to such objecting stockholder or deposit for his account, in the manner directed by the court, the amount of such appraisal and upon such payment or deposit the interest of such objecting stockholder shall vest in the person or persons making such payment or deposit.

Formerly Stock Corp. Law, § 57, as added by L. 1896, ch. 932, § 1, and am'd by L. 1900, ch. 760, § 1.

For form of certificate of dissolution by consent of stockholders, and instruments in connection therewith, see Forms Nos. 442–444.

For minutes of meeting of directors to vote on dissolution, see Form No. 445.

For minutes of meeting of stockholders to vote on dissolution, see Form No. 446.

For form of certificate for dissolution where notices have been waived, see Form No. 447.

For form of written consent of stockholders to be annexed to the above mentioned certificate, see Form No. 448.

For form of waiver of notice by directors of meeting to dissolve corporation, see Form No. 450.

For form of waiver of notice of stockholders of meeting for dissolution, see Form No. 451.

For form of power of attorney to vote and sign consent, see Form No. 452.

For minutes of meeting of directors relative to liquidation of dissolved corporation, see Form No. 453.

For form of financial statement by directors as trustees in dissolution, see Form No. 454.

For form of endorsement on certificate of stock of partial payment in liquidation, see Form No. 455.

For form of notice to creditors, see Form No. 457.

For additional cases applicable hereto see Gen. Corp. Law, § 35.

A complaint in an action by a stockholder to procure a dissolution and to set aside an alleged voluntary dissolution claimed to be a fraud on minority stockholders which was attempted pursuant to this section is demurrable if it does not affirmatively allege that the notice to stockholders required by this section had not been published or served or mailed to stockholders. The motives leading to a voluntary dissolution are immaterial if the statute has been complied with. Knickerbocker v. Groton Bridge & Mfg. Co., 111 A. D. 145 (1906).

Waiver of Notice of Meeting.

The notice of meeting and lapse of time provided for in subdivision 1 of the foregoing section may be waived by a consent in writing signed by every stockholder of the corporation, pursuant to section 42 of the General Corporation Law. It is provided in said section that when a corporation is authorized to take any action after notice to its members or after the lapse of a prescribed period of time, such action may be taken without notice and without the lapse of any period of time by a waiver in writing signed by every member of the corporation. In view of the fact that the dissolution proceedings above provided for affect only the members of the corporation, and not its creditors, the former have an undoubted right to waive the statutory notice and lapse of time. The rights of creditors are not affected by the action of the stockholders in dissolving the corporation. On the other hand, subdivision 3 expressly provides that notwithstanding the dissolution proceedings taken under the foregoing statute the corporation shall nevertheless continue in existence for the purpose of paying its debts. In accordance with the foregoing views there have been prepared for this edition forms for a dissolution where unanimous consent of stockholders has been obtained, as well as the forms for the usual proceedings taken after notice to stockholders.

Notice to Creditors to Present Claims.

See suggestions respecting notice to creditors contained in note under Form No. 457.

V. p. 127(n).

Duties and Liability of Directors on Voluntary Dissolution.

As trustees of the creditors of the corporation upon dissolution, it is the duty of directors to settle its affairs, collect the assets, pay the debts, and divide among the persons entitled thereto the money and other property remaining. They have authority to sue for and recover the debts and property of the corporation as such trustees and they are jointly and severally, personally liable to the corporate creditors to the extent of the property which came into their hands. However, even upon an illegal distribution of the assets, a receiver pendente lite will not be appointed, for in that case the defendant corporation itself has no property. Tapley Co. v. Keller, 133 A. D. 54, 117 N. Y. Supp. 817 (1909).

Parties Defendant in Suits Against Dissolved Corporation.

Upon the dissolution of a corporation under this section the directors become trustees for the benefit of all who may be entitled to share in its assets and, to this end, are entitled to take possession of the assets and distribute them among its creditors, pro rata, and they become accountable for only what they receive. In the case of contested claims which can be established and liquidated only by a judgment, the action should be against the corporation, which is expressly continued in existence for that purpose by subdivision 3. Whether or not the trustees can properly be joined as defendants in such an action in order to conclude them as to the existence of a debt and its amount is a question which has not been determined; but the action in any event should be against the corporation, and does not lie against the trustees alone. Cunningham v. Gauber, 133 A. D. 10; 117 N. Y. Supp. 866 (1909). Upon such a dissolution the directors become trustees for the creditors and are personally liable for corporate debts to the extent of the corporate assets coming into their hands. Id.

Directors Should Give Notice to Creditors or Provide for Unknown Claims.

Directors who transfer all the corporate property to another corporation which assumes payment of all the debts of the vendor are liable to account to the judgment creditors of the latter for the property so transferred. The fact that the directors did not know of the claim is immaterial, for they should have provided for unknown claims. If they undertake to divest the corporation of all its property and practically dissolve it without taking the proceedings for a voluntary dissolution which are prescribed by law, they are bound to give some notice to creditors of the proposed transfer. Darcy v. Bklyn. & N. Y. Ferry Co., 196 N. Y. 99 (1909), affg. 127 A. D. 167.

Right of Creditor of Dissolved Foreign Corporation.

Where a West Virginia corporation doing business here was voluntarily dissolved by its stockholders, pursuant to laws of that State, without reserving enough to pay its debts, a creditor here may sue directly such stockholders taking with notice as distributees of its assets which constitute a trust fund for payment of its debts, and is not required to first exhaust his remedy against the corporation, because the laws of West Virginia do not provide for such an action, and in that respect are quite different from our laws, which require as a prerequisite a judgment against the corporation and an execution thereon returned unsatisfied. Atlantic Dredging Co. v. Beard, 145 A. D. 342 (1911), affd. 203 N. Y. 584.

Sale of Property; Dissenting Stockholder's Remedy.

Where the assets of a corporation, which has been dissolved under this section, pursuant to vote of its stockholders, have been sold to a new corporation organized in another State for the purpose of avoiding heavy taxes, and an equitable plan was adopted for distribution of the new stock to stockholders of the original company, the reorganization will not be set aside in behalf of one who owns but one four-thousandth of the stock and has accepted pecuniary benefits under the plan. A dissenting stockholder's remedy is to take proceedings to have the value of his stock appraised. Treadwell v. United Verde Copper Co., 134 A. D. 394 (1909); see, also, Drake v. N. Y. Suburban Water Co., 36 A. D. 275, 279.

A sale of the good will of a corporation in dissolution proceedings under this section is not invalidated by the fact that a stockholder who objected to the sale commenced proceedings for the appraisal of his interest in the dissolved corporation and that appraisers had been appointed but that no appraisal had yet been made. The duty to pay the appraised value of the dissenting stockholder's interest within thirty days after the appraisal is a condition subsequent and the sale of the good will until invalidated by the failure to pay such stockholder, was effectual so far as the purchaser was concerned. R. J. Horner & Co. v. Lawrence, 86 Misc. 95 (1914).

Form of Conveyance after Dissolution.

The officers of a corporation, after dissolution proceedings have been completed, pursuant to this section, may execute a valid assignment of a claim for moneys due under a contract. Asphalt Paving & Contracting Co., 149 A. D. 622, 630 (1912). Such assignment may be executed in the usual corporate form, signed in the name of the corporation by the president or a vice-president, and attested by the secretary, with the usual proof of corporate execution because the corporation continues in existence until its affairs are adjusted and wound up. Id.

Dissolution where Preferred Stock is Deprived of Voting Rights.

In order to accomplish a dissolution under the provisions of this section it is necessary that the holders of two-thirds in amount of the entire outstanding stock of the corporation shall consent thereto in writing, notwithstanding the fact that the certificate of incorporation provides that the preferred stockholders shall not be entitled to vote in the management of the affairs of the company. Strictly speaking a dissolution is not a management of the affairs of the corporation, but is a complete suspension and winding up of its affairs. Opinion of Atty. Genl., Jan. 13, 1912, Vol. 2, p. 18.

Place of Meeting.

Place of meeting for the purpose of voting upon a proposition to dissolve a corporation under this section, must be in the city, town or village in which the last preceding annual meeting of the corporation was held within this State. Such annual meeting to have been legal must necessarily have been within the boundaries of the State of New York. The meeting must be called originally for such place, and if called for an improper place cannot be legally adjourned. Rept. of Atty. Genl., Jan. 18, 1912.

*ARTICLE 10-a

Provisions Applicable to Temporary and Permanent Receivers of Corporations

SECTION 225. Security.
226. Removal or new bond.
227. Notice to sureties upon accounting.

§ 225. Security. A receiver, appointed in an action or special proceeding, must, before entering upon his duties, execute and file with the proper clerk, a bond to the people, with at least two sufficient sureties, in a penalty fixed by the court, judge, or referee, making the appointment, conditioned for the faithful discharge of his duties as receiver; and the execution of any such bond by any fidelity or surety company authorized by the laws of this state to transact business, shall be equivalent to the execution of said bond by two sureties. But this section does not apply to a case where special provision is made by law for the security to be given by a receiver or for increasing the same.

The same provision is found in Code, § 715.

If the receiver's bond runs to the plaintiff instead of the people and is based on a consideration it is good as a common law bond and the sureties are liable. Carl v. Meyer, 51 A. D. 5 (1900).

If the order requires but one surety, it may be amended so as to require two. Holmes v. McDowell, 15 Hun 585, affd. on op. below, 76 N. Y. 596 (1879).

See also Code, §§ 729 and 730, as to sufficiency of bond and amending defects

§ 226. Removal or new bond. The court, or, where the order was made out of court, the judge making the order, by or pursuant to which the receiver was appointed, or his successor in office, may, at any time, remove the receiver, or direct him to give a new bond, with new sureties, with the like condition specified in the last section. But this section does not apply to a case where special provision is made by law for the security to be given by a receiver, or for increasing the same, or for removing a receiver.

§ 227. Notice to sureties upon accounting. A receiver who, having executed and filed a bond as provided for in section two hundred and twenty-five or section two hundred and twenty-six of this chapter, before presenting his accounts as receiver, must give notice to the surety or sureties on his official bond, of his

* This article, consisting of §§ 225, 226 and 227, is new, added by L. 1909, ch. 240.

intention to present his accounts, not less than eight days before the day set for the hearing on said accounting. The same notice must be given to such surety or sureties where the accounting is ordered on the petition of a person or persons other than the receiver, and in no case shall the receiver's accounts be passed, settled or allowed, unless the said notice provided for in this section shall have first been given to the surety or sureties on the official bond of such receiver.

No action can be maintained upon the bond as a statutory obligation unless the surety had notice of the accounting. The complaint should be dismissed, but not on the merits. Stratton v. City Trust, etc., Co., 86 A. D. 551 (1903); French v. Dauchy, 134 N. Y. 543 (1892); Coe v. Patterson, 122 A. D. 76 (1907).

Where the right to appoint a receiver in voluntary dissolution proceedings existed, but was exercised at a time not sanctioned by law, the receiver appointed became a receiver de facto and his sureties having executed a bond voluntarily which recited his appointment, were estopped from denying the validity of the appointment. Thompson v. Denner, 16 A. D. 160 (1897).

It seems that if it be shown that the receiver converted property of the estate to his own use, the surety would be liable independent of the accounting. Stratton v. City Trust Co., 69 A. D. 322 (1902); s. c., 86 A. D. 551 (1903).

ARTICLE 11

Powers, Duties and Liabilities of Receivers of Corporation

SECTION 230. Application of this article.
231. Receiver trustee of property.
232. Receiver's title to property.
233. Transfer of assets of corporation to receiver.
234. Security of receiver.
235. Authority of single receiver.
236. Authority where there is more than one receiver.
237. Surviving receivers.
238. Oath of receiver.
239. General powers of receivers.
240. Power of receiver to institute proceedings to recover assets.
241. Power of receiver in the settlement of controversies.
242. Power of receiver to employ counsel.
243. Power of receiver to hold real property.
244. Power of receiver to recover stock subscriptions.
245. Duty of receiver to convert assets into money.
246. Duty of receiver as to private sales.
247. Duty of receiver to keep accounts.
248. Duty of receiver to serve copy of report upon attorney-general and superintendent of banks.
249. Duty of certain receivers to make reports.
250. Duty of receivers to give notice to creditors.
251. Delivery of property and payment of debts to receiver after notice.

SECTION 252. Penalty for concealing property from receiver.
253. Duty of receiver to call creditors' meeting.
254. Proceedings at creditors' meeting.
255. Deduction of disbursements and commissions by receiver.
256. Refunding consideration of subsisting contracts.
257. Retention of funds for subsisting contracts and pending suits.
258. Payment of debts not due.
259. Allowance of set-offs.
260. Penalties recovered by receiver.
261. Order of payment by receiver.
262. Failure to file claim before first dividend.
263. Second dividend by receiver.
264. Surplus to stockholders.
265. Disposition of moneys retained by receiver for suits.
266. Duty of receiver as to unclaimed dividend.
267. Effect of failure to file claim before second dividend.
268. Final accounting by receiver.
269. Notice of final accounting.
270. Hearing on final accounting.
271. Reference of final account.
272. Further accounting.
273. Removal of receiver.
274. Vacancy.
275. Renunciation by receiver.
276. Control of receiver by court.
277. Commissions and expenses of receiver in voluntary dissolution.
278. Commissions and expenses of receiver except in voluntary dissolution.

§ 230. Application of this article. Unless otherwise provided the provisions of this article shall apply only to permanent receivers appointed pursuant to section one hundred and six or section one hundred and ninety-one of this chapter.

New; added by L. 1909, ch. 28.

Section 106 provides for a permanent receiver in actions by judgment creditors for sequestration and also actions to dissolve a corporation.

Section 191 provides for receivers in actions for voluntary dissolution.

Section 134 provides for the appointment of a permanent receiver in an action to annul a corporation, as where a corporation is dissolved upon its voluntary application, see section 191.

This article, therefore, applies to permanent receivers in actions brought under articles 6, 7, and 9, supra.

Jurisdiction to appoint receivers of corporations is wholly statutory. The power to declare a forfeiture of corporate franchises was originally in England vested in the courts of law and was exercised in a proceeding brought by the Attorney-General in the name of the sovereign. The Court of Chancery never assumed jurisdiction in such cases until it was conferred by act of Parliament. Decker v. Gardner, 124 N. Y. 334 (1891); Matter of Coleman, 174 N. Y. 373 (1903); Attorney-General v. Utica Insurance Co., 2 Johns. Ch. 371 (1817); Attorney v. Bank of Niagara, Hopkins Ch. 354 (1825).

The court may order a reference to determine upon or report a proper person to be appointed receiver. Matter of Eagle Iron Works, 8 Paige Ch. 385 (1840), where the practice is stated.

§ 231. Receiver trustee of property. Permanent receivers shall be trustees of the property for the benefit of the creditors of the corporation and of its stockholders.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 67, in part.

Consolidators' Note.

This section covers the same ground as the following provision in Revised Statutes which latter provision therefore has been omitted:

"All assignees and trustees, appointed under any authority, conferred by any of the provisions of the preceding articles of this title, in the several cases therein contemplated, are hereby declared to be trustees of the estate of the debtor, in relation to whose property they shall be appointed, for the benefit of his creditors; and shall be vested with all the powers and authority hereinafter specified, and shall be subject to the control, obligations and responsibilities hereinafter declared, in respect to trustees."

R. S., pt. 2, ch. 5, tit. 1, art. 8, § 1.

The receiver of a voluntarily dissolved corporation is, by force of the statute, a trustee of the property of the corporation for the benefit of all its creditors; and the six years' statute of limitations does not run in his favor against claims not barred at the time of his appointment, so long as the trust is open and continuing, and has not been repudiated or denied. Ludington v. Thompson, 153 N. Y. 499; see Matter of Coleman, 174 N. Y. 383.

As to when directors are trustees in case of dissolution see Gen. Corp. Law, § 35.

It is the settled doctrine that the receiver of an insolvent corporation represents not only the corporation but also the creditors and stockholders. Attorney-General v. Guardian Mutual Life Ins. Co., 77 N. Y. 272 (1879); Mason v. Henry, 152 N. Y. 529 (1897); and may recover from delinquent directors the damages which their misconduct has occasioned to the corporation. Bowers v. Male, 186 N. Y. 28 (1906).

Although the receiver represents creditors he is not vested with a right which is in the creditors alone and therefore cannot recover value of stock alleged to have been fraudulently issued where the issue was made with the consent of all the directors and stockholders, for like the corporation he is bound by an equitable estoppel. Bostwick v. Young, 118 A. D. 490 (1907).

§ 232. Receiver's title to property. Such receivers shall, from the time of their having filed the security required by law, be vested with all the property, real or personal vested or contingent, of the corporation.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 67, in part. Thus am'd by L. 1909, ch. 240; L. 1913, ch. 766.

Thus am'd by L. 1909, ch. 240. Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 67, in part.

Consolidators' Note.

This section relates to the same subject as the following provision of the Revised Statutes which is not applicable and therefore has been omitted:

"The trustees taking such oath shall be deemed vested with all the estate, real and personal, of such debtor (except such as is exempted by the preceding articles), as follows:

1. In proceedings under the first article of this title, from the first publication of the notice to the non-resident, absconding or concealed debtor:

2. In proceedings under the second article, from the appointment of trustees:

3. In proceedings under the third, fifth, and sixth articles, from the execution of the assignment, in these articles directed:

4. In proceedings under the fourth article, when the assignment was voluntary, from the time of its execution; when executed by an officer as therein directed, from the time of the first publication of the notice in that article required to be given to creditors."

R. S., pt. 2, ch. 5, tit. 1, art. 8, § 6.

Statutory receivers take title to the property coming to them as such. Their powers and rights are analogous to those of an assignee of an insolvent debtor. There is a vital distinction between statutory receivers who take title and temporary or chancery receivers who have no title and simply act as the arm of the court for the preservation of property over which it is exercising control until some final determination shall be made respecting it. Decker v. Gardner, 124 N. Y. 334 (1891); Stokes v. Hoffman House, 167 N. Y. 554 (1901); Prince v. Schlesinger, 116 A. D. 500 (1906). For further cases indicating the distinction see Temporary Receiver, Gen. Corp. Law, § 104, supra.

The situation of a receiver of an insolvent company is less restricted than that of an assignee under a general assignment for the benefit of creditors, for the powers and duties of the latter are prescribed by the instrument of assignment, whereas questions with respect to the receivership will be determined on equitable principles as limited by statute. Peo. v. St. Nicholas Bank, 151 N. Y. 592 (1897).

When an assignment to a foreign receiver is effective to vest the receiver with the assets of the insolvent corporation throughout the United States, an ancillary receiver appointed in New York takes no title to assets in this State. Chicago Title, etc., Co. v. German Ins. Co., 119 A. D. 347 (1907).

An attaching creditor's right to the property of a foreign corporation is superior to that of a receiver previously appointed in the home jurisdiction, if the levy is made prior to the appointment of a receiver in this State. Nat'l Park Bank v. Clark, 92 A. D. 262 (1904). The appointment of the foreign receiver does not take away the title of the corporation so far as to deprive the courts of this State of the right to control the assets here for the benefit of domestic creditors. Hammond v. Nat'l Loan Assn., 58 A. D. 455 (1901), and cases cited; Courtright v. Vreeland, 117 N. Y. Supp. 952 (1909).

Title only vests upon the filing of the bond and a creditor may obtain a superior lien by attachment or judgment after the appointment and prior to the filing. Chamberlain v. Rochester S. P. V. Co., 7 Hun 557 (1876).

This section is not inconsistent with Gen. Corp. Law, § 193. Matter of Berry, 26 Barb. 55 (1857).

The sale of the franchise of an insolvent electric company by a receiver appointed in sequestration proceedings made at public auction vests in the purchaser all the rights conferred by the original franchise. Matter of Longacre Electric L. & P. Co., 188 N. Y. 361 (1907).

§ 233. Transfer of assets of corporation to receiver. In all cases where receivers have been or shall be appointed for any corporation of this state other than an insurance company on application by the attorney-general, all property, real and personal,

and all securities of every kind and nature belonging to such corporation, no matter where located or by whom held, shall be transferred to, vested in and held by such receiver; provided, however, that such transfer shall only be made when directed by an order of the supreme court, due notice of the application for such order having been made on the attorney-general and the custodian of the funds, securities or property.

Formerly L. 1884, ch. 285, § 1.

Consolidators' Note.

There is some difference between this section and the preceding section and it has therefore been preserved.

Receiver's Title.

The receiver takes title by virtue of the statute and no formal conveyance is necessary. Matter of Attorney-General v. Atlantic Mutual Life Ins. Co., 100 N. Y. 279 (1885).

After property has passed into the possession of the receiver no lien can be acquired or action taken with reference thereto without leave of the court. Attorney-General v. Continental Life Ins. Co., 28 Hun 360, affd., no op., 93 N. Y. 630 (1883).

Interference with the exclusive right of the receiver to manufacture under a patent is a contempt. Matter of Woven Tape Skirt Co., 12 Hun 111 (1877).

A sale of property under an execution without leave of the court while the property is in possession of the receiver, is illegal and void, although the levy was made before the appointment of the receiver. Walling v. Miller, 108 N. Y. 173 (1888); but the sale after the appointment of the receiver is only irregular where the property has not come into the actual possession of the receiver. Varnum v. Hart, 119 N. Y. 101 (1890).

Where a corporation has purchased goods and thereafter the receiver appointed in dissolution proceedings refuses to accept the same, the vendor may sell the property without leave of court in order to ascertain the amount of his loss by breach of the contract, for the title to the property which the receiver refused to accept did not pass to him. Moore v. Potter, 155 N. Y. 481 (1898).

Where a creditor procures an attachment and a levy before the appointment of an ancillary receiver the property passes to the receiver subject to the lien of the attachment. Bennett v. Electric Construction Co., 8 A. D. 301 (1896); National Park Bank v. Clark, 92 A. D. 262 (1904). The usual course in such proceedings is to provide for the preservation of rights and liens acquired before the appointment of the receiver by attaching creditors and others entitled to particular rights in the order authorizing the receiver to possess himself of the corporate property. Id.

§ 234. Security of receiver. Before entering upon the duties of their appointment, such receiver shall give such security to the people of the state, and in such penalty, as the court shall direct, conditioned for the faithful discharge of the duties of their appointment, and for the due accounting for all moneys received by them.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 66, in part. See Gen. Corp. Law, § 225 et seq.

Consolidators' Note.

The provisions of section 715 of the Code of Civil Procedure have not been inserted in this article for the reason that the section provides that they shall not apply to "a case where special provision is made by law for the security to be given by a receiver." This treatment of the matter does not affect the provisions in section 715 of the Code of Civil Procedure relating to bonds of fidelity or surety companies. See Jones v. Blum, 145 N. Y. 338, and Nealis v. American Tube and Iron Co., 76 Hun 223.

§ 235. Authority of single receiver. When one receiver only, shall be appointed, all the provisions herein contained, in reference to several receivers shall apply to him.

Formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 2.

§ 236. Authority where there is more than one receiver. When there are more receivers than one appointed, the debts and property of the corporation may be collected and received by any one of them; and when there are more than two receivers appointed, every power and authority conferred on the receivers may be exercised by any two of them.

Formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 3.

§ 237. Surviving receivers. The survivor or survivors of any receivers shall have all the powers and rights given to receivers. All property in the hands of any receiver at the time of his death, removal or incapacity, shall be delivered to the remaining receiver or receivers, if there be any; or to the successor of the one so dying, removed or incapacitated; who may demand and sue for the same.

Formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 4.

§ 238. Oath of receiver. Before proceeding to the discharge of any of their duties, all such receivers shall take and subscribe an oath, that they will well and truly execute the trust by their appointment reposed in them, according to the best of their skill and understanding; which oath shall be filed with the officer or court, that appointed them.

Formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 5.

§ 239. General powers of receivers. The said receivers shall have power:

1. To sue in their own names or otherwise, and recover all the property, debts and things in action, belonging or due or to

become due to such corporation, whether accruing or maturing before or after the dissolution thereof and whether vested or contingent at the time of such dissolution, in the same manner and with the like effect as such corporation might or could have done if no receivers had been appointed; and no set-off shall be allowed in any such suit, for any debt, unless it was owing to such creditor by such corporation before the appointment of the receiver of such corporation, or unless it shall have been duly contracted by such receiver subsequent to his appointment; notwithstanding the notice to creditors the receivers may sue for and recover any property or effects of the corporation and any debts due to it, at any time, before the day appointed for the delivery or payment thereof;

2. To take into their hands, all the property of such corporation, whether attached, or delivered to them, or afterwards discovered; and all books, vouchers and securities relating to the same;

3. In the case of a non-resident, absconding or concealed debtor, to demand and receive of every sheriff who shall have attached any of the property of such debtor, or who shall have in his hands, any moneys arising from the sale of such property, all such property and moneys, on paying him his reasonable costs and charges, for attaching and keeping the same, to be allowed by the court having jurisdiction;

4. From time to time, to sell at public auction, all the property, real and personal, vested in them, which shall come to their hands, after giving at least fourteen days' public notice of the time and place of sale, and also publishing the same for two weeks in a newspaper, printed in the county, where the sale shall be made, if there be one;

5. To allow such credit on the sale of real property by them, as they shall deem reasonable, subject to the provisions of this article for not more than three-fourths of the purchase money; which credit shall be secured by a bond of the purchaser, and a mortgage on the property sold;

6. On such sales, to execute the necessary conveyances and bills of sale;

7. To redeem all mortgages and conditional contracts and all pledges of personal property, and to satisfy any judgments, which may be an incumbrance on any property so sold by them; or to sell such property subject to such mortgages, contracts, pledges or judgments;

8. To settle all matters and accounts between such corporation

and its debtors, or creditors, and to examine any person touching such matters and accounts, on oath, to be administered by either of them;

9. Under the order of the court appointing them, to compound with any person indebted to such corporation and thereupon to discharge all demands against such person.

Formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 7, except last clause of ¶ 1, beginning "Notwithstanding," etc., from R. S., pt. 2, ch. 5, tit. 1, art. 8, § 10. Thus am'd by L. 1913, ch. 766.

Consolidators' Note.

This section comes from the chapter in the Revised Statutes relating to the powers, duties and liabilities of trustees of insolvent debtors (R. S., pt. 2, ch. 5, tit. 1, art. 8). It was made applicable to receivers appointed in proceedings for the voluntary dissolution of a corporation by the following provision in the Revised Statutes relating to the voluntary dissolution of a corporation.

"Such receivers shall have all the power and authority, conferred by law upon trustees to whom an assignment of the estate of insolvent debtors may be made; pursuant to the provisions of the fifth chapter of the second part of the Revised Statutes."

R. S., pt. 3, ch. 8, tit. 4, art. 3, § 68.

See Matter of Coleman, 174 N. Y. 383.

As to the application of R. S., pt. 2, ch. 5, see Herring v. N. Y., L. E. & W. R. R. Co., 105 N. Y. 382.

Subd. 1. Some of the provisions relating to trustees of insolvent debtors which were made applicable to receivers in proceedings for the voluntary dissolution of a corporation cannot be applied to such receivers. An illustration is found in the bracketed matter in this subdivision.

"The rights of the receiver become fixed at the time of his appointment; the rights of creditors of the bank represented by him then attach; and it would not be equitable to countenance any subsequent arrangement to give any one of them an undue preference over the others. Parties must stand or fall by the condition of things in existence at the time of the appointment of the receiver, unless special equities exist."

Matter of Van Allen, 37 Barb. 225 [231].

The Court of Appeals citing above case says in a unanimous decision in Van Dyck v. McQuade, 85 N. Y. 616 [617].

"If, under the authority derived from the statute, the receiver in this case had the power to allow a set-off, that power did not extend to a case where no mutual debts subsisted at the date of the appointment of the receiver."

Subd. 5. The words "not exceeding 18 months" have been bracketed out because a receiver is required to report within a year unless his time is extended. For the same reason the words "subject to the provisions of this article" have been inserted.

Cases Applicable.

The receiver may disaffirm any act, transfer or agreement in fraud of creditors. Real Property Law, § 268 (Cons. Laws, ch. 50, L. 1909, ch. 52); Personal Property Law, § 19 (Cons. Laws, ch. 41, L. 1909, ch. 45). These sections are derived from L. 1858, ch. 314, which was repealed by the Real Property Law of 1896 and the Personal Property Law of 1897 which contained a substitute provision now found in the Consolidated Laws. As to the

effect of this statute see Southard v. Benner, 72 N. Y. 424 (1878); Vail v. Hamilton, 85 N. Y. 453 (1881); National Tradesmen Bank v. Whetmore, 124 N. Y. 241 (1891); Wile v. Cauffman, 39 A. D. 206 (1899); McQueen v. New, 45 A. D. 579 (1899); Sheldon v. Wickham, 161 N. Y. 500 (1900); Lain v. Sayer, 50 A. D. 554 (1900).

An action to set aside and vacate a judgment against the corporation on the ground that it was collusively obtained and in fraud of creditors may be brought in the name of and by the receiver. Whittlesey v. Delaney, 73 N. Y. 571 (1878).

In an action by the receiver against a director to recover for property alleged to have been improperly appropriated, the corporate books are not per se evidence against the director to establish liability for he is not chargeable with knowledge of the entries made by others. Rudd v. Robinson, 126 N. Y. 113 (1891).

An action or special proceeding brought by a statutory receiver does not abate because of his death or removal, but the action may be continued by his successor who must be substituted on his application or that of a party interested. Code Civ. Pro. § 766; the substitution is not jurisdictional, however, and the action can be prosecuted in the name of the original plaintiff unless one of the parties applies for a substitution. Hegewisch v. Silver, 140 N. Y. 414 (1893), and cases cited.

Subdivision 7 does not authorize a receiver in an action for dissolution on the ground of insolvency to sell real estate subject to certain liens referred to in the final decree and disregard others that are valid and existing, and the judgment creditor is entitled to issue execution upon such judgment and sell property thereunder despite such previous sale by the receiver. Matter of Coleman, 174 N. Y. 373 (1903).

An ancillary receiver of a foreign corporation appointed by an order granting him "the usual powers and duties of receivers according to the laws of this State and the practice of this court" and giving him the right to continue the business of the corporation until further order, has all the powers granted by this section and may under subdivision 8 enter into an agreement which will amount to an accord and satisfaction. Goodrich v. Sanderson, 35 A. D. 546 (1898).

As to power generally to compromise see Matter of Croton Ins. Co., 3 Barb. Ch. 642 (1847).

Where a receiver contracts to sell real estate under order of the court, and cannot give good title, the vendee can recover in addition to his deposit only such sum as the court in its discretion deems equitable between the parties. There is no absolute right to damages as in case of sale between individuals. The Court of Appeals will not review the discretion of the lower courts. Peo. v. N. Y. Building Loan B. Co., 189 N. Y. 233 (1907).

All the power which a court has with reference to directing a sale on dissolution is to order all the right, title and interest of the corporation or the receivers sold. Peo. v. N. Y. Building Loan B. Co., 189 N. Y. 233 (1907); Mayer v. Burr, 118 N. Y. Supp. 203 (1909); such sale does not affect the validity of a prior valid lien. Id.

Receivers' Certificates.

Certificates issued in a sequestration action to pay interest on a mortgage to prevent a default are void because the court has no power to authorize such issue and the holders thereof are not entitled to payment as against bondholders out of a fund arising from a foreclosure sale. Knickerbocker Trust Co. v. Oneonta, C. & R. S. Ry. Co., 201 N. Y. 379 (1911), affg. 138

A. D. 687. The bondholders are not estopped by receipt of the interest by the trustee from attacking the validity of the certificates. Id.

It is not within the power of the court to authorize the temporary receiver of a business corporation appointed in a proceeding for its dissolution to issue certificates of indebtedness for the purpose of raising money to continue its business which shall be liens upon the real property prior to the lien of a mortgage previously given to secure the payment of its bonds. Matter of Westchester Co. Brewery, 73 Misc. 352 (1911).

A court of equity has undoubted power to authorize its receiver to borrow money upon the credit of the property and to issue as security for the payment thereof receiver's certificates which shall be a first lien upon the property superior to the liens of mortgagees and other creditors. This power is derived from the court's duty to protect and preserve the property in its hands. Wallace v. Loomis, 97 U. S. 146 (1877); Union Trust Co. v. Illinois Midland Ry. Co., 117 U. S. 434 (1885); Bibber-White Co. v. White River Val. El. R. Co., 115 Fed. 786 (1902).

For papers relative to receivers' certificates see Forms Nos. 361–363.

In the case of private corporations certificates may be issued without the consent of lienors to meet the expenses of preserving the property and of realizing upon the same, but not for the purpose of improving or adding to the property or of carrying on the corporate business. Raht v. Attrill, 106 N. Y. 423 (1887); Hanna v. State Trust Co., 70 Fed. 2 (1895); Baltimore Building & Loan Assn. v. Alderson, 90 Fed. 142 (1898); International Trust Co. v. Decker Bros., 152 Fed. 78 (1907); Bernard v. Union Trust Co., 159 Fed. 620 (1908); Wiggins v. Neversink L. & P. Co., 47 Misc. 315 (1905).

Railroad corporations are quasi-public concerns and the maintenance of a railway and equipment and the continuation of the business and operation of the road are essential to the public convenience and to the preservation of the mortgage securities. Any person therefore taking a mortgage upon railroad property does so with a knowledge presumably of the legal condition that receivers' certificates may be issued for necessary expenses in continuing the business which will be superior to the mortgage lien. International Trust Co. v. Decker Bros., 152 Fed. 78 (1907), citing many cases.

Unsecured claims which accrued prior to the appointment of a receiver cannot be paid out of the proceeds of the sale of certificates in the absence of the consent of bondholders. Knickerbocker Trust Co. v. Tarrytown, White Plains, etc., Ry. Co., 117 N. Y. Supp. 871 (1909), and cases cited.

The order should be granted only after notice to a lienor and a full hearing and investigation on the merits. Knickerbocker Trust Co. v. Tarrytown, White Plains, etc., Ry. Co., 117 N. Y. Supp. 871 (1909).

If the improvement is not necessary to preserve or operate the property, but is in the nature of a permanent improvement, certificates therefore will not be authorized. Rochester Trust & Safe Deposit Co. v. Rochester & Irondequoit R. R., 29 Misc. 222 (1899).

The certificates are not negotiable and therefore bona fide purchasers take them subject to equities existing between the original parties and also subject to the terms of the order authorizing the issue and the power of the court to grant the same. Union Trust Co. v. Chicago, etc., R. R. Co., 7 Fed. 513 (1881); Central Nat'l Bank v. Hazard, 30 Fed. 484 (1887); Bernard v. Union Trust Co., 159 Fed. 620 (1908).

Rights in this State of Receivers of Foreign Corporations.

A foreign trustee, receiver or liquidator may, in a proper case, maintain an action in New York courts to recover from a stockholder resident therein his proportionate liability as such stockholder. An allegation that under

under his appointment as liquidator all the property, effects and choses in action to which the corporation was or appeared to be entitled came into plaintiff's custody or under its control is sufficient to show title in the plaintiff. Royal Trust Co. v. Harding, 155 A. D. 104 (1913). An allegation that the court in which the foreign judgment was rendered is one of general jurisdiction and that one service of notice of application for said judgment was given is sufficient to establish prima facie the validity of the foreign judgment. Id.

Upon the principal of comity a foreign receiver has the right to bring an action in this State to enforce rights recognized by the common or statutory law of a foreign State. This includes the enforcement of assessments legally made by the courts of such foreign State. The liability of stockholders of foreign corporations falls within this rule. Howarth v. Angle, 162 N. Y. 179 (1900); Stone v. Penn Yan, etc., Ry. Co., 197 N. Y. 279 (1910); Shipman v. Treadwell, 208 N. Y. 404 (1913), affg. 150 A. D. 57.

A receiver, being a quasi trustee and representing the creditors, has the right to enforce the liability of stockholders for debts imposed by the statutes of the State where the corporation has its domicile. In the interest of interstate comity he may bring an action in this State to enforce the liability of a resident stockholder, where it appears that the same liability has been determined as to all the stockholders in the foreign court, and where the remedy involves no departure from our practice and does not conflict with public policy nor work injustice to any of our citizens. Howarth v. Angle, 162 N. Y. 179 (1900); Shipman v. Treadwell, 200 N. Y. 472, 476 (1911).

Enforcement in this State by Foreign Receiver of Double Liability of Stockholder of Foreign Corporation.

Shipman v. Treadwell, 200 N. Y. 472, and 208 N. Y. 404, decides, that after a court of competent jurisdiction in a foreign State has determined the liability of all stockholders under a statute providing for double liability, and the receiver has been directed to collect by proper proceedings in this State, the receiver may bring an action in this State to recover of resident stockholders their share to pay the debts of the corporation. The judgment in the foreign court is conclusive as to the assets and liabilities of the foreign corporation and as to the necessity for and amount of the assessment.

Leave to Sue Receiver.

Failure to obtain leave to sue a receiver may be ground for staying the action, or may be punishable as a contempt, but it does not affect the cause of action so as to make the omission to allege the obtaining of leave a ground for demurrer. Leave may be granted nunc pro tunc. Pruyn v. McCreary, 105 A. D. 302 (1905), affd., no op., 182 N. Y. 568 (1905); Le Fevre v. Matthews, 39 A. D. 232 (1899); Hirshfield v. Kalischer, 81 Hun 606 (1894); James v. James Cement Company, 8 St. Rep. 490 (1887); Hutchinson v. Bien, 46 Misc. 302 (1905); Di Chiara v. Sutherland, 62 Misc. 555 (1909).

The application for leave to sue must be deemed a motion in the action in which the receiver was appointed. Matter of Commercial Bank, 35 A. D. 224 (1898); and see Gen. Corp. Law, § 314.

§ 240. Power of receiver to institute proceedings to recover assets. Whenever any receiver of a domestic corporation, or of the property within this state of any foreign corporation, shall have been appointed and qualified, as provided in articles five,

six, seven, nine, eleven or twelve of this chapter either before, upon, or after final judgment or order in the action or special proceeding in which such appointment was made, and shall, by his own verified petition, affidavit or other competent proof, show to the supreme court, at a special term thereof, held within the judicial district wherein such appointment was made, that he has good reason to believe that any officer, stockholder, agent or employee of such corporation, or any other person whomsoever, has embezzled or concealed, or withholds or has in his possession or under his control, or has wrongfully disposed of, any property of such corporation which of right ought to be surrendered to the receiver thereof; or that any person can testify concerning the embezzlement, concealment, withholding, possession, control or wrongful disposition of any such property, the court shall make an order, with or without notice, commanding such person or persons to appear at a time and place to be designated in the order, before the court or before a referee named by the court for that purpose, and to submit to an examination concerning such embezzlement, concealment, withholding, possession, control or wrongful disposition of such property; and at the time of making such order or at any time thereafter, the court may, in its discretion, enjoin and restrain the person or persons so ordered to appear and be examined from in any manner disposing of any property of such corporation which may be in the possession or under the control of the person so ordered to be examined, until the further order of the court in relation thereto. No person so ordered to appear and be examined shall be excused from answering any question on the ground that his answer might tend to convict him of a criminal offense; but his testimony taken upon such examination shall not be used against him in any criminal action or proceeding.

Any person so ordered to appear and be examined shall be entitled to the same fees and mileage, to be paid at the time of serving the order, as are allowed by law to witnesses subpœnaed to attend and testify in an action in the supreme court, and shall be subject to the same penalties upon failure to appear and testify in obedience to such an order as are provided by law in the case of witnesses who fail to obey a subpœna to appear and testify in an action.

Any person appearing for examination in obedience to such order shall be sworn by the court or referee to tell the truth, and

shall be entitled to be represented on such examination by counsel, and may be cross-examined, or may make any voluntary statement in his own behalf concerning the subject of his examination which may seem to him desirable or pertinent thereto.

The court before which such examination is taken, as well as the referee, if one be appointed for that purpose, shall have power to adjourn such examination from time to time, and may rule upon any question or objection arising in the course of such examination, to the same extent that might be done if the person so examined were testifying as a witness in the trial of an action.

When the examination of any person under such order shall be concluded, the testimony shall be signed and sworn to by the person so examined, and shall be filed in the office of the clerk of the county where the action is pending, or was tried, in which the receiver was appointed; and if from such testimony it shall appear to the satisfaction of the court that any person so examined is wrongfully concealing or withholding, or has in his possession or under his control, any property which of right belongs to such receiver, the court may make an order commanding the person so examined forthwith to deliver the same to such receiver, who shall hold the same subject to the further order of the court in relation thereto; and otherwise, the court may, at the conclusion of any such examination, make such final order in the premises as the interests of justice require.

Formerly L. 1898, ch. 534, §§ 1–5.

See Gen. Corp. Law, § 312, as to notice to Attorney-General.

See Noble v. Halliday, 1 N. Y. 330 (1848), and Matter of Stonebridge, 53 Hun 545 (1889), as to sufficiency of a petition framed under similar provision in Revised Statutes superseded by this section.

See cases under Gen. Corp. Law, § 301, as to whether the immunity granted is as extensive as the constitutional guaranty.

Consolidators' Note.

The statute inserted here is entitled "An act to facilitate the collection and recovery of the assets of corporations for which receivers have been appointed." It applies to receivers appointed in proceedings for the voluntary dissolution of a corporation and to actions to dissolve corporations. Appropriate changes in references have been made to carry out the intent of the statute. The statute is a complete scheme for the recovery of assets by receivers and supersedes the following provisions of the Revised Statutes which for that reason have been omitted:

"And all the provisions of law, in respect to trustees of insolvent debtors, the collection and preservation of the property of such debtors, the concealment and discovery thereof, and the means of enforcing such discovery, shall be applicable to the receivers so appointed, and to the property of such corporation."

R. S., pt. 3, ch. 8, tit. 4, art. 3, § 72.

"Whenever the trustees shall show by their own oath or other competent proof, to the satisfaction of any officer named in the first section of the seventh article of this title, or of any judge of a county court, that there is good reason to believe that the debtor, his wife, or any other person has concealed or embezzled any part of the estate of such debtor vested in said trustees; or that any person can testify concerning the concealment or embezzlement thereof; or that any person who shall not have rendered an account as above required, is indebted to such debtor, or has property in his custody or possession, belonging to such debtor; such officer or judge shall issue a warrant commanding any sheriff or constable, to cause such debtor, his wife, or other person, to be brought before him at such time and place as he shall appoint, for the purpose of being examined.

"The officer issuing such warrant, shall examine every person so brought before him, on oath, in the presence of the trustees or any of them, touching all matters relative to the debtor, his dealings and estate, and touching the detention or concealment of any part of his property, and touching the indebtedness of any person to such debtor; and shall reduce the examination to writing; which the person so examined is hereby required to sign, and which shall be attested by the officer.

"If any person so brought before such officer shall refuse to be sworn, or to answer satisfactorily, all lawful questions put to him, or shall refuse to sign the examination, not having a reasonable objection thereto, to be allowed by such officer, the said officer shall by warrant commit such person to prison, there to remain without bail, until he shall submit to be sworn or to answer as required, or to sign such examination; in which warrant, the particular default of the person committed shall be specified; and if it be, in not answering any question, such question shall also be specified therein.

"If any person so committed shall bring a writ of habeas corpus, he shall not be discharged by reason of any insufficiency in the form of the warrant of commitment; but the court or officer before whom such person shall be brought, shall re-commit such person, unless it shall be made to appear that he hath answered all lawful questions put to him, or had sufficient reason for refusing to sign the examination, as the case may be; or unless such person shall then answer, on oath, the questions so put to him.

"Any sheriff or jailer wilfully suffering any person so committed or re-committed, pursuant to the foregoing sections, to escape, shall be liable to indictment for a misdemeanor; and on conviction thereof, in addition to any other punishment the court may inflict, shall forfeit to the trustees a sum equal to the whole amount of debts due to the creditors of such debtor, not exceeding two thousand five hundred dollars.

"The person so examined, and answering to the satisfaction of the officer, shall not be liable to any penalty imposed in this article for concealing and not delivering any property, or paying any debt; but his answers on such examination, may be given in evidence in the same manner, and with the like effect, as if they had been made in answer to a bill in equity filed by such trustees."

R. S., pt. 2, ch. 5, tit. 1, art. 8, §§ 12–17.

See, also, § 239, subd. 8.

Rights of Receiver Pendente lite.

The power to institute proceedings to recover assets is not conferred by this section upon a receiver appointed by the court in the exercise of its equitable jurisdiction as a so-called common law receiver pendente lite of the assets of a foreign corporation to prevent the unlawful disposition and

waste of its assets. Such appointment is not under subdivision 3, section 306, of this law, and the appointee is not a receiver of the corporation itself but only of its assets, hence this section cannot be invoked by him to procure an examination concerning the property of the judgment debtor. Matter of Howell v. German Theatre, Inc., 64 Misc. 110 (1909). The right of a judgment creditor to examine a third party in supplementary proceedings is not lost by appointment of such receiver. Id.

§ 241. Power of receiver in the settlement of controversies. If any controversy shall arise between the receivers and any other person, in the settlement of any demands against such corporation, or of debts due to such corporation the same may be referred to one or more indifferent persons, who may be agreed upon by the receivers and the party, with whom such controversy shall exist, by a writing to that effect, signed by them.

If such referee or referees be not selected by agreement, then the receivers or the other party to the controversy, provided no action at law is pending arising out of any such debts or demands, may serve a notice of their intention to apply to any judge of the supreme court at chambers, residing in the same district with said receivers, for the appointment of one or more referees, specifying the time and place when such application will be made, which notice shall be served at least ten days before the time so therein specified.

On the day so specified, upon due proof of the service of such notice, the judge before whom the application is made may, in his discretion, proceed to select one or more referees, the same in all respects as they are now selected according to the rules and practice of the supreme court.

When any witness to such controversy shall reside out of the county where the said receivers resided at the time of their appointment, the referee or referees appointed to hear said controversy shall have power to issue a commission or commissions in like manner as justices of the peace are now authorized to issue the same, and the testimony so taken shall be returned to said referee or referees in the same manner, and be read before them on a hearing, in like manner as testimony taken on commission before justices of the peace.

The officer before whom they shall be selected, shall certify such selection in writing. Such certificate, or the written agreement of the parties, shall be filed by the receivers in the office of a clerk of the supreme court, and an order shall thereupon be entered

by such clerk in vacation or in term, appointing the persons so selected to determine the controversy.

Such referees shall have the same powers, and be subject to the like duties and obligations, and shall receive the same compensation, as referees appointed by the supreme court, in personal actions pending therein.

The report of the referees shall be filed in the same office where the order for their appointment was entered, and shall be conclusive on the rights of the parties, if not set aside by the court.

Formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, §§ 19–25; §§ 19, 22, as amended by L. 1862, ch. 373, §§ 1, 4; §§ 20, 21, as amended by L. 1907, ch. 476, § 1.

Consolidators' Note.

This section was made applicable by the following provision of the Revised Statutes which latter provision therefore has been omitted:

"Such receivers shall have the same power to settle any controversy that shall arise between them and any debtors or creditors of such corporation (by a reference), as is given by law to trustees of insolvent debtors; and the same proceedings for that purpose shall be had, and with the like effect; and application for the appointment of referees may be made to any officer authorized to appoint such referees on the application of trustees of insolvent debtors, who shall proceed therein in the same manner, and the referees shall proceed in like manner, and file their report with the like effect in all respects."

R. S., pt. 3, ch. 8, tit. 4, art. 3, § 73.

See People v. American Steam Boiler Ins. Co., 14 Misc. 165.

Rights of Creditors.

The method prescribed by this section for ascertaining the validity of a disputed claim by reference is not exclusive and the court may in its discretion authorize an action to be brought against the receiver who disputes the validity of the claim so that the matter may be more deliberately examined. Ludington v. Thompson, 153 N. Y. 499 (1897).

If an action against the receiver is in form an action upon notes but is in fact one to ascertain whether the plaintiff is a creditor entitled to share in the distribution, it is not barred by the six years' statute of limitations unless the allowance of the claim in a proceeding under the statute would have been barred; the six years' statute of limitations, however, does not run in favor of the receiver against claims not barred at the date of his appointment so long as the trust is open and continuing and has not been repudiated or denied. Ludington v. Thompson, 153 N. Y. 499 (1897), and cases cited.

A creditor who presents his claim becomes a party to the action and the proceeding determining the validity thereof is not a special proceeding but a step in the action. Peo. v. American Loan & Trust Co., 150 N. Y. 117 (1896), and cases cited.

§ 242. Power of receiver to employ counsel. If the receiver of a corporation employs counsel he shall within three months after he has qualified as receiver enter into a written contract fixing the compensation of such counsel at not exceeding a certain

amount or a certain percentage of the sums received and disbursed by him, which contract must be approved by the supreme court, on at least eight days' notice to the attorney-general. A payment by such receiver to his counsel on account of services shall only be made, pursuant to an order of the court, on notice to the attorney-general and subject to review on the final accounting. A contract with counsel shall not be made for a longer period than eighteen months, but may be renewed from time to time for periods of not more than one year, if approved by the supreme court on at least eight days' notice to the attorney-general. In case of the intervention of any policy-holder or depositor, by permission of the court, such policy-holder or depositor shall defray the legal expenses thereof, and no allowance shall be made for costs or fees to any attorney of such policy-holder or depositor. It shall be unlawful for receivers of an insurance, banking or railroad corporation, or trust company to pay to any attorney or counsel any costs, fees or allowances until the amounts thereof shall have been stated to the special term as provided in section two hundred and forty-nine of this chapter, as expenses incurred, and shall have been approved by that court, by an order of the court duly entered; and any such order shall be the subject of review by the appellate division and the court of appeals on an appeal taken therefrom by any party aggrieved thereby.

Formerly L. 1883, ch. 378, § 2a, added by L. 1906, ch. 349, § 2, from "If the receiver," to "in case of the intervention." Sentence beginning "In case of the intervention." L. 1883, ch. 378, § 5. Remainder of section, L. 1883, ch. 378, § 4, in part, as amended by L. 1896, ch. 139, § 1.

Where the receiver of a banking corporation has been appointed on the motion of the Attorney-General, the court on the ground of public policy will refuse to approve the receiver's contract employing as counsel a Deputy Attorney-General who resigned his official position to accept the retainer. Peo. v. Brooklyn Bank, 125 A. D. 354 (1908); such appointment will not be confirmed on application of one of two co-receivers if the other opposes the appointment and the two cannot act in accord. Id.

Services rendered by an attorney in dissolution proceedings before the receiver is appointed must be deemed rendered to the corporation and cannot be paid for by the receiver out of the funds. Matter of Little, 47 A. D. 22 (1900), affd. on op. below, 165 N. Y. 643 (1901).

An attorney, acting as counsel for a receiver after the receiver's resignation, in connection with the receiver's claim for fees and extra allowances, is not entitled to compensation from the trust estate; but the receiver is individually liable therefor. Peo. v. N. Y. Bldg. Loan Banking Co., 117 N. Y. Supp. 450 (1909).

The practice of a receiver employing his partner as counsel is not to be commended, but if the receiver has not and will not share in the fees there is no law against such employment. Matter of Simpson, 36 A. D. 562 (1899),

affd. on op. below, 158 N. Y. 720 (1899); Parker v. Day, 155 N. Y. 383 (1898).

Creditors who intervene and contest the allowance of commissions to the receiver, resulting in a reduction thereof, are not entitled to an allowance out of the funds of the estate for their disbursements and counsel fees as they were simply individual parties to the action protecting their own interests. Matter of Attorney-General v. North American Life Ins. Co., 91 N. Y. 57 (1883).

An application to authorize the receiver of an insolvent corporation to pay, as a preferred claim, a reasonable allowance to counsel employed by the corporation, in the defense of the proceeding, is properly denied, when it appears that, by reason of the actual insolvency of the corporation, known to its officers, and of their attempt to continue it in business by fraudulent means, the employment of counsel to resist the proceeding was unjustifiable. Peo. v. Coml. Alliance Life Ins. Co., 148 N. Y. 563 (1896).

Change of Attorney.

Although the right of the receiver to substitute another attorney in place of one already employed is not absolute as in the case of other clients, still the court should grant the motion unless there is proper evidence before him that the interests of the trust would be prejudiced by the change. The court has, however, the right to examine the reasons and determine how the change will affect the interests of the beneficiaries for whom the receiver is acting. Peo. v. Bank of Staten Island, 112 A. D. 791 (1906).

Court May Grant Counsel Additional Fee Notwithstanding Receiver's Contract.

This section does not contemplate that a receiver should make a contract for attorney's services which would prevent the court in its proper discretion upon a final accounting from allowing such additional sum to counsel as would commend itself to the good judgment of the court. Peo. v. Brooklyn Bank, 64 Misc. 538, 556 (1909).

§ 243. Power of receiver to hold real property. A receiver, appointed by or pursuant to an order or a judgment, in an action in the supreme court or a county court, or in a special proceeding for the voluntary dissolution of a corporation, may take and hold real property, upon such trusts and for such purposes as the court directs, subject to the direction of the court, from time to time, respecting the disposition thereof.

Formerly Code Civ. Pro. § 716, in part. For remainder of section see Code Civ. Pro. § 716.

Consolidators' Note.

This section is general in its application and therefore has been inserted in this article. It will be preserved also in the Code of Civil Procedure as it applies to other subjects than corporations.

§ 244. Power of receiver to recover stock subscriptions. If there shall be any sum remaining due upon any share of stock

subscribed in such corporation, the receiver shall immediately proceed to recover the same, unless the person so indebted shall be wholly insolvent; and for that purpose may commence and prosecute any action or proceeding for the recovery of such sum, without the consent of any creditors of such corporation.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 69.

If the action has been commenced by the corporation it can be continued in the name of the original party for the benefit of the receiver pursuant to Code, § 756. Phœnix Warehousing Co. v. Badger, 67 N. Y. 294 (1876); Sigua Iron Co. v. Brown, 171 N. Y. 488 (1902).

In an action for services rendered to the corporation, the receiver may, it seems, counterclaim for the subscriptions unpaid by the plaintiff, but the counterclaim must be based upon a subscription and not an agreement to subscribe. Van Schaick v. Mackin, 129 A. D. 335 (1908).

§ 245. Duty of receiver to convert assets into money. The receivers shall, as speedily as possible, convert the property, real and personal, of the corporation into money.

Formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 26, in part.

§ 246. Duty of receiver as to private sales. A receiver duly appointed in this state by and pursuant to a judgment in an action, or by and pursuant to an order in a special proceeding, may, upon application to the court by which such judgment was rendered, or such order was made, and upon notice to such parties as may be entitled to notice of applications made in such action or special proceeding, be authorized by the said court to sell or convey the property, whether real or personal, of the corporation of which he is the receiver, at private sale, upon such terms and conditions as the court may direct.

Formerly L. 1898, ch. 522, § 1.

See Peo. v. Anglo-American S. & L. Assn., 60 A. D. 389 (1901), for an agreement of sale which the court refused to approve.

Consolidators' Note.

This section is general in its application and therefore has been inserted. It will also be taken care of in the Code of Civil Procedure as it relates to other subjects than corporations.

§ 247. Duty of receiver to keep accounts. They shall keep a regular account of all moneys received by them as receivers; to which, every creditor, or other person interested therein, shall be at liberty, at all reasonable times, to have recourse.

Formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 26, in part.

§ 248. Duty of receiver to serve copy of report upon attorney-general and superintendent of banks. All receivers of insolvent corporations who are required by law to make and file reports of their proceedings shall at the time of making and filing such reports, serve a copy thereof upon the attorney-general of this state, and receivers of such corporations as report to, and are under the supervision of, the banking department shall on the first day of January and July of each year, during the continuance of their respective trusts, file with the superintendent of banks a report, verified by oath, in such form as the superintendent may prescribe, showing the condition of their respective trusts. In case any receiver of an insolvent corporation shall neglect to make and file a report of his proceedings for thirty days after the time he is required by law to make and file such report, or shall neglect for the same length of time to serve a copy thereof on the attorney-general, as required by this section the attorney-general may make a motion in the supreme court for an order to compel the making and filing and serving a copy on him of such report, or for the removal of such receiver from his office.

Formerly L. 1880, ch. 537, § 1, as amended by L. 1881, ch. 639, § 1. Last sentence, L. 1880, ch. 537, § 2.

Consolidators' Note.

Sections 3 and 4 of Laws 1880, chapter 537 have been repealed because covered by sections 7 and 8 of Laws 1883, chapter 378, which latter sections have been consolidated in the text as sections 253 and 254. See People v. Seneca Lake Grape and Wine Co., 52 Hun 175; Whitney v. N. Y. & Atlantic R. R. Co., 32 Hun 165; 66 App. Div. 444; 76 Hun 220; 57 Hun 441; 3 App. Div. 504.

§ 249. Duty of certain receivers to make reports. It shall be the duty of every receiver of an insurance, banking or railroad corporation, or trust company, to present every six months to the special term of the supreme court, held in the judicial district wherein the place of trial or venue of the action or special proceeding in which he was appointed may then be, on the first day of its first sitting, after the expiration of such six months, and to file a copy of the same, if a receiver of a bank or trust company, with the superintendent of banks; if a receiver of an insurance company, with the superintendent of insurance; and in each case with the attorney-general, an account exhibiting in detail the receipts of his trust, and the expenses paid and incurred therein during the preceding six months. Of the intention to present

such account, as aforesaid, the attorney-general, and also the surety or sureties on the official bond of such receiver, shall be given eight days' notice in writing; and the attorney-general shall examine the books and accounts of such receiver at least once every twelve months.

Formerly L. 1883, ch. 378, § 4, in part, as amended by L. 1885, ch. 40, § 1, and L. 1896, ch. 139, § 1.

§ 250. Duty of receivers to give notice to creditors. The receivers immediately upon their appointment, shall give notice thereof which shall be published for three weeks in a newspaper printed in the county where the principal place of conducting the business of such corporation shall have been situated; and therein shall require,

1. All persons indebted to such corporation, by a day and at a place therein to be specified, to render an account of all debts and sums of money owing by them respectively, to such receivers and to pay the same.

2. All persons having in their possession any property or effects of such corporation to deliver the same to the said receivers by the day so appointed.

3. All the creditors of such corporation to deliver their respective accounts and demands to the receivers or one of them, by a day to be therein specified, not less than forty days from the first publication of such notice.

4. All persons holding any open or subsisting contract of such corporation, to present the same in writing and in detail to such receivers, at the time and place in such notice specified.

Thus am'd by L. 1909, ch. 28. Paragraphs 1–3, formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 8. Paragraph 4, R. S., pt. 3, ch. 8, tit. 4, art. 3, § 70.

The note under section 136, Gen. Corp. Law, also applies to this section.

Consolidators' Note.

The following provision of the Revised Statutes relating to powers, duties and liabilities of trustees of insolvent debtors are inapplicable and therefore have been omitted:

"In the case of an insolvent or imprisoned debtor, such notice shall be published for at least three weeks in a newspaper printed in the county where application was made and in the case of non-resident, absconding or concealed debtors, it shall be published, for the same time, in the newspapers in which the notice of an attachment having issued, is directed to be printed."

R. S., pt. 2, ch. 5, tit. 1, art. 8, § 9.

"Held, that the provisions of 2 Revised Statutes, 469, sections 70 and 72, to the effect that receivers immediately after their appointment shall give a certain notice, do not apply to a temporary receiver."

Nealis v. American Tube & Iron Co., 76 Hun 220.

Rights of Creditors.

A mortgagee who does not foreclose until after the insolvency and appointment of an assignee is entitled to a dividend on the whole amount of his debt, provided it does not exceed the amount of the deficiency judgment entered. Matter of Simpson, 36 A. D. 562 (1899), affd. on op. below, 158 N. Y. 720 (1899).

Creditors have a right to prove and have dividends upon their entire debts irrespective of collateral securities held by them, for the insolvency of the corporation does not change the contractual relations existing. If the collateral is more than sufficient to satisfy the deficiency in the payment of the debt from the dividends declared, the receiver may redeem them for the benefit of the estate. Peo. v. Remington, 121 N. Y. 328 (1890).

Where after the appointment of the receiver of a lessee corporation, the lessor re-enters and sublets, he may prove his claim for the difference between the rent reserved in the original lease and that under the subletting. Peo. v. St. Nicholas Bank, 151 N. Y. 592 (1897).

§ 251. Delivery of property and payment of debts to receiver after notice. After the first publication of the notice of the appointment of receivers, every person having the possession of any property belonging to such corporation, and every person indebted to such corporation, shall account and answer for the amount of such debt and for the value of such property to the said receivers.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 72, in part.

This provision does not apply to temporary receivers. Nealis v. Am. Tube & Iron Co., 76 Hun 220 (1894), affd., 150 N. Y. 42 (1896).

§ 252. Penalty for concealing property from receiver. Every person indebted to such corporation, or having the possession or custody of any property or thing in action, belonging to it, who shall conceal the same, and not deliver a just and true account of such indebtedness, or not deliver such property or thing in action, to the receivers, or one of them, by the day for that purpose appointed, shall forfeit double the amount of such debt, or double the value of such property so concealed; which penalties may be recovered by the receivers.

Formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 11.

Consolidators' Note.

This provision was contained in chapter 5 of the Revised Statutes (pt. 2, tit. 1, art. 8) and is made applicable by section 72 of chapter 8 of the Revised Statutes (pt. 3, tit. 4, art. 3.)

§ 253. Duty of receiver to call creditors' meeting. They shall call a general meeting of the creditors of such corporation, within four months from the time of their appointment by a notice to be published in the same manner, as hereinbefore directed respecting the publication of the notice of their appointment; in which notice, they shall specify the place and time of such meeting, which time shall not be more than three months, nor less than two months after the first publication of such notice. Every such notice shall be published at least once in each week, until the time of such meeting.

First clause to "time of their appointment," formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 74, in part. Remainder formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 27.

Consolidators' Note.

The provisions made applicable by the following section of the Revised Statutes have been incorporated in this article, and the following provision therefore has been repealed: "The receiver shall be subject to all the duties and obligations by law imposed on trustees of insolvent debtors, so far as they may be applicable, except where other provisions shall be herein made." R. S., pt. 3, ch. 8, tit. 4, art. 3, § 74.

§ 254. Proceedings at creditors' meeting. At such meeting, or other adjourned meeting thereafter, all accounts and demands for and against such corporation, and all its open and subsisting contracts, shall be ascertained and adjusted as far as may be, and the amount of moneys in the hands of the receivers declared.

From "At such meeting" to "thereafter," formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 28, in part. Remainder formerly R. S., pt. 3, ch. 8, tit. 4, art. 8, § 74, in part.

The receiver should not allow any claim which is not recoverable at law or in equity. Attorney-General v. Life & Fire Ins. Co., 4 Paige 224 (1833).

If the receiver procures the allowance of and pays an unfounded claim, a creditor may make himself a party and have the order allowing the claim vacated. Schenck v. Ingraham, 4 Hun 67 (1875).

The claims of creditors are presentable when the receiver is appointed and that date fixes their status and amount regardless of when they are in fact presented. Peo. v. Am. Loan & Tr. Co., 172 N. Y. 371 (1902); Peo. v. Merchants' Trust Co., 187 N. Y. 293 (1907).

§ 255. Deduction of disbursements and commissions by receiver. Out of the moneys in their hands the receivers may first deduct all the necessary disbursements made by them in the discharge of their duty and such commissions as may be allowed by law.

Formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 29.

Consolidators' Note.

The commissions of receivers of corporations are no longer regulated by this section of the Revised Statutes, but by sections 280 and 281 of this chapter. Hence the omission of the bracketed matter in section 255 and the insertion of the words, "and such commissions as may be allowed by law." Section 3320 of the Code of Civil Procedure has not been inserted in this article for the reason that it provides for the expenses and commissions of receivers not otherwise provided for.

§ 256. Refunding consideration of subsisting contracts. If there shall be any open and subsisting engagements or contracts of such corporation, which are in the nature of insurances or contingent engagements of any kind, the receivers may, with the consent of the party holding such engagement, cancel and discharge the same, by refunding to such party the premium or consideration paid thereon by such corporation, or so much thereof as shall be in the same proportion to the time which shall remain of any risk assumed by such engagement, as the whole premium bore to the whole term of such risk; and upon such amount being paid by such receivers to the person holding or being the legal owner of such engagement, it shall be deemed canceled and discharged as against such receivers.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 75.

This section does not apply to a life insurance contract and can only apply to contracts of fire and marine or other insurance having a definite term to run and which are contracts of indemnity, for in such cases the amount paid for the indemnity may be apportioned. Peo. v. Security Life Ins. & Annuity Co., 78 N. Y. 114 (1879).

§ 257. Retention of funds for subsisting contracts and pending suits. The receivers shall retain out of the moneys in their hands, a sufficient amount to pay the sums, which they are hereinbefore authorized to pay, for the purpose of canceling and discharging any open or subsisting engagements. If any suit be pending against the corporation or against the receivers, for any demand, the receivers may retain the proportion which would belong to such demand if established, and the necessary costs and proceedings, in their hands, to be applied according to the event of such suit, or to be distributed in a second or other dividend.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, §§ 77, 78.

Consolidators' Note.

The following provision of the Revised Statutes is covered by this section and the former therefore has been repealed: "If, at the time any dividend is made, any prosecution be pending against the trustees, in which a demand against such debtor may be established, the trustees may retain in their

hands, the proportion which would belong to such demand if established, and the necessary costs and expenses of such suit or proceeding, to be applied according to the event of such proceeding or suit, or to be distributed in a second or other dividend."

R. S., pt. 2, ch. 5, tit. 1, art. 8, § 38.

The following section of the Revised Statutes on this subject is inapplicable and is therefore omitted:

"Whenever any bond shall have been executed by an attaching creditor for the purpose in the last section specified, the trustees shall retain a sufficient sum from the monies in their hands to indemnify such creditor, until a final determination be had, respecting his liability."

R. S., pt. 2, ch. 5, tit. 1, art. 8, § 31.

Liability on Lease.

A permanent receiver by taking possession of and occupying leased property incurs a liability to pay rent according to the terms of the lease at least as long as he occupies property, whereas temporary or chancery receivers having no title can create no privity of estate by entry, and if liable at all are liable only for the period of their occupancy. Prince v. Schlesinger, 116 A. D. 500 (1906), and cases cited.

A lease to a corporation is not terminated by the latter's dissolution and its covenant to pay rent does not thereupon cease to be obligatory; a receiver therefore is authorized to retain out of its assets sufficient to cancel and discharge such open and subsisting engagement and the court may make an order directing payment of the rent as it accrues. Peo. v. National Trust Co., 82 N. Y. 283 (1880).

§ 258. Payment of debts not due. Every person to whom a corporation shall be indebted on a valuable consideration, for any sum of money not due at the time of such distribution, but payable afterwards, shall receive his proportion with other creditors, after deducting a rebate of legal interest upon the sum distributed, for the time unexpired of such credit.

Formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 35.

§ 259. Allowance of set-offs. Where mutual credit has been given by any corporation, and any other person, or mutual debts have subsisted between such corporation and any other person, the receivers may set off such credits or debts, and pay the proportion or receive the balance due. But no set-off shall be allowed of any claim or debt, which would not have been entitled to a dividend, as hereinbefore directed.

No set-off shall be allowed by such receivers, of any claim or debt, which shall have been purchased by, or transferred to, the person claiming its allowance, which could not have been set off by him, in a suit brought by such receivers.

First paragraph formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 36. Second paragraph formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 37.

See Matter of Van Allen, 37 Barb. 225 (1861), discussing fully the rights and duties of a receiver in case of mutual claims.

A receiver may not allow a set-off against a debt due, where the demand sought to be set off was assigned to the debtor for that purpose after his appointment; and the receiver cannot do so indirectly by ratification or waiver. Van Dyck v. McQuade, 85 N. Y. 616 (1881).

Where a marine insurance company becomes insolvent, after the occurrence of a general average loss which is unadjusted, the receiver can only recover the amount due upon the premium notes after deducting the loss, for it is a case of mutual credits within this section. Osgood v. De Groot, 36 N. Y. 348 (1867), and authorities cited; Pardo v. Osgood, 5 Robt. 348 (1868); Berry v. Brett, 6 Bosw. 627 (1860); the premium notes given a life insurance company may be offset against the value of the policy. Peo. v. Security Life Ins. & Annuity Co., 78 N. Y. 114 (1879).

§ 260. Penalties recovered by receiver. All penalties which shall be recovered by any receivers, pursuant to the provisions of this article, shall be deemed a part of the property of the corporation, and shall be distributed as such among its creditors.

Formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 39.

§ 261. Order of payment by receiver. The receivers shall distribute the residue of the moneys in their hands, among all those who shall have exhibited their claims as creditors, and whose debts shall have been ascertained, as follows:

1. All debts due by such corporation to the United States, and all debts entitled to a preference under the laws of the United States.

2. All debts that may be owing by the corporation as guardian, executor, administrator or trustee; and if there be not sufficient to pay all debts of the character above specified, then a distribution shall be made among them, in proportion to their amounts respectively.

3. Judgments actually obtained against such corporation, to the extent of the value of the real estate on which they shall respectively be liens.

4. All other creditors of such corporation, in proportion to their respective demands, without giving any preference to debts due on specialties.

First clause to colon (:) formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 79, in part; subd. 1, "All debts due by such corporation to the United States and," R. S., pt. 2, ch. 5, tit. 1, art. 8, § 32; subd. 1, "all debts entitled to a preference under the laws of the United States," R. S., pt. 3, ch. 8, tit. 4, art. 3, § 79, in part; subd. 2, R. S., pt. 2, ch. 5, tit. 1, art. 8, § 34; subds. 3 and 4, R. S., pt. 3, ch. 8, tit. 4, art. 3, § 79, in part.

Consolidators' Note.

The following provisions of the Revised Statutes relating to the duties of trustees of insolvent debtors have been omitted as inapplicable:

"They shall distribute the residue of the monies in their hands, among

all those who shall have exhibited their claims as creditors, and whose debts shall have been ascertained, in proportion to their respective demands, and without giving any preference to debts due on specialties, as follows:

"1. In the case of proceedings under the first article of the title, among those who were creditors at the time of issuing the first warrant of attachment:

"2. In proceedings under the third and fifth articles of this title, among those who were creditors at the time of the execution of the assignment by the insolvent:

"3. In proceedings under the fourth article, when an assignment was executed by any officer as therein directed among those who were creditors at the time of the first publication of notice to creditors to appear and determine whether they will unite in a petition; and when the assignment was voluntary among those who were creditors at the time of the execution thereof:

"4. In proceedings under the sixth article, among those creditors, at whose suit the debtor was imprisoned on execution at the time of his discharge."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, § 33.]

"If they shall have been appointed trustees under the first article of this title, they shall pay to every attaching creditor the amount of any recovery which may have been had against him, on any bond he may have executed for the purpose of retaining any property or any vessel, for the benefit of all the creditors, and his costs for defending any such suit."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, § 30.]

Decisions Generally.

The wages of employees of domestic corporations doing business in the State are preferred to every other debt or claim. Labor Law, § 9 (Cons. Laws, ch. 31; L. 1909, ch. 36), and cases there cited, post.

All unpreferred creditors who have duly proved claims stand upon an equal footing even if some have not taken an active part in the prosecution of the action or appeal. Peo. v. Am. Loan & Trust Co., 177 N. Y. 231 and 467 (1904). Rule 30 of the General Rules of Practice providing for exceptions to the referee's report in so far as inconsistent with such a distribution must yield to the statute. Id.

Subdivision 3 does not apply to a judgment which is void because obtained in violation of Gen. Corp. Law, § 193; but a judgment regularly obtained after the filing of a petition for voluntary dissolution, without assistance from the corporation, is entitled to a preference. Matter of Waterbury, 8 Paige Ch. 380 (1840).

A judgment rendered after the appointment of a receiver who received no real estate belongs under subdivision 4. Atty.-Gen. v. Guardian Mut. Ins. Co., 5 Supp. 84 (1888), and this is true even if the corporation owned real estate. Matter of Atty.-Gen. v. Atlantic Mut. Life Ins. Co., 100 N. Y. 279 (1885).

The special term may in its discretion order the receiver to pay the expenses of a reference held to determine the priorities of creditors and stockholders. Peo. v. Met. Mut. S. & L. Assn., 103 A. D. 153 (1905), affd. on op. below, 182 N. Y. 531 (1905); on other questions certified.

State and city taxes are, subject to the general expenses of the receivership, to be paid in preference to the claims of the general creditors of the corporation where prior to the receivership process has been issued for their collection. Wise v. Wise Co., 153 N. Y. 507 (1897); Matter of Atlas Iron Construction Co., 19 A. D. 415 (1897); Matter of Donaldson, 27 Misc. 745–755 (1899), and cases there cited; Matter of Bowlby, 34 Misc. 311 (1901), but they have no preference over a creditor who has levied an attach-

ment before the tax became due. Wise v. Wise Co. Such preference involves no departure from the policy of the statute. Matter of Receivership of Columbian Ins. Co., 3 Abb. Ct. App. 239 (1866).

Officers are not entitled to any preference in the payment of their salary. Matter of Croton Ins. Co., 3 Barb. Ch. 642 (1847).

As the relation of a depositor in a savings bank to the corporation is that of creditor only, a depositor who has commenced an action against the corporation which is continued against a receiver in dissolution proceedings, is not entitled to a preference over other creditors and depositors. Peo. v. Mechanics & Traders' Sav. Inst., 92 N. Y. 7 (1883).

If a consignee of goods has a right to sell at less than the consigned price or may take the property himself, the relation is simply that of debtor and creditor and the consignor is not entitled to a preference in funds in the hands of the receiver of the consignee on the ground that the proceeds of the sale are trust funds. Baker v. Turner, 19 A. D. 223 (1897).

Money set apart for distribution among stockholders by way of dividend becomes a trust fund to which stockholders as individuals have a vested right and they are entitled thereto in preference to the creditors of the corporation. LeRoy v. Globe Ins. Co., 2 Edw. Ch. 657 (1836); Van Dyck v. McQuade, 86 N. Y. 38 (1881).

A defendant who succeeds in an action brought against him by a receiver is entitled to be paid his costs in full out of the estate and is not bound to accept a pro rata dividend with general creditors. Columbian Ins. Co v. Stevens, 37 N. Y. 536 (1868).

Status of Claims.

A claim against a surety company upon an undertaking on attachment must be valued and determined and its status fixed as of the date of the commencement of the action to dissolve the corporation, and there can be no claim against the corporate assets in the receivership proceedings where the liability upon the undertaking did not become absolute until after the commencement of such proceedings. Peo. v. Met. Surety Co., 205 N. Y. 135 (1912).

Where a claim against funds in the hands of the receiver of a dissolved corporation is based on the breach of condition of a bond conditioned upon the validity of certain scrip, claimant must show that the invalidity existed at the time of commencement of the action for dissolution, because contingent claims cannot share in the distribution of such funds. Claims must be determined, valued and their status fixed as of the time of such action for dissolution. People v. Met. Surety Co., 158 A. D. 651 (1913).

Interest.

While interest is allowed as against the corporation itself or its stockholders, if the assets are sufficient for the purpose, as between preferred and unpreferred creditors no interest is allowed after the law takes charge through the appointment of a receiver. Peo. v. Am. Loan & Tr. Co., 172 N. Y. 371 (1902); Peo. v. Merchants' Trust Co., 187 N. Y. 293 (1907).

Operating Expenses.

Damages for injuries to persons or property during the receivership caused by the torts of the receiver's agents and employees are classed as operating expenses and are accorded the same priority of payment as belongs to other necessary expenses of the receivership. Such claims are to be paid out of the net income if that is sufficient, but in the event of a deficiency they will be

paid out of the corpus. Such claims therefore have priority over mortgage debts or other debts existing when the action was brought in which the receiver was appointed. Robinson v. N. Y. & S. I. El. Co., 99 A. D. 509 (1904), and cases cited.

§ 262. Failure to file claim before first dividend. Every creditor who shall have neglected to exhibit his demand before the first dividend, and who shall deliver his account to the receivers before the second dividend, shall receive the sum he would have been entitled to on the first dividend, before any distribution be made to the other creditors.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 81, in part.

Consolidators' Note.

The following provision of the Revised Statutes has been omitted as superseded by this section:

"Any creditor who shall have neglected to deliver to the trustees an account of his demand, before the first, second, third, or other dividend, and who shall deliver his account to them before the second, or other subsequent dividend, shall receive the sum he would have been entitled to, on any former dividend, before any distribution be made to other creditors."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, § 41.]

§ 263. Second dividend by receiver. If the whole of the property of such corporation be not distributed on the first dividend, the receivers shall, within one year thereafter, make a second dividend of all the moneys in their hands, among the creditors entitled thereto; of which, and that the same will be a final dividend, three weeks' notice shall be inserted once in each week in a newspaper printed in the county where the principal place of business of such corporation was situated.

Such second dividend shall be made in all respects in the same manner as herein prescribed in relation to the first dividend, and no other shall be made thereafter among the creditors of such corporation, except to the creditors having suits against it, or against the receivers, pending at the time of such second dividend, and except of the moneys which may be retained to pay such creditors, as herein provided.

First paragraph formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 80. Second paragraph formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 81, in part.

Consolidators' Note.

The following provision of the Revised Statutes has been omitted because superseded by this section:

"If the whole of such debtor's estate be not distributed on the first dividend, the trustees shall, within one year thereafter, make a second dividend

of all the monies belonging to the estate of the debtor, then in their hands, among the creditors entitled thereto, as herein before specified; and in the same manner from year to year, so long as any monies belonging to the estate of such debtor shall remain in the hands of the trustees, they shall make a dividend thereof among the creditors entitled thereto."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, § 40.]

§ 264. Surplus to stockholders. If after the second dividend is made, there shall remain any surplus in the hands of the receivers, they shall distribute the same among the stockholders of such corporation, in proportion to the respective amounts paid in by them, severally, on their shares of stock.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 83.

Consolidators' Note.

The following provision of the Revised Statutes has been omitted as superseded by this section:

"If after settling the estate of any debtor, and after discharging his debts, entitled to a dividend, any surplus shall remain in the hands of his trustees, the same shall be paid to such debtor or his legal representatives."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, § 43.]

The following provision has been omitted as inapplicable:

"Every debtor who shall be discharged under the third, fourth or fifth articles of this title, shall be allowed the sum of five per cent. on the net produce of all his estate, that shall be received by the assignee, to be paid by him to them, in case such net produce, after such allowance made, shall be sufficient to pay the creditors of such debtor, entitled to a dividend, the sum of seventy cents on the dollar, on the amount of their debts respectively, as the same shall have been ascertained; but the said allowance shall not exceed in the whole, the sum of five hundred dollars."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, § 44.]

Rights of Stockholders.

This is a clear and simple recognition of the principle that every stockholder has a quasi lien upon, or an interest in, all the assets of the corporation, for the value of his distributive share of such assets, after the payment of the corporate indebtedness. He is entitled to have a sale of assets for cash or its equivalent, and cannot be compelled to submit to an exchange of his lien on the assets for a lien upon, or interest in, other securities. Peo. v. Anglo-American S. & L. Assn., 60 A. D. 389, 403 (1901).

After dissolution a transferee of stock takes the same subject to all claims which the corporation has against the transferrer, for the interest of stockholders becomes an equitable right to a proportionate share of the assets after payment of debts, which right is not negotiable. James v. Woodruff, 10 Paige 541 (1844), aff'd., no op., 2 Den. 574 (1845).

§ 265. Disposition of moneys retained by receiver for suits. When any suit pending at the time of the second dividend shall be terminated, they shall apply the moneys retained in their hands for that purpose, to the payment of the amount recovered, and their necessary charges and expenses; and if nothing shall have

been recovered, they shall distribute such moneys, after deducting their expenses and costs, among the creditors and stockholders of the corporation, in the same manner as herein directed in respect to a second dividend.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 84.

§ 266. Duty of receiver as to unclaimed dividend. If any dividend that shall have been declared, shall remain unclaimed by the person entitled thereto for one year after the same was declared, the receivers shall consider it as relinquished, and shall distribute it, on any subsequent dividend, among the other creditors.

Formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, § 42.

§ 267. Effect of failure to file claim before second dividend. After such second dividend shall have been made, the receivers shall not be answerable to any creditor of such corporation, or to any person having claims against such corporation, by virtue of any open or subsisting engagement, unless the demands of such creditor shall have been exhibited, and the engagements upon which such claims are founded, shall have been presented to the said receivers, in detail and in writing, before or at the time specified by them in their notice of a second dividend.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 82.
See Gen. Corp. Law, § 303, and cases cited.

§ 268. Final accounting by receiver. A receiver shall apply within one year after qualifying as such for a final settlement of his accounts and an order for distribution, or shall apply to the court upon notice to the attorney-general for an extension of time, setting forth the reasons why he is unable to close his accounts, which order may be granted in the discretion of the court. The attorney-general or any creditor, or any party interested, may apply for an order that the receiver show cause why an accounting and distribution shall not be had at any time after the expiration of one year after the receiver qualifies; and it shall be the duty of the attorney-general after the expiration of eighteen months from the time the receiver enters upon his duties, in case he has not applied for a final settlement of his accounts, to apply for such an order on notice to such receiver. In case of such application

by a party other than the receiver the court shall direct the receiver to take steps to account with all convenient speed. The receiver is not required or authorized to file any account, except as herein provided, except by special order of the court.

Formerly Code Civ. Pro. § 2431b, added by L. 1906, ch. 293, § 2.

Consolidators' Note.

This section supersedes the provisions of the Revised Statutes given below since it provides that the "receiver is not required or authorized to file any account except as herein provided except by special order of the court."

"Within three months after the time herein prescribed for making a second dividend, the receivers shall render a full and accurate account of all their proceedings to the court of chancery, on oath, which shall be referred to a master to examine and report thereon."

[R. S., pt 3, ch. 8, tit. 4, art. 3, § 86.]

"Within ten days after any dividend made by any trustees, they shall render an oath, and file with the clerk of the court of common pleas of the county in which they reside, or with a clerk of the supreme court, an account in writing of all their proceedings in the premises stating:

1. Their disbursements, commissions and the dividends made by them:

2. The names and residences of the creditors to whom dividends were made, and the names of those actually receiving them:

3. The property, monies and effects of the debtor remaining in their hands, and the value and situation of such property:

And such trustees may at any time be compelled by a rule of the supreme court, or of the court of common pleas of the county in which they reside, to render such account on oath, on the application of the debtor, or of any creditor."

[R. S., pt. 2. Ch. 5, tit. 1, art. 8, § 45.]

§ 269. Notice of final accounting. Previous to rendering such account the receivers shall insert a notice of their intention to present the same, once in each week, for three weeks, in a newspaper, of the county in which notices of dividends are herein required to be inserted, specifying the time and place at which such account will be rendered. Said receivers shall also give notice to the sureties on their official bonds, as provided in section two hundred and twenty-seven of this chapter.

Thus am'd by L. 1909, ch. 240.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 87.

The note under § 136, Gen. Corp. Law, also applies to this section.

§ 270. Hearing on final accounting. Upon the coming in of such report, the court shall hear the allegations of all concerned therein, and shall allow or disallow such account, and decree the same to be final and conclusive upon all the creditors of such corporation, upon all persons who have claims against it, upon any

open or subsisting engagement, and upon all the stockholders of such corporation.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 89, in part.

§ 271. Reference of final account. The referee to whom such account shall be referred, shall hear and examine the proofs, vouchers and documents offered for or against such account, and shall report thereon fully to the court.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 88.

Before a referee is appointed to pass on the accounts, the receiver should file a full and definite account, verified by his oath, itemizing with particularity the various claims made by him, and the reference should relate specifically to the claims therein contained. Peo. v. Columbia Car Spring Co., 12 Hun 585 (1878).

The old equity practice of reviewing the referee's report by an independent proceeding instituted by petition no longer obtains, and at present exceptions must be filed pursuant to Rule 30 of the General Rules of Practice. Matter of Guardian Savings Inst., 9 Hun 267 (1876); Matter of Kautsky, 56 A. D. 440 (1900).

Creditors have a right to appear before the referee. Greason v. Goodwillie-Wyman Co., 38 Hun 138, 141 (1885).

If the receiver mingles the trust fund with his own funds, he will be charged with interest on the amount of the trust fund used for his own purposes. Matter of Commonwealth Ins. Co., 32 Hun 78 (1884).

If no property, assets, effects, or books come into the receiver's hands, and the order appointing him has been vacated, he is entitled to be discharged and have his bond canceled. Peo. v. Bushwick Chemical Works, 18 N. Y. Supp. 542 (1892), affd. on op. below, 133 N. Y. 694 (1892).

The court may in the first instance order the fees of the referee to be paid directly out of the fund. Atty.-Gen. v. Continental Life Ins. Co., 93 N. Y. 45 (1883).

§ 272. Further accounting. Such receivers shall also account from time to time in the same manner, and with the like effect, for all moneys which shall come to their hands after the rendering of such account, and for all moneys which shall have been retained by them for any of the purposes hereinbefore specified, and shall pay into court all unclaimed dividends.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 89, in part.

§ 273. Removal of receiver. Such receivers may be removed by the court.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 85, in part.

Consolidators' Note.

The following provision of the Revised Statutes has been omitted as superseded by this section:

"And they may be removed by the supreme court, for cause shown."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, § 46.]

See Horton v. McNally Co., 155 A. D. 322, 333 (1913).

§ 274. Vacancy. Any vacancy created by removal, death or otherwise, may be supplied by the court.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 85, in part.

Consolidators' Note.

The following provision of the Revised Statutes has been omitted having been incorporated in this article:

"Whenever any trustee shall be removed, or shall die, or become incapacited to perform his duties, the officer who originally appointed such trustee, or in case of his absence, death, or removal, any other officer residing in the county where such trustee was resident, who by law would have been empowered to make such appointment, after giving notice, and an opportunity to the creditors to propose proper persons, may appoint another in the place of such trustee, who shall, in all respects, have the like powers and authority, and be subject to the same control, obligations and responsibilities; and the said appointment shall be certified and recorded, as the original appointment was required to be recorded."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, § 48.]

§ 275. Renunciation by receiver. Any receiver who shall be desirous of renouncing the trust vested in him, may apply to the court from whom his appointment was received, for an order to all persons interested, to show cause why such renunciation should not be accepted.

Such application shall be accompanied by a full, true and just account of all the transactions of such receiver, and particularly of the property, moneys and effects received by him; of all payments made, whether to creditors or otherwise; and of the remaining effects and property of the corporation, in respect to which he was appointed receiver, within his knowledge, and the situation of the same.

To such account shall be annexed the affidavit of the receiver, that the said account is in all respects just and true, according to the best of his knowledge and belief; which affidavit shall be subscribed and sworn to, before the court, to whom the application is made, and shall be certified by the clerk of the court.

Such court, shall thereupon grant an order, directing notice to be given to all persons interested in the property of the corporation, in respect to which such receiver was appointed, to show cause on a day or at a term and at a place therein to be specified, why he should not be permitted to renounce his appointment.

Such notice shall be published, once in each week, for six weeks successively in such newspapers, as such court shall direct.

On the day appointed for such hearing, and on such other days

as shall from time to time be appointed, if it shall appear that notice was duly published, the court shall proceed to hear the proofs and allegations of the parties.

If it shall appear that the proceedings of such receiver, in relation to his trust, have been fair and honest, and particularly in the collection of the property and debts vested in him; and if such court be satisfied that for any reason it is inexpedient for such receiver to continue in the execution of the duties of his appointment, and that such duties can be executed by another receiver, without injury to the property of the corporation, or to the creditors; and if no good cause to the contrary appear, such court shall grant an order, allowing such receiver to renounce his appointment.

Upon such order being granted, such receiver shall be discharged from the trust reposed in him, and his power and authority shall thereupon cease; but he shall, notwithstanding, remain subject to any liability he may have incurred, at any time previous to the granting of such order, in the management of his trust.

The expense of all proceedings in effecting such renunciation shall be paid by the receiver making the application.

Thus am'd by L. 1909, ch. 28.

Formerly R. S., pt. 2, ch. 5, tit. 1, art. 8, §§ 49, 51, 52, 53, 54, 55, 56, 60, 62.

Consolidators' Note.

The following provisions of the Revised Statutes have been omitted as inapplicable:

"If the officer who made such appointment shall not then be in office, such application may be made to a circuit judge, supreme court commissioner, or the first judge of the county, residing in the same county where the appointment of such assignee was made."

"Such assignment shall be executed by such trustee, to such person, or persons, as the court or officer shall appoint for that purpose; and in the appointment, such persons as shall have been named to be assignees by the creditors of such debtor, or by the major part of them, shall be preferred, if approved by such court or officer."

"Such assignment shall transfer to the persons to whom it shall be made, all the remaining estate and effects, vested in the trustee so renouncing; and such new assignee shall have the same powers, be subject to the same duties, and be entitled to the same compensation, as the original trustee; and shall continue any suit that may have been commenced by such original trustee, in his name, or in that of such new assignee."

"Upon producing to the officer or court allowing such assignment, the certificate of the assignee, duly proved by the oath of a subscribing witness, that such assignment has been duly made, and the property capable of delivery, belonging to such debtor, together with all the books, vouchers and docu-

ments, relating to the estate of such debtor, has been duly delivered; and also a certificate of the county clerk, that such assignment has been recorded; such court or officer shall grant to the trustee so applying, an order that he be discharged from his trust."

"Such new assignment, upon being duly proved or acknowledged, shall be recorded in the office of the clerk of the county where such order was granted; and the petition of the trustee, the affidavit and proceedings thereon, with the certificate of the new assignee, shall be filed in the same office where the original papers and proceedings, in respect to such debtor, were filed."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, §§ 50, 57, 58, 59, 61.]

After a receiver has been discharged the court cannot make an order that he should pay a creditor, he no longer having any funds out of which payment could be made. N. Y. & W. U. Tel. Co. v. Jewett, 115 N. Y. 166 (1889).

The note under § 136, Gen. Corp. Law, also applies to this section.

§ 276. Control of receiver by court. The receivers shall be subject to the control of the court and may be compelled to account at any time.

Formerly R. S., pt. 3, ch. 8, tit. 4, art. 3, § 85, in part.

Consolidators' Note.

The following provisions of the Revised Statutes have been omitted as superseded by this section:

"Such trustees shall be subject to the order of the supreme court, and of the court of common pleas of the county in which they were appointed, upon the application of any creditor, or of any debtor in respect to whom they were appointed, in relation to the execution of any of the powers and duties confided to them."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, § 46, pt.]

"Whenever any authority shall be exercised by a court of common pleas, or any officer, pursuant to any provisions of this title, the proceedings may be removed into the supreme court by certiorari, and there examined and corrected. But no such certiorari shall issue, unless allowed by a justice of the supreme court, or a circuit judge; nor shall it operate as a stay of proceedings, unless it shall be so directed in the order of allowance."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, § 47.]

The following provisions of the Revised Statutes have been omitted because inapplicable:

"Any person who shall discover to the trustees any secreted effects, property, or things in action, belonging to such debtor, so that they shall be recovered by them, shall be entitled to ten dollars on the hundred dollars, and at that rate, on the value of the effects so discovered, to be paid by the trustees, out of the estate of such debtor; but this section shall not extend to persons who have such property, effects or things, in their own possession."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, §18.]

"If they shall have been appointed trustees under the first article of this title, they shall pay to every attaching creditor the amount of any recovery which may have been had against him, on any bond he may have executed for the purpose of retaining any property or any vessel, for the benefit of all the creditors, and his costs for defending any such suit."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, § 30.]

The court has jurisdiction in personam over a receiver appointed in an action to dissolve a corporation, and may restrain the prosecution of an

action begun by the receiver in another State. Such injunction will be granted where the issues can be decisively disposed of here in a single action, and all parties having conflicting claims may assert the same, while the foreign judgment would not be conclusive upon some of the claimants. Guaranty Trust Co. v. Edison United Phonograph Co., 128 A. D. 591 (1908).

§ 277. Commissions and expenses of receiver in voluntary dissolution. A receiver appointed pursuant to article nine is entitled, in addition to his necessary expenses, to commissions upon the sums received and disbursed by him as the court by which or the judge by whom he is appointed allows, as follows: On the first twenty thousand dollars not exceeding five per centum; on the next eighty thousand dollars, not exceeding two and one-half per centum; and on the remainder, not exceeding one per centum; but in case the commissions of a receiver so computed shall not amount to one hundred dollars, said court or judge may in his or its discretion allow said receiver such a sum not exceeding one hundred dollars for his commissions as shall be commensurate with the services rendered by said receiver.

Formerly Code Civ. Pro. § 2431a, added by L. 1906, ch. 293, § 2.

Consolidators' Note.

Section 3320 of the Code of Civil Procedure has not been consolidated in this chapter for the reason that it provides for the expenses and commissions of receivers except as otherwise specially prescribed by statute.

The following provision of the Revised Statutes was expressly repealed by ch. 349 of L. 1906:

"Such receivers shall, in addition to their actual disbursements, be entitled to such commissions as the court shall allow, not exceeding the sum allowed by law to executors or administrators."

[R. S., pt. 3, ch. 8, tit. 4, art. 3, § 76.]

The following provision of the Revised Statutes is omitted as embraced within the language of section 76 of the Revised Statutes.

"And a commission at the rate of 5 per cent. on the whole sum which shall have come into their hands."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, § 29.]

Receiver's Compensation.

The receiver is entitled to commissions upon the moneys actually received and disbursed by him by order of the court, without deduction for moneys paid out to persons claiming an interest in the fund or in settlement of claims against him as receiver or in satisfaction of liens upon the property of the corporation. Matter of Little, 47 A. D. 22 (1900), aff'd. on opinion below, 165 N. Y. 643 (1901).

§ 278. Commissions and expenses of receiver except in voluntary dissolution. A receiver of a corporation, except a receiver appointed in proceedings for its voluntary dissolution, is entitled, in addition to his necessary expenses, to such commissions, not exceeding two and one-half per centum upon the sums

received and disbursed by him, as the court by which or the judge by whom he is appointed allows, but except upon a final accounting such a receiver shall not receive on account of his services for any one year a greater amount than twelve thousand dollars, nor for any period less than a year more than at that rate. Upon final accounting, the court may make an additional allowance to such receiver, not exceeding two and one-half per centum upon the sums received and disbursed by him, if the court is satisfied that he has performed services that fairly entitle him to such additional allowance. Where more than one receiver shall be appointed, the compensation herein provided shall be divided between said receivers.

Formerly L. 1883, ch. 378, § 2, as am'd by L. 1886, ch. 275, § 1; L. 1901, ch. 506, § 1; L. 1906, ch. 349, § 1.

The compensation of receivers appointed in an action to foreclose a mortgage is regulated by Code, § 3320, this section applying only to receivers appointed in proceedings in bankruptcy. U. S. Trust Co. v. N. Y., W. S. & B. R. R. Co., 101 N. Y. 478 (1886).

The compensation of a temporary receiver is also governed by the Code, § 3320. Matter of Smith Co., 31 A. D. 39 (1898).

Only the money which has actually come into the hands of the receiver can be taken as the basis of computing his commissions in case of his resignation. Peo. v. Mutual Benefit Assn., 39 Hun 49 (1886).

Where the receiver allowed those owning all the stock to conduct the business, make purchases and sales, and receive and disburse the receipts, and also employed a clerk at a fixed salary, and where the only money received by him was the proceeds of a sale at auction of the corporate property, he was entitled only to commission on the proceeds of the sale and not on the money received and disbursed by those to whom he gave the entire management. Matter of Woven Tape Skirt Co., 85 N. Y. 506 (1881).

It is only where the receiver pays off and discharges encumbrances on property before the sale that he is entitled to commissions on the amount of the encumbrances. Matter of Security Life Ins. & Annuity Co., 31 Hun 36; aff'd., 95 N. Y. 654 (1884).

Upon a change of receivers each receiver should be allowed one-half of the percentage on the moneys in the hands of the first receiver. Attorney-General v. Continental Life Ins. Co., 32 Hun 223 (1884); the second receiver is entitled to a commission for paying out only. Id.

Counsel employed by the Attorney-General to appear in the action will not be given an allowance from the estate. Attorney-General v. Continental Life Ins. Co., 88 N. Y. 571 (1882).

A receiver who has been finally discharged will not be allowed to intervene in proceedings to reach newly discovered assets and to receive fees thereon, as he would have no authority to receive or pay out the fund and therefore could earn no fees. Matter of Grand Central Bank, 27 Misc. 116 (1899).

The receiver is not entitled to charge for counsel fees to himself in suits prosecuted or defended by him as attorney. The commissions allowed by law are intended to be full compensation for his personal services. Matter of Bank of Niagara, 6 Paige 213 (1836).

Court May Grant Additional Allowance to Receiver.

A receiver's compensation shall not exceed $12,000 for any one year nor more than that rate for any less period; but upon final accounting an additional allowance may be made, not exceeding two and one-half per cent. upon the sums received and disbursed, if the court is satisfied that the services performed entitle the receiver to the additional allowance. Peo. v. Brooklyn Bank, 64 Misc. 538 (1909). Where more than one receiver has been appointed the compensation shall be divided between them. Id.

ARTICLE 12

Provisions Applicable to Two or More of the Foregoing Proceedings or Actions

SECTION 300. Application of preceding articles to certain corporations.
301. Officers and agents may be compelled to testify in certain actions.
302. Injunction staying actions by creditors in certain actions.
303. Creditors of corporation may be brought in to prove their claims in certain actions.
304. When attorney-general must bring certain actions.
305. Requisites of injunction against corporations in certain cases.
306. Appointment of receivers of property of corporations.
307. Judicial suspension or removal of officer of corporation.
308. Application of the last three sections.
309. Misnomer not available in action against stockholder.
310. Appraisal of property of insolvent corporation.
311. Application by attorney-general for removal of receiver and to facilitate closing affairs of receivership.
312. Service of papers upon attorney-general.
313. Designation of depositories of funds in order appointing receiver.
314. Application to the court in certain actions and proceedings.
315. County wherein action may be brought by attorney-general on behalf of the people.
316. Preferences in actions *of proceedings by or against receivers.

§ 300. Application of preceding articles to certain corporations. Articles fifth, sixth or seventh of this chapter do not apply to a religious corporation; or to a municipal or other political corporation, created by the constitution, or by or under the laws of this state; or to any corporation which the regents of the university have power to dissolve, except upon the application of the regents, or of the trustees of such a corporation; and in aid of its liquidation under such dissolution.

Formerly Code Civ. Pro. § 1804.

Consolidators' Note.

This article contains without change the provisions in ch. 15, tit. 2, art. 5 of the Code of Civil Procedure entitled "Provisions applicable to two or

* So in original.

more of the actions specified in this title," and in addition to the provisions of the Code of Civil Procedure certain other statutory provisions of too general a nature to be inserted under any of the preceding articles.

§ 301. Officers and agents may be compelled to testify in certain actions. In an action, brought as prescribed in article fifth, sixth or seventh, a stockholder, officer, alienee, or agent of a corporation, is not excused from answering a question, relating to the management of the corporation, or the transfer or disposition of its property, on the ground that his answer may expose the corporation to a forfeiture of any of its corporate rights, or will tend to convict him of a criminal offense, or to subject him to a penalty or forfeiture. But his testimony shall not be used, as evidence against him, in a criminal action or special proceeding.

Formerly Code Civ. Pro. § 1805.

The constitutionality of this section does not seem to have been determined. but it would appear very doubtful in view of the decision in Peo. ex rel. Lewisohn v. O'Brien, 176 N. Y. 253 (1903), holding that section 342 of the Penal Code as it read before the amendment by chapter 649, Laws of 1904. was not coextensive with the constitutional immunity, Cons. art. I, section 6, and did not afford the witness the protection contemplated. Said section 342 read as follows: "No person shall be excused from giving testimony upon any investigation or proceeding for a violation of this chapter upon the ground that such testimony would tend to convict him of a crime; but such testimony cannot be received against him upon any criminal investigation or proceeding." See also Peo. ex rel. Lewisohn v. Gen. Sess., 96 A. D. 201 (1904), affd., no op., 179 N. Y. 594 (1904), construing the said section as amended in 1904; also Peo. v. Cahill, 126 A. D. 391 (1908), affd., 193 N. Y. 232 (1908); Peo. ex rel. Hunt v. Lane, 116 N. Y. Supp. 990 (1909); Hale v. Henkel, 201 U. S. 43 (1906); McAlister v. Henkel, 201 U. S. 90 (1906); Edelstein v. U. S., 149 Fed. 636 (1906).

§ 302. Injunction staying actions by creditors in certain actions. In such an action, the court may, in its discretion, on the application of either party, at any stage of the action, before or after final judgment, and with or without security, grant an injunction order, restraining the creditors of the corporation from bringing actions against the defendants, or any of them, for the recovery of a sum of money, or from taking any further proceedings in such actions, theretofore commenced. Such an injunction has the same effect, and. except as otherwise expressly prescribed in this section, is subject to the same provisions of law, as if each creditor, upon whom it is served, was named therein, and was a party to the action in which it is granted.

Formerly Code Civ. Pro. § 1806.

See Gen. Corp. Law, § 184. and cases there cited.

The power to enjoin is purely statutory. Davidson v. John Good Cordage Co., 63 A. D. 366 (1901), and cases cited.

The court is not authorized to restrain the holder of a mortgage on corporate real estate, given by a former owner thereof, which the corporation did not assume, from prosecuting an action to foreclose. Davidson v. John Good Cordage Co., 63 A. D. 366 (1901).

In the absence of an injunction the appointment of a temporary receiver does not preclude the maintenance of an action by a creditor against the corporation. Peo. v. Com. Alliance Life Ins. Co., 5 A. D. 273 (1896).

A policy-holder's suit against an insolvent insurance company may be enjoined after the appointment of a permanent receiver of the company. Atty.-Gen. v. Guard. Mut. Life Ins. Co., 77 N. Y. 272 (1879).

If the creditor's action hampers the receiver and increases the expenses it will be enjoined. Atty-Gen. v. N. A. Life Ins. Co., 6 Abb. N. C. 293 (1879).

If the charter of the company makes each stockholder liable for the entire debt to judgment creditors whose execution has been returned unsatisfied, the court cannot, on application of one creditor, restrain the other creditors from prosecuting actions against the stockholders. Judson v. Rossie Galena Co., 9 Paige 598 (1842).

It is the policy of the law in order to expedite the administration, avoid excessive expense, secure uniformity in remedies and equality in right among creditors, to bring all claimants against the estate into the common forum which will be provided, if necessary, in the action itself in which the corporation is dissolved and the receiver appointed. Marshall v. Wendell, 45 A. D. 120 (1899). There may be cases in which it may be expedient that the rights be determined in a separate action and that the receiver be brought in as a party. Id.

The court although granting the injunction may allow the entry of judgment as security, the validity to be determined in the action in which the receiver is appointed. Galwey v. U. S. Steam Sugar Ref. Co., 21 How. 313 (1861), affd., 36 Barb. 256 (1861).

Where the receiver may prosecute stockholders for unpaid subscriptions, a like action of a judgment creditor commenced after the appointment of the receiver in sequestration proceedings will be enjoined. Rankine v. Elliott, 16 N. Y. 377 (1857).

§ 303. Creditors of corporation may be brought in to prove their claims in certain actions. In such an action, the court may, at any stage of the action, before or after final judgment, make an order requiring all the creditors of the corporation to exhibit and prove their claims, and thereby make themselves parties to the action, in such a manner, and in such a reasonable time, not less than six months from the first publication of notice of the order as the court directs; and that the creditors, who make default in so doing, shall be precluded from all benefit of the judgment, and from any distribution which may be made thereunder, except as hereinafter provided. Notice of the order must be given by publication, in such newspapers, and for such a length of time, as the court directs. Notwithstanding such order any such creditor who shall exhibit and prove his claim in the manner

directed thereby, with proof, by affidavit or otherwise, that he has had no notice or knowledge thereof in time to comply therewith, any time before an order is made directing a final distribution of the assets of such corporation, shall be entitled to have his claim received, and shall have the same rights and benefits thereon, so far as the assets of such corporation then remaining undistributed may render possible, as if his claim had been exhibited and proved within the time limited by such order.

Formerly Code Civ. Pro. § 1807.

Before the adding of the last sentence of this section by amendment of 1886, claims not exhibited within the time mentioned in the notice were precluded from sharing in the assets. Peo. v. Security L. I. & A. Co., 78 N. Y. 114 (1879); Matter of Harmony, etc., Ins. Co., 45 N. Y. 310 (1871).

The receiver is authorized to apply for and the court in its discretion may grant an order extending the time to file claims as the statute does not limit the time. Peo. ex rel. Attorney-General v. Security L. I. & A. Co., 79 N. Y. 267 (1879).

The receiver owes a like duty to all creditors to see to it that each has an equal opportunity to enforce his claim. Id.; Peo. v. Family Fund Soc., 31 A. D. 166 (1898).

The claims under policies of a life insurance company must on dissolution be valued and determined and their status fixed as of the date of the commencement of the action and are not affected by death of the insurer after that date and before distribution of the assets. Peo. v. Coml. Alliance L. Ins. Co., 154 N. Y. 95 (1897); Peo. v. Grand Lodge of Empire Order, 156 N. Y. 533 (1898), disapproving on this point 78 N. Y. 114 (1879), 82 N. Y. 336 (1880), 88 N. Y. 77 (1882).

The validity of the claim is usually determined by a reference which the court has the power to order. Peo. v. Remington, 45 Hun 347 (1887).

The claim of a creditor should be paid though the time to prove debts has expired, if the receivers had sufficient assets in their hands. Peo. v. Remington, 59 Hun 282 (1891), affd. on op. below, 126 N. Y. 654 (1891); Matter of Ziegler, 98 A. D. 117 (1904).

The original determination of conflicting claims to a dividend adjudged in a final order in voluntary dissolution proceedings should not be determined on a motion to substitute the name of one claimant for another in the order of distribution. The question as to the right to the dividend should be determined before the entry of the final order. Matter of Hulbert Bros. & Co., 160 N. Y. 9 (1899).

In an action to dissolve and liquidate a corporation all creditors or stockholders are in one sense parties and before the court. They are represented by the Attorney-General and by the receiver when one is appointed. All the creditors are subject to the summary jurisdiction of the court in the distribution of the estate of insolvent corporations. Webster v. Kings Co. Trust Co., 80 Hun 420 (1894).

The right of a person claiming to be a creditor to share in the assets must be determined in the receivership proceedings. Rinn v. Astor Fire Ins. Co., 59 N. Y. 143 (1874); Peo. v. Am. L. & T. Co., 150 N. Y. 117 (1896).

§ 304. When attorney-general must bring certain actions. Where the attorney-general has good reason to believe, that an

action can be maintained in behalf of the people of the state, as prescribed in articles fifth, sixth or seventh of the chapter, except section one hundred and thirty of this chapter, he must bring an action accordingly, or apply to a competent court for leave to bring an action, as the case requires; if, in his opinion, the public interests require that an action should be brought. In a case where the action can be brought only by the attorney-general in behalf of the people, if a creditor, stockholder, director, or trustee of the corporation, applies to the attorney-general for that purpose, and furnishes the security required by law, the attorney-general must bring the action, or apply for leave to bring it, if he has good reason to believe, that it can be maintained. Where such an application is made section nineteen hundred and eighty-six of the code of civil procedure applies thereto, and to the action brought in pursuance thereof.

Formerly Code Civ. Pro. § 1808.

For further cases see Gen. Corp. Law, § 132.

See Code, § 3242, as to collection of costs.

While Gen. Corp. Law, § 90, is to govern the action of the court in granting relief, Gen. Corp. Law, § 304, is to govern the action of the Attorney-General in deciding to ask relief. The sole responsibility of suing in the name of the people rests upon him, that subject being wholly in his keeping as the representative of the public interests. The question as to what the public interests require is committed to the absolute discretion of the Attorney-General, and if he abuses this power a remedy may be found in his removal from office. Peo. v. Ballard, 134 N. Y. 269 (1892).

An action under Gen. Corp. Law, § 131, may be maintained in the name of the people on the relation of a party, whereas an action under Gen. Corp. Law, § 101, must, it seems, be brought either in the name of the people or the party in interest. Peo. ex rel. Hearst v. Ramapo Water Co., 51 A. D. 145 (1900).

An action to dissolve a banking corporation because insolvent may be maintained in the name of the people without a relator. Peo. v. Mercantile Co-operative Bank, 53 A. D. 295 (1900); Peo. v. Manhattan R. E. Co., 74 A. D. 535 (1902), revsd. on other grounds, 175 N. Y. 133 (1903).

§ 305. Requisites of injunction against corporations in certain cases. An injunction order, suspending the general and ordinary business of a corporation, or suspending from office, or restraining from the performance of his duties, a trustee, director, or other officer thereof, can be granted only by the court, upon notice of the application therefor, to the proper officer of the corporation, or to the trustee, director, or other officer enjoined. If such an injunction order is made, otherwise than as prescribed in this section, it is void.

Formerly Code Civ. Pro. § 1809, in part. For remainder of section, see Code Civ. Pro. § 1809.

An ex parte injunction which suspends generally the ordinary business of a corporation is prohibited. The section, however, refers only to injunctions extending to a total suspension of corporate business, and has no application where only a single act or duty is restrained. Town of Fort Edward v. Hudson Valley Ry. Co., 127 A. D. 438 (1908); Roosevelt v. Edson, 7 Civ. Pro. 5 (1885).

Enjoining the obstruction of the highway by a railroad at a given point does not violate the section. Town of Fort Edward v. Hudson Valley Ry. Co., 127 A. D. 438 (1908); Howlett v. N. Y., W. S. & B. Ry. Co., 14 Abb. N. C. 328 (1882).

The section is inapplicable to an injunction against the mayor of the corporation "The mayor, aldermen and commonalty of the City of New York," as the latter was created by crown charters and not State. Roosevelt v. Edson, 7 Civ. Pro. 5 (1885).

Where the only business actually done was running ferryboats, although the charter gave other powers, an injunction enjoining said business was within the prohibition of the section. Mayor v. Starin, 16 St. Rep. 882 (1888); it is the business done in fact that is meant. Id.

An ex parte injunction prohibiting directors from taking any action to remove the treasurer, or even considering a resolution declaring the office vacant, is void; and a motion to vacate does not operate as a waiver. Wilkie v. Rochester, etc., Rway. Co., 12 Hun 242 (1877). See too Ciancimino v. Man, 20 N. Y. Supp. 702 (1892).

An order to show cause why a receiver should not be appointed in an action brought under Gen. Corp. Law, § 90, is sufficient basis for an order which, in addition to appointing the temporary receiver, grants a preliminary injunction. Goss v. Warp Twisting-in Mach. Co., 117 N. Y. Supp. 228 (1909).

The officer upon whom the notice is served is guilty of a misdemeanor if he does not disclose the fact of service and the time and place of the application to the other directors, officers, and managers. Penal Law, § 665, subd. 5, which see, post.

Order Staying Removal of a Director Not an Injunction.

A clause contained in an order to show cause why a director should not be permitted to examine the corporate books, and staying the defendant corporation from removing such director pending the proceeding, is not an injunction within the meaning of this section, nor does it suspend the ordinary business of the corporation. Peo. ex rel. Stauffer v. Bonwit Bros. 69 Misc. 70 (1910).

Notice of Application.

An order to show cause why an injunction should not be granted is a sufficient notice of the application for such injunction as required by this section. Goss v. Warp Twisting-in Machine Co., 133 A. D. 122 (1909).

§ 306. Appointment of receivers of property of corporations. A receiver of the property of a corporation can be appointed only by the court, and in one of the following cases:

1. An action, brought as prescribed in articles fifth, sixth or seventh of this chapter.

2. An action brought for the foreclosure of a mortgage upon the

property, of which the receiver is appointed, where the mortgage debt, or the interest thereupon, has remained unpaid, at least thirty days after it was payable, and after payment thereof was duly demanded of the proper officer of the corporation and where either the income of the property is specifically mortgaged, or the property itself is probably insufficient to pay the mortgage debt.

3. An action brought by the attorney-general, or by a stockholder, to preserve the assets of a corporation, having no officer empowered to hold the same.

4. A special proceeding for the voluntary dissolution of a corporation.

5. Upon the application of the regents of the university, in aid of the liquidation of a corporation whose dissolution they contemplate or have decreed; or upon the application of the trustees of such a corporation, with notice to the regents.

Where the receiver is appointed in an action, otherwise than by or pursuant to a final judgment, notice of the application for his appointment must be given to the proper officer of the corporation.

Formerly Code Civ. Pro. § 1810.

As to notice in case of moneyed corporations, see Gen. Corp. Law, § 50, supra.

In an action brought pursuant to Gen. Corp. Law, § 90, to compel directors to account, the court acquires jurisdiction to appoint a receiver, although there is no demand for the removal of the directors or the election of others in their stead. Jacobus v. Diamond Soda Water M. Co., 94 A. D. 366 (1904); Halpin v. Mutual Brewing Co., 91 Hun 226 (1895).

A non-resident officer and stockholder of a foreign corporation may have a receiver appointed to preserve the assets, and the fact that he is both officer and stockholder does not take away rights conferred on him as stockholder. MacNabb v. Porter Air-Lighter Co., 44 A. D. 102 (1899).

A receiver of a foreign corporation cannot maintain an action against the corporation as sole defendant for the appointment of an ancillary receiver of the corporation itself, for the plaintiff already possesses by comity all powers which the ancillary receiver would have and further would in legal effect be maintaining an action against himself. Mabon v. Ongley El. Co., 156 N. Y. 196 (1898). And see note to this case in 5 Ann. Cas. 403.

Subdivision 3 was not designed to permit officers to abandon their posts and abdicate their official functions for the express purpose of shifting their burdens to the court, and a resignation of all officers for that purpose is illegal and ineffective. The officers may ask for a voluntary dissolution. Zeltner v. Zeltner Brewing Co., 174 N. Y. 247 (1903).

The Supreme Court, it seems, has no power to appoint a receiver of the property of a domestic or foreign corporation in an action brought by a creditor-at-large on behalf of himself and of all others similarly situated. Lehigh Coal, etc., Co. v. Central R. R. of N. J., 43 Hun 546 (1887).

Where the directors of an insolvent company refuse to bring proceedings for its dissolution, so that the rights of the creditors and stockholders may be protected, and there is danger that all the assets will be wiped out by executions prior to the expiration of thirty days, the stockholders may maintain an action in equity to compel a distribution of the assets, and the court has power to appoint a receiver to preserve the assets. Porter v. Industrial Information Co., 5 Misc. 262 (1893).

Receivers, When Improperly Appointed.

A judgment directing cancellation of stock issued for secret formulae and requiring copies of the same to be delivered to a receiver appointed to take possession of the property until the interests of the parties would justify his discharge, is reversible where the facts do not bring the case within the provisions for the appointment of a receiver and where prior to the judgment the stockholder had returned the stock to the corporation which had rescinded the resolution authorizing its issue. Brewster v. Brewster Co., 145 A. D. 812 (1911), modf'd, 204 N. Y. 687.

A receiver should not be appointed in a representative action brought by a stockholder, where it appears that the directors, who had instrusted the share stock to a codirector, repudiated his unlawful acts when discovered, compelled partial restitution, removed him from the offices of treasurer and general manager, undertook criminal proceedings against him, and the stockholders had appointed a committee to preserve the assets and prevent further waste. Sedgwick v. Seward Dev. Co., 144 A. D. 455 (1911).

A receivership would be destructive of the corporation if the receiver has no authority to carry on the business and if the only limit upon his tenure of office is vague and indefinite. Brewster v. Brewster Co., 145 A. D. 812 (1911), modfd. 204 N. Y. 687.

A receiver cannot be given possession of the corporate property without security. Brewster v. Brewster Co., 145 A. D. 812 (1911), modfd. 204 N. Y. 687.

When Receiver Should Not be Appointed.

Where by reason of the removal of three directors by order of the court there remain only two who are at least de facto directors and one of them as vice-president de facto is given power in the by-laws to exercise the duties of president, they may conduct the ordinary business of the corporation and take charge of and preserve its assets, and in such case a receiver should not be appointed on the ground that there are no officers entitled to hold corporate assets. Ehret v. Ringler Co., 144 A. D. 480 (1911); appeal dismissed because of changed conditions, 204 N. Y. 638 (1912).

Common Law Receiver Pendente Lite.

A receiver, who has not been appointed under the above section but by virtue of the general equity jurisdiction of the court has been appointed receiver of the corporate property and not of the corporation itself, cannot invoke the provisions of section 240 for the purpose of examination of a third person concerning the corporate property as a judgment debtor. Matter of Howell v. German Theatre, Inc., 64 Misc. 110 (1909).

A so-called common law receiver pendente lite of corporate assets to prevent the unlawful disposition and waste thereof, appointed by a court, in the exercise of its equitable jurisdiction, is not a receiver appointed under the provisions of section 3 of this section. Matter of Howell v. German Theatre, Inc., 64 Misc. 110 (1909).

Appointment, Without Authority, of Ancillary Receiver.

Where the court, without authority, appointed ancillary receivers of a corporation, at the instance of a contract creditor who had not obtained judgment and return of execution unsatisfied, such receiver may not be paid out of the assets of the corporation without its consent, but the latter may waive the objection that the creditor had not exhausted his remedy at law and may give him the same status as though he had obtained judgment and had execution returned unsatisfied. Moe v. McNally, 138 A. D. 480 (1910), and numerous cases cited.

Authority of De Facto Directors and Officers.

A receiver of a corporation should not be appointed under this section on the ground that there are no officers of the corporation entitled to hold its assets merely because three of five directors have been ousted by order of the court, if the two remaining directors are prima facie qualified to act in that they are apparently duly elected, especially where one of them, the vice-president, is given by the by-laws all the powers of the president who was ousted. Ehret v. Ringler Co., 144 A. D. 480 (1911), appeal dismissed 204 N. Y. 638. De facto directors and officers of a corporation have authority to conduct its ordinary business and preserve its property. Id. See also matter of Ringler & Co., 204 N. Y. 30 (1912), revsg. 145 A. D. 361.

Receiver of Assets in this State of Foreign Corporation.

This section does not interfere with the equitable power of the court to appoint a receiver to preserve the property of a foreign corporation in this State as distinguished from a receiver of the corporation itself. Woerishoffer v. No. River Const. Co., 6 Civ. Pro. 113 (1884); Buckley v. Harrison, 10 Misc. 683 (1895); Walter v. McAllister Co., 21 Misc. 747 (1897); Popper v. Supreme Council, 61 A. D. 405 (1901); Hallenborg v. Greene, 66 A. D. 590 (1901); Reusens v. Mfg. & Selling Co., 99 A. D. 214 (1904); Horton v. McNally Co., 155 A. D. 322, 333 (1913); and see Prince v. Schlesinger, 116 A. D. 500 (1906); also cases under Gen. Corp. Law, § 104 supra.

§ 307. Judicial suspension or removal of officer of corporation. A trustee, director, or other officer of a corporation shall not be suspended or removed from office, by a court or judge, otherwise than by the final judgment of a competent court, in an action brought by the attorney-general, as prescribed in section ninety of this chapter.

Formerly Code Civ. Pro. § 1811.

The Supreme Court has no jurisdiction to entertain a suit in equity brought by a stockholder in his own behalf and that of all other stockholders to determine the respective rights to the office of director as between rival claimants. Moir v. Provident Savings Life Assr. Soc., 127 A. D. 591 (1908).

The directors of a business corporation have no power to pass a by-law under which they may assume to exercise the power of removing a fellow director; the power must be derived from the statute, the articles of incorporation or by-laws adopted by the stockholders. Raub v. Gerken, 127 A. D. 42 (1908).

§ 308. Application of the last three sections. The last three sections apply to an action or special proceeding, against a cor-

poration created by or under the laws of the state, or a trustee, director, or other officer thereof; or against a corporation created by or under the laws of another state, government, or country, or a trustee, director, or other officer thereof, where the corporation does business within the state, or has, within the state, a business agency or a fiscal agency, or an agency for the transfer of its stock.

Formerly Code Civ. Pro. § 1812, in part. For remainder of section see Code Civ. Pro. § 1812.

§ 309. Misnomer not available in action against stockholder. Where an action, authorized by a law of the state, is brought against one or more persons, as stockholders of a corporation, an objection to any of the proceedings can not be taken, by a person properly made a defendant in the action on the ground that the plaintiff has joined with him, as a defendant in the action, a person, whose name appears on the stock-books of the corporation, as a stockholder thereof, by the name so appearing; but who is misnamed, or dead, or is not liable for any cause. In such a case, the court may, at any time before final judgment, upon motion of either party, amend the pleadings and other papers, without prejudice to the previous proceedings, by substituting the true name of the person intended, or by striking out the name of the person who is dead, or not liable, and, in a proper case, inserting the name of his representative or successor.

Formerly Code Civ. Pro. § 1813, in part. For remainder of section see Code Civ. Pro. § 1813.

§ 310. Appraisal of property of insolvent corporation. Whenever by reason of the provisions of any law of this state it shall become necessary to appraise in whole or in part the property of any corporation in the hands of a receiver or otherwise, the persons whose duty it shall be to make such appraisal shall value the real estate at its full and true value, taking into consideration actual sales of neighboring real estate similarly situated during the year immediately preceding the date of such appraisal, if any; and they shall value all such property, stocks, bonds or securities as are customarily bought or sold in open markets in the city of New York or elsewhere, for the day on which such appraisal or report may be required, by ascertaining the range of the market and the average of prices as thus found, running through a reasonable period of time.

Formerly L. 1891, ch. 34, § 1.

Consolidators' Note.

This section of L. 1891, ch. 34, embraces the subject of appraisals of property generally. Only such portion of the section as applies to corporations has been inserted in this article. Other parts of the section have been taken care of in other consolidated laws.

Miscellaneous Cases.

As to amendments generally, see Code, § 721 et seq.

See Decedent's Estate Law § 120 (L. 1909, ch. 18), which contains the same provisions.

An appraiser may properly determine the value of stocks from reports of public sales of such securities made at the New York Stock Exchange, and where no sales are made, he must ascertain the value from the best information which he can obtain. The rule as to the adoption of stock exchange values is to be applied, although it appears that the property to be appraised consists of very large blocks of stock which if thrown on the market at one time might have a tendency to produce a break in it and possibly result in the offer of a mere nominal price therefor. Matter of Gould, 19 A. D. 352 (1897), modified on another point, 156 N. Y. 423 (1898).

Three months is a reasonable period of time to consider the "range of the market and the average of prices" in order to determine the value of stocks. There can be no fixed and inflexible rule applicable to all cases. There must be a reasonable application of the law to the particular case in question, although considerable variation would occur in different cases in regard to the period of time considered. Matter of Crary, 31 Misc. 72 (1900).

There may be introduced, as evidence of fair market value, the opinion of witnesses qualified to answer, price quotations of the stock contained in market reports and authentic publications and prices established by sales made in the regular course of business, even though not made on the exchanges. Matter of Proctor, 41 Misc. 79 (1903).

§ 311. Application by attorney-general for removal of receiver and to facilitate closing affairs of receivership. The attorney-general may, at any time he deems that the interests of the stockholders, creditors, policy-holders, depositors or other beneficiaries interested in the proper and speedy distribution of the assets of any insolvent corporation will be subserved thereby, make a motion in the supreme court at a special term thereof, in any judicial district:

1. For an order removing the receiver of any insolvent corporation and appointing a receiver thereof in his stead, or,

2. To compel him to account, or,

3. For such other and additional order or orders as to him may seem proper to facilitate the closing up of the affairs of such receivership, and

Any appeal from any order made upon any motion under this section shall be to the appellate division of the department in which such motion is made.

Formerly L. 1883, ch. 378, § 7.

§ 312. Service of papers upon attorney-general. A copy of all motions and all motion papers, and a copy of any other application to the court, together with a copy of the order or judgment to be proposed thereon to the court, in every action or proceeding for the dissolution of a corporation or a distribution of its assets, shall, in all cases, be served on the attorney-general, in the same manner as provided by law for the service of papers on attorneys who have appeared in actions, whether the applications but for this section would be ex parte or upon notice, and no order or judgment granted shall vary in any material respect from the relief specified in such copy, order or judgment, unless the attorney-general shall appear on the return day and shall have been heard in relation thereto; and any order or judgment granted in any action or proceeding aforesaid, without such service of such papers upon the attorney-general, shall be void, and no receiver of any such corporation shall pay to any person any money directed to be paid by any order or judgment made in any such action or proceeding, until the expiration of eight days after a certified copy of such order or judgment shall have been served as aforesaid upon the attorney-general.

Formerly L. 1883, ch. 378, § 8.

Consolidators' Note.

The provisions of this section apply not only to actions brought by the Attorney General but to proceedings for the voluntary dissolution of a corporation. Hence its insertion in this general article.

"That section 8 of chapter 378 of the Laws of 1883, entitled 'An act in relation to receivers of corporations,' requiring that a copy of all motions and all motion papers, and a copy of any other application to the court, together with a copy of the order or judgment to be proposed thereon, in every action for the dissolution of a corporation, shall, in all cases, be served on the Attorney General, applies to proceedings for the voluntary dissolution of corporations, and the court has no jurisdiction to entertain such proceedings unless a service of such notice is made or waived." People v. Seneca Lake Grape and Wine Co., 52 Hun, 175.

"Held, that the action brought to sequestrate the property of the company, in which Henry was appointed receiver, was an action for 'a distribution of its assets,' within the meaning of section 8 of chapter 378 of 1883, requiring copies of all notices and all motion papers in every such action to be served upon the Attorney General." Whitney v. N. Y. & Atlantic R. R. Co., 32 Hun, 165.

Other citations under this section are Dohn v. Buffalo Amusement Co., 66 A. D. 446; Nealis v. American Tube and Iron Co., 76 Hun, 220; Matter of Stonebridge, 57 Hun, 441; People v. American Steam Boiler Ins., Co., 3 A. D. 504.

The provisions of this section requiring service upon the Attorney General do not apply to proceedings supplementary to execution. Opinion of Atty. Genl., Feb. 19, 1913.

The statute is a wholesome one designed to insure the conservation and distribution of the assets of the defunct corporation among its creditors, and it must be stringently enforced. Dohn v. Buffalo Amusement Co., 66 A. D. 446 (1901).

In voluntary dissolution the purpose of the statute is to require notice to be given to the Attorney-General of the time and place when the petition will be presented to the court, that he may be present and be heard upon the initiatory application as well as all the other proceedings to be had in the matter, and unless service of such notice is waived, the court has no jurisdiction to entertain the proceeding. Peo. v. Seneca Lake Grape & Wine Co., 52 Hun 174 (1899).

Foreign Corporations.

The section applies only to actions against domestic corporations and not to an action to sequester property of a foreign corporation within this State. MacNabb v. Porter Air-Lighter Co., 44 A. D. 102 (1899).

The section does not apply to the appointment of an auxiliary receiver of a foreign corporation to preserve the corporate property in this State. Woerishoffer v. N. R. Construction Co., 6 Civ. Pro. 113 (1884).

Sequestration.

The notice must be given in an action by a judgment creditor for sequestration and the appointment of a receiver. Whitney v. N. Y. & Atlantic R. R. Co., 32 Hun 164 (1884); but the section does not apply to a motion for the appointment of a receiver in foreclosure. Id.

If an order in sequestration proceedings is made appointing a receiver without notice, and thereafter another order on notice is made confirming the appointment nunc pro tunc as of the date of the original order, the appointment is valid from the date of the second order irrespective of the question whether the defect was jurisdictional and not to be remedied by an order nunc pro tunc. Morrison v. Menhaden, 37 Hun 522 (1885).

A judgment of sequestration and the appointment of a receiver in an action by a judgment creditor in which no notice was given the Attorney-General is not a bar to the maintenance of a like action commenced prior thereto by another judgment creditor. Cole v. Millerton Iron Co., 133 N. Y. 164 (1892).

Voluntary Dissolution.

The requirement applies to proceedings for voluntary dissolution. Peo. v. Seneca Lake Grape & Wine Co., 52 Hun 174 (1889).

The notice must be given in voluntary dissolution proceedings whether the corporation is solvent or insolvent. Matter of Broadway Ins. Co., 23 A. D. 282 (1897); the court has power to vacate the order actually made where it was granted without jurisdiction. Id.

After an injunction has been granted in voluntary dissolution proceedings enjoining creditors from taking proceedings in actions commenced by them, an order made in such an action modifying the injunction without notice, so as to permit the prosecution of the action to judgment, is void. Dohn v. Buffalo Amusement Co., 66 A. D. 446 (1901).

Where no notice of the application for the order to show cause in voluntary dissolution proceedings was served, nor the order itself, the Attorney-General has no authority to admit due and timely service of the notice of motion and to sign waivers ante-dating the order, and all proceedings are absolutely void, the court being without jurisdiction to entertain the proceedings. Matter of Strong, 128 A. D. 208 (1908); Knickerbocker T. Co. v. Tarrytown, etc.,

Ry. Co., 117 N. Y. Supp. 871 (1909); but see Greason v. Goodwillie, etc., Co., 38 Hun 138 (1885), holding that where an order to show cause is used as a notice of motion no notice need be given of the application for said order to show cause.

The Attorney-General may accept short notice of the proceedings. Matter of Peekamose Fishing Club, 151 N. Y. 511 (1897).

Notice must be given of an application for the appointment of a referee to hear and determine a disputed claim. Matter of Eustace v. N. Y. Building L. Co., 98 A. D. 97 (1904); but stockholders who intervene in a voluntary dissolution proceeding, and proceed before a referee appointed to determine the validity of the claim, waive their right to object because of the failure to give the notice. Peo. v. Am. Steam Boiler Co., 3 A. D. 504 (1896).

Order for Examination.

Under R. S., pt. 2, ch. 5, tit. 1, art. 8, §§ 12–17, which was superseded by L. 1898, ch. 534 (now Gen. Corp. Law, § 240), notice of the application for the warrant commanding the sheriff to produce the person for examination, was essential. Matter of Vanamee, 119 N. Y. 646 (1890), affg. on this point 29 St. Rep. 198, 8 N. Y. Supp. 219; Matter of Stonebridge, 57 Hun 441 (1890). Although the present statute says that the order may be granted without notice, it is believed that this applies only to dispensing with notice to the person to be examined and not with the notice to the Attorney-General because of the above provision making notice necessary upon applications which would otherwise be ex parte.

Receivers.

A receiver authorized by the court to prosecute an action need not give notice thereof and no papers need be served on the Attorney-General. Nealis v. Am. Tube & Iron Co., 76 Hun 220 (1894), affd., 150 N. Y. 42–45 (1896).

As to curing receiver's omissions in voluntary dissolution proceedings see Gen. Corp. Law, § 194.

An application to appoint a trustee to distribute corporate property, where there is no trustee to execute a trust, is not within the section, for the execution of the trust is dependent on the deed of trust and not upon the court. Matter of Gay, 4 N. Y. Supp. 602 (1899).

See too Gillig v. Treadwell Co., 151 N. Y. 552, 556 (1897).

§ 313. Designation of depositories of funds in order appointing receiver. All orders appointing receivers of corporations shall designate therein one or more places of deposit, wherein all funds of the corporation not needed for immediate disbursement shall be deposited and no deposits or investments of such trust funds shall be made elsewhere, except upon the order of the court upon due notice given to the attorney-general.

Formerly L. 1883, ch. 378, § 3.

§ 314. Application to the court in certain actions and proceedings. All applications to the court shall be made in the judicial district where the principal office of the corporation against which proceedings are taken is located, excepting such

applications as are made in actions brought by the attorney-general on behalf of the people of the state, and all such applications shall be made in the judicial district in which the action is triable.

Formerly L. 1883, ch. 378, § 9, as am'd by L. 1896, ch. 282, § 2.

See Gen. Corp. Law, § 3, subd. 10, and §§ 108 and 183; also Bus. Corp. Law, § 2, subd. 5.

§ 315. County wherein action may be brought by attorney-general on behalf of the people. An action or proceeding brought by the attorney-general on behalf of the people of the state against any corporation for the purpose of procuring its dissolution, the appointment of a receiver, or the sequestration of its property, may be brought in any county of the state, to be designated by the attorney-general.

Formerly L. 1883, ch. 378, § 1, in part, as am'd by L. 1896, ch. 282, § 1.

Consolidators' Note.

This provision of the statute of 1883 has been incorporated in this article because it relates to actions or proceedings brought by the Attorney General "against any corporation for the purpose of procuring its dissolution, the appointment of a receiver or the sequestration of its property."

§ 316. Preferences in actions or proceedings by or against receivers. All actions or other legal proceedings and appeals therefrom or therein brought by or against a receiver of any of the insolvent corporations referred to in this chapter, shall have a preference upon the calendars of all courts next in order to actions or proceedings brought by the people of the state of New York.

Formerly L. 1883, ch. 378, § 10.

See Code, § 791 et seq.

The receiver of a bank suing on promissory notes should be granted a preference although there has been a delay in bringing the action on for trial, when he has been ordered to make a final accounting and a trial of the action is necessary to enable him to do so. Schlesinger v. Gilhooly, 111 A. D. 158 (1906).

ARTICLE 13

Alteration and Repeal of Charter of Corporation

SECTION 320. Alteration and repeal of charter.
321. Conflicting corporate laws.

§ 320. Alteration and repeal of charter. The charter of every corporation shall be subject to alteration, suspension and repeal, in the discretion of the legislature.

The State Constitution, as adopted in 1846 and as revised in 1894, provides as follows: "Corporations may be formed under general laws; but shall not

be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general and special acts passed pursuant to this section may be altered from time to time or repealed." Const., art. 8, § 1. The necessity for a special act is entirely within the judgment of the Legislature not open to judicial review. Met. Bank v. Van Dyck, 27 N. Y. 400 (1863). Prior thereto the Revised Statutes, passed in 1827, provided that "The charter of every corporation, that shall hereafter be granted by the legislature, shall be subject to alteration, suspension and repeal, in the discretion of the legislature." This statutory provision was repealed in 1890, but it was thought that the Legislature, by such repeal, might have relinquished its control of charters of corporations organized during the interval subsequent to the Revised Statutes and prior to 1846. The statutory provision was, therefore, re-enacted by Laws of 1895, ch. 672, as section 40 of the General Corporation Law (now section 320). When this provision was first inserted in the Revised Statutes it was the result of public alarm and protest caused by the decision of the United States Supreme Court in the celebrated case of Trustees of Dartmouth College v. Woodward, 4 Wheaton 518 (1819). This statute became the permanent policy of the State when the Constitution of 1846 was adopted. In the Dartmouth College case the court held that if a State wished to alter charters it must reserve the right to do so.

While the legislature under its reserved power has the right to repeal the charter of a corporation, it has not the right to confiscate any valid franchise or property right previously acquired. Matter of Long Sault Dev. Co. v. Kennedy, 212 N. Y. 1 (1914), affg. 158 A. D. 398.

In exercising the reserved power to amend corporate charters the legislature may not deprive a corporation of property already acquired or the proceeds of lawful contracts previously made, or destroy or substantially impair the purposes of the grant or rights which are vested in the corporation thereunder; but it may make any alteration or amendment of the charter which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right. N. Y. Central & H. R. R. R. Co. v. Williams, 199 N. Y. 108, 117 (1910), discussing the New York and Federal decisions.

Even if a statute is unconstitutional so far as individuals are concerned because not the proper exercise of police power it may nevertheless be valid as to corporations under the reserved power to amend, the provisions as to persons being readily separable from the rest of the statute. N. Y. C. & H. R. R. R. Co. v. Williams, 199 N. Y. 108, 117 (1910).

The general rule is that forfeitures are not favored in law, and a party insisting on a forfeiture must bring himself within the strict letter and terms of any instrument or statute conferring the right. Bklyn. Central R. R. Co. v. Bklyn City R. R. Co., 32 Barb. 358 (1861); Vil. of Fredonia v. Fredonia Natural Gas Lt. Co., 84 Misc. 150 (1914).

Under the reserved power in section 1 of article 8 of the State Constitution the legislature may amend or annul the charter of a domestic corporation. In amending the charter a corporation may be given greater or less powers than other corporations of the same class without violating the "equal protection of the law" provision of the Federal Constitution. Bush v. N. Y. Life Ins. Co., 135 A. D. 447 (1909); 119 N. Y. Supp. 796.

The reservation becomes a part of the charter of every corporation, whether organized under a general act or by special statute, thus preventing it from becoming irrevocable. Lord v. Equitable Life Assur. Soc., 194 N. Y. 212 (1909); Pratt v. City of N. Y., 183 N. Y. 151 (1905).

There is a distinction between the repeal of a charter and the repeal of a special franchise. The right to amend a charter does not include the right to take away money invested in reliance thereon or property acquired thereunder. The charter of a corporation is the law which gives it existence; that is its general franchise, which may be repealed by the Legislature. A special franchise is the right granted to use public property for a public use, but with profit, such as the right to build and operate a railroad in the streets of a city. Such a franchise, when acted upon, becomes property and is not repealable unless such power is reserved in the grant, although it may be condemned upon making compensation. Lord v. Equitable Life Assur. Soc., 194 N. Y. 225, 227 (1909), distg. Peo. v. O'Brien, 111 N. Y. 1 (1888). Special franchises survive the death of the corporation. Id. Under its reserved power the Legislature cannot interfere with or annul contracts made with third persons nor can it take away property acquired by the corporation without providing compensation as such property is protected by the State and United States Constitutions. Mayor, etc. v. N. Y. & Twenty-third St. Ry. Co., 113 N. Y. 317 (1889); Peo. v. O'Brien, supra; City of N. Y. v. Bryan, 130 A. D. 658 (1909).

The amendment by ch. 354, L. 1901 of § 47 of the Stock Corp. Law (now § 61) in such manner as to allow a corporation whose certificate of incorporation did not provide for preferred stock, to issue such stock upon obtaining the consent of two-thirds of the stockholders, instead of the consent of all the stockholders, as provided prior to the amendment, was a valid exercise of the power reserved to the Legislature to alter or repeal the charter granted to any corporation. Hinckley v. Schwarzschild & Sulzberger Co., 107 A. D. 470 (1905); appeal dismissed, 193 N. Y. 599.

The provisions of a statute, permitting the merger of two corporations against the dissent of a portion of the stockholders of such corporations, are not unconstitutional as depriving the dissenting stockholders of their property without due process of law. Colby v. Equitable Trust Co., 192 N. Y. 535 (1908), affg. 124 A. D. 262, revsg. 55 Misc. 355.

The fact that a corporation is in the hands of a Federal receiver does not prevent the forfeiture of its charter by the State. Peo. v. New York City Ry. Co., 57 Misc. 114 (1907).

A corporation is subject to the general statutes of the State of its organization applicable to its conduct and management as well as to the reservation of the right on the part of the Legislature to alter its charter by subsequent laws, and a stockholder must be regarded as consenting not only to the existing law, but to such alterations as may be made. Martin v. Remington-Martin Co., 95 A. D. 18 (1904); Union Hotel Co. v. Hersee, 79 N. Y. 454 (1880).

While the Legislature under its reserved power cannot deprive a corporation of its property or annul its contracts with third persons, it may take away its franchise to be a corporation, or prescribe the conditions and terms upon which it may live and exercise such franchise. Mayor, etc. v. Twenty-third St. Ry. Co., 113 N. Y. 311 (1889).

An amendment to the Stock Corporation Law prohibiting a domestic stock corporation, whose certificate of incorporation did not provide for the issuance of preferred stock, to issue such stock upon obtaining the consent of two-thirds of the stockholders, instead of the consents of all the stockholders, as provided in the statute prior to its amendment, was a valid exercise of the power reserved to the Legislature to alter or repeal the charter granted to any corporation. Hinckley v. Schwarzschild & Sulzberger Co., 107 A. D. 470 (1905), appeal dismissed, 193 N. Y. 599.

The courts have held that legislative control over affairs of corporations is not absolute and unlimited, and in several instances the courts have restrained its exercise. Thus in Rochester & C. Turnpike Road Co. v. Joel, 41 A. D. 43, the Legislature prohibited the plaintiff from exacting tolls on bicycles passing over its road. The court held the law unconstitutional, on the ground that it took from the corporation a vested property right, but the authority to take was derived from the franchise granted by the State. It could take no tolls without it, and concededly the State has control of such subject under the reserved power. Hinckley v. Schwarzschild & Sulzberger Co., 107 A. D. 470 (1905); appeal dismissed, 193 N. Y. 599.

§ 321. Conflicting corporate laws. If in any corporate law there is or shall be any provision in conflict with any provisions of this chapter or of the stock corporation law, the provisions so conflicting shall prevail, and the provision of this chapter or of the stock corporation law with which it conflicts shall not apply in such a case. If in any such law there is or shall be a provision relating to a matter embraced in this chapter or in the stock corporation law, but not in conflict with it, such provision in such other law shall be deemed to be in addition to the provision in this chapter or in the stock corporation law relating to the same subject-matter, and both provisions shall, in such case, be applicable.

Provisions in the Business Corporations Law, the Transportation Corporations Law and the Railroad Law similar to and not in conflict with the provisions of the General Corporation Law and the Stock Corporation Law, must be deemed to be in addition to the provisions of said last-mentioned laws. Oelbermann v. N. Y. & Northern Ry. Co., 77 Hun 332 (1894).

Repeal by Implication.

A repeal of statutes by implication is not favored in the law; and when both the latter and former statute can stand together, both will stand unless the former is expressly repealed, or the legislative intent to repeal it is very manifest. Peo. ex rel. Kingsland v. Palmer, 52 N. Y. 83, 88 (1873); Davis v. Supreme Lodge Knights of Honor, 165 N. Y. 159 (1900).

Where it is intended to alter or repeal an existing statutory enactment, the act itself should contain provisions to that effect, or it should be plainly manifest that such was the design, by the latter act being repugnant to and inconsistent with the former. Mark et al. v. The State, 97 N. Y. 578 (1885); Coxe v. The State, 144 N. Y. 396 (1895).

A repeal by implication because of inconsistency or repugnancy should never be declared where a reasonable construction will harmonize statutes alleged to be conflicting. Peo. ex rel. Woods v. Crissey, 91 N. Y. 632 (1883).

The invariable rule of construction in respect to the repealing of statutes by implication, is, that the earliest act remains in force, unless the two are manifestly inconsistent with and repugnant to each other, or, unless in the latest act, some express notice is taken of the former, plainly indicating an intention to abrogate it. Bowen v. Lease, 5 Hill 226 (1843).

Although a statute is not expressly repealed by a subsequent enactment upon the same subject, yet, if it appears by the latter statute that it was

intended to cover the subject-matter of the former, the prior statute will be deemed by implication to have been repealed. Peo. v. Vosburgh, 76 Hun 562 (1894).

When a statute amends a former statute "so as to read as follows," it operates as a repeal by implication of inconsistent provisions in the former law, and of provisions omitted in the amended law. In re Estate of Prime, 136 N. Y. 347 (1893); Guaranty Trust Co. v. Troy Steel Co., 33 Misc. 484 (1900). Where the amended act re-enacts provisions in the former law, either ipsissimis verbis or by the use of equivalent though different words, the law will be regarded as having been continuous. Id.

Where a revising statute covers the whole subject-matter of antecedent statutes, and such plainly appears to have been the legislative intent, it is to be deemed to contain the entire law upon the subject, and it virtually repeals the former enactments. Matter of N. Y. Institution for Deaf, etc., 121 N. Y. 234 (1890).

Where a general act conflicts with a special act, the latter is not to be deemed repealed by implication. In re Brown v. Duane, 39 St. Rep. 694; City of Buffalo v. Neal, 86 Hun 76, 84 (1895), and cases there cited.

Special privileges granted by the Legislature to a gas company in consideration of its furnishing gas at a specified price were not taken away by repeal of the law granting them and the enactment of provisions similar to the foregoing section. Peo. ex rel. Standard Gas Light Co. v. Gilroy, 22 N. Y. Supp. 271 (1893).

When by any reasonable or fair construction the two enactments can be permitted to stand together and each accomplish a different and independent result a special or local statute will not be affected by a subsequent general law relating to the same general subject. Matter of Dobson, 146 N. Y. 357, 360 (1895).

ARTICLE 14

Laws Repealed; Construction; When to Take Effect

SECTION 330. Laws repealed.
331. Construction.
332. When to take effect.

§ 330. Laws repealed. Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

The words "such repeal shall not revive a law repealed by any law hereby repealed, but shall include all laws amendatory of the laws hereby repealed," which were contained in the former section 34 of the General Corporation Law, were omitted by the Consolidated Laws from the foregoing section and were re-enacted into the General Construction Law.

Reviver of Repealed Statutes.

A legislative intent to revive a law which has, by legislative action, already been wholly annihilated, is not alone sufficient to accomplish such revival; there must be some legislative expression using language equivalent to a re-enactment. Bank of Metropolis v. Faber, 150 N. Y. 200 (1896); Same v. Same, 1 A. D. 341 (1896), disapproving Ottman v. Hoffman, 7 Misc. 714, infra.

The effect of the repeal of a repealing law is to restore the law repealed by the latter, in the absence of a contrary intention expressly declared or necessarily to be implied. Ottman v. Hoffman, 7 Misc. 714 (1894), and cases there cited.

§ 331. Construction. Nothing in this chapter shall be construed to impair any right or liability which any existing corporation, its officers, directors, stockholders or creditors may have or be subject to or which any such corporation, other than a railroad corporation, had or was subject to on the date when this chapter takes effect, by virtue of any special act of the legislature creating such corporation or creating or defining any such right or liability, unless such special act is repealed by this chapter or the other general laws hereinbefore mentioned.

Matter contained in former section 36 of the General Corporation Law and omitted from this section has been enacted as part of the General Construction Law.

Consolidators' Note.

This section was originally taken from Laws 1890, chapter 563, section 25, and made section 36 by Laws 1892, chapter 687. The wording of the section has been changed, but only so as to conform the language to its re-enactment. The date "April 30, 1891," which was the date fixed for the taking effect of the old law, has been omitted, and in its place have been substituted the words "the date when this chapter takes effect," as the exact date is now uncertain and there is no real necessity for fixing a date definitely. The time of the taking effect of the act will be certain enough and serve all useful purposes. This change brings the provisions of the act down to date without change of substance.

Effect of Repeal.

The Legislature has power, without violating the Federal Constitution, to repeal or amend laws pertaining to business or stock corporations formed under the law of 1875, and to prescribe the liability of stockholders in such corporations to its creditors for debts contracted after the act was repealed or amended. Berwind-White Coal Mining Co. v. Ewart, 11 Misc. 490 (1895), affd., 90 Hun 60 (1895).

A later statute covering the same subject-matter as a prior statute and embracing new provisions operates to repeal the prior act, although the two acts are not in express terms repugnant. McDermott v. Nassau Electric R. R. Co., 85 Hun 422. See also People v. Wilmerding, 136 N. Y. 363.

The rule that a special act is not affected by a subsequent general act does not apply if the intent is manifest that the general act should apply to all cases, whether existing under general or special acts. McKenna v. Edmundstone, 91 N. Y. 233.

The saving and construction clauses of the Stock Corp. Law of 1890, ch. 564, §§ 71, 72, which preserved under that law an existing liability of stockholders under the Manufacturing Act of 1848, ch. 40, were not embodied in the amended Stock Corp. Law of 1892, ch. 688, but the equivalent thereof was accomplished by inserting these clauses in the Stat. Const. Law of 1892, ch. 677, §§ 31, 32, and continued the liability of stockholders theretofore existing into the new and amended law. Close v. Potter, 155 N. Y. 145, revsg. 11 Misc. 729.

In construing a statute, the court should ascertain and carry out the intention of the legislature, and where the use of certain words in the statute is inconsistent with that intention, or makes the whole clause meaningless or absurd, the court may reject such words when, by their rejection, the clear intention of the legislature may be carried out. Gusthal v. Strong, 23 A. D. 315.

§ 332. When to take effect. This chapter shall take effect immediately.

Section 35 of the former General Corporation Law, containing a saving clause, was omitted from this law in the enactment of the Consolidated Laws because similar provisions were embodied in the General Construction Law, § 93.

SCHEDULE OF LAWS REPEALED.

Revised Statutes.. Part 1, chapter 18, ... All
Revised Statutes.. Part 3, chapter 8, title 4, sections.... 2, 42
Revised Statutes.. Part 3, chapter 8, title 4, article 3, §§ 66–91

Laws of	Chapter	Section
1811....	67....	All
1811....	235....	All
1813....	78....	All
1815....	47....	All
1815....	202....	All
1816....	58....	All
1817....	223....	All
1818....	67....	All
1819....	102....	All
1821....	14....	All
1822....	213....	All
1825....	325....	4–11, 13, 14, 17, 18
1828....	21....	1, ¶¶ 76, 77, 457 (2d Meet)
1836....	284....	All
1836....	316....	All
1838....	160....	All
1838....	161....	All
1838....	262....	All
1839....	218....	All
1842....	165....	All
1846....	155....	All
1846....	215....	17, 18
1847....	100....	3, 4
1847....	210....	All
1847....	222....	All
1847....	270....	All
1847....	272....	All
1847....	287....	All
1847....	398....	All
1847....	404....	All
1847....	405....	All
1848....	37....	All
1848....	40....	All
1848....	45....	All
1848....	140....	All
1848....	259....	All
1848....	265....	All
1848....	360....	All
1849....	250....	All
1849....	362....	All
1850....	71....	All
1850....	140....	All
1851....	14....	All
1851....	19....	All
1851....	98....	All
1851....	107....	All
1851....	487....	All
1851....	497....	All
1852....	228....	All
1852....	372....	All
1853....	53....	All
1853....	117....	All
1853....	124....	All
1853....	135....	All
1853....	245....	All
1853....	333....	All
1853....	471....	1, 2, 4
1853....	481....	All
1853....	502....	All
1853....	626....	All

General Corporation Law.

Laws of	Chapter	Section
1854....	3....	All
1854....	87....	All
1854....	140....	All
1854....	201....	All
1854....	232....	All
1854....	269....	All
1854....	282....	All
1854....	312....	All
1855....	301....	All
1855....	302....	All
1855....	390....	All
1855....	478....	All
1855....	485....	All
1855....	495....	All
1855....	546....	All
1855....	559....	All
1856....	65....	All
1857....	29....	All
1857....	83....	All
1857....	185....	All
1857....	202....	All
1857....	262....	All
1857....	444....	All
1857....	546....	All
1857....	558....	All
1857....	643....	All
1857....	776....	All
1858....	10....	All
1858....	125....	All
1858....	348....	All
1859....	209....	All
1859....	311....	All
1859....	455....	All
1860....	116....	All
1860....	269....	All
1860....	523....	All
1861....	149....	All
1861....	170....	All
1861....	215....	All
1861....	238....	All
1862....	205....	All
1862....	248....	All
1862....	425....	All
1862....	438....	All
1862....	449....	All
1862....	472....	All
1863....	63....	All
1863....	134....	All
1863....	346....	All
1864....	85....	All
1864....	337....	All
1864....	517....	All
1864....	582....	All
1865....	234....	All
1865....	246....	All
1865....	307....	All
1865....	691....	All
1865....	780....	All
1866....	73....	All
1866....	259....	All
1866....	322....	All
1866....	371....	All
1866....	697....	All
1866....	780....	All
1866....	799....	All
1866....	838....	All
1867....	12....	All
1867....	49....	All
1867....	248....	All
1867....	254....	All
1867....	419....	All
1867....	480....	All
1867....	509....	All
1867....	775....	All
1867....	906....	All
1867....	937....	All
1867....	960....	All
1867....	971....	All
1867....	974....	All
1868....	253....	All
1868....	290....	All
1868....	573....	All
1868....	781....	All
1869....	234....	All
1869....	237....	All
1869....	605....	All
1869....	706....	All
1869....	844....	All
1869....	917....	All
1870....	124....	All
1870....	135....	All
1870....	322....	All
1870....	443....	All
1870....	568....	All
1870....	773....	All
1871....	95....	All
1871....	481....	All
1871....	535....	All
1871....	560....	All
1871....	652....	All
1871....	657....	All
1871....	669....	All
1871....	697....	All
1871....	883....	All

General Corporation Law.

Laws of	Chapter	Section
1872....	81....	All
1872....	128....	All
1872....	146....	All
1872....	248....	All
1872....	283....	All
1872....	350....	All
1872....	374....	All
1872....	426....	All
1872....	609....	All
1872....	611....	All
1872....	779....	All
1872....	780....	All
1872....	820....	All except 20
1872....	829....	All
1872....	843....	All
1873....	151....	All
1873....	352....	All
1873....	432....	All
1873....	440....	All
1873....	469....	All
1873....	616....	All
1873....	634....	All
1873....	710....	All
1873....	737....	All
1873....	814....	All
1874....	76....	All
1874....	143....	All
1874....	149....	All
1874....	240....	All
1874....	288....	All
1874....	430....	All
1875....	4....	All
1875....	58....	All
1875....	88....	All
1875....	108....	All
1875....	113....	All
1875....	119....	All
1875....	120....	All
1875....	159....	All
1875....	193....	All
1875....	256....	All
1875....	319....	All
1875....	343....	2, 4, 8
1875....	365....	All
1875....	445....	All
1875....	510....	All
1875....	586....	All
1875....	598....	All
1875....	606....	All
1875....	611....	All
1876....	77....	All
1876....	135....	All
1876....	190....	All
1876....	198....	All
1876....	280....	All
1876....	358....	All
1876....	373....	All
1876....	415....	All
1876....	435....	All
1876....	446....	All
1877....	103....	All
1877....	158....	All
1877....	164....	All
1877....	171....	All
1877....	224....	All
1877....	266....	All
1877....	311....	All
1877....	374....	All
1878....	35....	All
1878....	61....	All
1878....	85....	All
1878....	121....	All
1878....	163....	All
1878....	203....	All
1878....	210....	All
1878....	261....	All
1878....	264....	All
1878....	316....	All
1878....	334....	All
1878....	394....	All
1879....	214....	All
1879....	253....	All
1879....	290....	All
1879....	293....	All
1879....	350....	All
1879....	377....	All
1879....	393....	All
1879....	395....	All
1879....	413....	All
1879....	415....	All
1879....	441....	All
1879....	503....	All
1879....	505....	All
1879....	512....	All
1879....	541....	All
1880....	5....	All
1880....	85....	All
1880....	90....	All
1880....	94....	All
1880....	113....	All
1880....	133....	All
1880....	155....	All
1880....	182....	All
1880....	187....	All

General Corporation Law.

Laws of	Chapter	Section
1880....	223....	All
1880....	225....	All
1880....	241....	All
1880....	245....	1, § 3, subd. 5, part relating to receivers appointed as prescribed in Code Civil Procedure, § 2429.
1880....	254....	All
1880....	263....	All
1880....	267....	All
1880....	349....	All
1880....	415....	All
1880....	417....	All
1880....	474....	All
1880....	484....	All
1880....	510....	All
1880....	537....	All
1880....	575....	All
1880....	582....	All
1880....	583....	All
1880....	585....	All
1881....	22....	All
1881....	58....	All
1881....	77....	All
1881....	116....	All
1881....	117....	All
1881....	148....	All
1881....	213....	All
1881....	232....	All
1881....	295....	All
1881....	296....	All
1881....	311....	All
1881....	313....	All
1881....	321....	All
1881....	337....	All
1881....	338....	All
1881....	351....	All
1881....	399....	All
1881....	422....	All
1881....	464....	All
1881....	468....	All
1881....	470....	All
1881....	472....	All
1881....	485....	All
1881....	551....	All
1881....	589....	All
1881....	639....	All
1881....	649....	All
1881....	650....	All
1881....	674....	All
1881....	685....	All
1882....	73....	All
1882....	82....	All
1882....	140....	All
1882....	273....	All
1882....	289....	All
1882....	290....	All
1882....	306....	All
1882....	309....	All
1882....	331....	All
1882....	349....	All
1882....	353....	All
1882....	393....	All
1882....	405....	All
1883....	46....	All
1883....	71....	All
1883....	102....	All
1883....	216....	All
1883....	232....	All
1883....	237....	All
1883....	238....	All
1883....	240....	All
1883....	287....	All
1883....	323....	All
1883....	361....	All
1883....	378....	All
1883....	381....	All
1883....	382....	All
1883....	384....	All
1883....	386....	All
1883....	387....	All
1883....	388....	All
1883....	409....	All
1883....	482....	All
1883....	483....	All
1883....	497....	All
1884....	140....	All
1884....	193....	All
1884....	208....	All
1884....	223....	All
1884....	252....	All
1884....	267....	All
1884....	285....	1
1884....	367....	All
1884....	386....	All
1884....	397....	All
1884....	421....	All
1884....	422....	All
1884....	439....	All
1884....	441....	All
1884....	444....	All

General Corporation Law.

Laws of	Chapter	Section
1885....	40....	All
1885....	84....	All
1885....	127....	All
1885....	141....	All
1885....	153....	All
1885....	171....	All
1885....	305....	All
1885....	369....	All
1885....	422..	All
1885....	423....	All
1885....	489....	All
1885....	498....	All
1885....	535....	All
1885....	540....	All
1885....	549....	All
1886....	65....	All
1886....	182....	All
1886....	271....	All
1886....	275....	All
1886....	310....	All
1886....	321....	All
1886....	322....	All
1886....	403....	All
1886....	415....	All
1886....	509....	All
1886....	551....	All
1886....	579....	All
1886....	586....	All
1886....	592....	All
1886....	601....	All
1886....	605....	All
1886....	634....	All
1886....	642....	All
1887....	450....	All
1887....	486....	All
1887....	536....	All
1887....	570....	All
1887....	601....	All
1887....	616....	All
1887....	622....	All
1887....	724....	All
1888....	189....	All
1888....	306....	All
1888....	313....	All
1888....	359....	All
1888....	394....	All
1888....	447....	All
1888....	462....	All
1888....	513....	All
1888....	514....	All
1888....	549....	All
1888....	560....	All
1889....	57....	All
1889....	76....	All
1889....	78....	All
1889....	236....	All
1889....	242....	All
1889....	281....	All
1889....	332....	All
1889....	369....	All
1889....	426....	All
1889....	519....	All
1889....	524....	All
1889....	531....	All
1889....	532....	All
1889....	564....	All
1890....	23....	All
1890....	98....	All
1890....	119....	All
1890....	193....	All
1890....	292....	All
1890....	416....	All
1890....	421....	All
1890....	483....	All
1890....	497....	All
1890....	505....	All
1890....	508....	All
1890....	543....	All
1890....	563....	All
1891....	34....	Part relating to appraisal of property of insolvent corporations
1891....	38....	All
1891....	57....	All
1891....	287....	All
1892....	2....	All
1892....	19....	4
1892....	687....	All except 37
1894....	136....	All
1894....	400....	All
1895....	672....	All
1896....	139....	All
1896....	282....	All
1896....	932....	1, part adding § 57 to L. 1892, Ch. 688
1898....	522....	Part relating to receivers of corporations
1898....	534....	All
1899....	201....	All
1900....	177....	All
1900....	704....	All

General Corporation Law.

Laws of	Chapter	Section
1900....	733....	All
1900....	760....	All
1901....	96....	All
1901....	214....	All
1901....	355....	All
1901....	506....	All
1901....	538....	All
1902....	9....	All
1902....	60....	All
1902....	285....	All
1903....	178....	All
1904....	236....	All
1904....	296....	All
1904....	490....	All
1904....	705....	All
1904....	737....	All
1904....	754....	All
1905....	256....	All
1906....	228....	All
1906....	239....	All
1906....	349....	All
1906....	531....	All
1907....	115....	All
1908....	457....	All
Code Civil Procedure.....		432, subd. 2, from words "by a writing" to "an authentication;" 716, pt. relating to corporations; 1781–1808; 1809, pt. relating to corporations; 1810, 1811; 1812, 1813, pt. relating to corporations; 2411; 2412–2414, pt. relating to corporations; 2415, 2416, 2419–2431b; 3390–3396, pt. relating to corporations

STATUTORY PAYMENTS FOR INCORPORATION.

TAX UPON ORGANIZATION.

Provisions of the Tax Law in Relation to the Payment of Organization Tax by Corporations.

[The following is section 180 of chapter 62, Laws of 1909, entitled "An act in relation to taxation, constituting chapter sixty of the consolidated laws." The provisions of the Consolidated Tax Law regulating the annual taxation of corporations are published elsewhere in this volume. See the index under "Taxation."]

§ 180. Organization tax. Every stock corporation incorporated under any law of this state shall pay to the state treasurer a tax of one-twentieth of one per centum upon the amount of capital stock which the corporation is authorized to have, and a like tax upon any subsequent increase. Provided, that in no case shall such tax be less than five dollars. Such tax shall be due and payable upon the incorporation of such corporation or upon the increase of its capital stock. Except in the case of a railroad corporation neither the secretary of state nor county clerk shall file any certificate of incorporation or article of association, or give any certificate to any such corporation or association until he is furnished a receipt for such tax from the state treasurer, and no stock corporation shall have or exercise any corporate franchise or powers, or carry on business in this state until such tax shall have been paid. And in case of a decrease of capital stock, upon which the tax required by law has been paid, and a subsequent increase thereof, a tax shall be paid only upon so much of such increase as exceeds the amount of capital stock upon which a tax has been before paid. In case of the consolidation of existing corporations into a corporation, such new corporation shall be required to pay the tax hereinbefore provided for only upon the amount of its capital stock in excess of the aggregate amount of capital stock of said corporations. This section shall not apply to state and national banks or to building, mutual loan, accumulating fund and co-operative associations. A railroad corporation need not pay such tax at the time of filing its certificate of incorporation, but shall pay the same before the public service commission shall grant a certificate, as required by the railroad

Amd., May 25, 1923, ch. 794.

law, authorizing the construction of the road as proposed in its articles of association, and such certificate shall not be granted by the public service commission until it is furnished with a receipt for such tax from the state treasurer. If the board of railroad commissioners or public service commission shall have heretofore granted, or the public service commission shall hereafter grant, such certificate and upon an appeal from the determination of such board of railroad commissioners or public service commission, such certificate has been or may hereafter be denied the comptroller shall refund the amount of tax so paid to the railroad corporation or corporations by which such tax was paid, upon proof of payment being presented and appropriation being made therefor.

Formerly L. 1896, ch. 908, § 180, as am'd by L. 1897, ch. 369; L. 1901, ch. 448; L. 1906, ch. 524; L. 1910, ch. 472; L. 1911, ch. 91.

The minimum amount of tax payable was increased from one dollar to five dollars by the amendment of 1910. The last sentence in the section was added in 1911.

The provisions imposing a tax for the privilege of organizing stock corporations in this State were first enacted by L. 1886, ch. 143, which was subsequently amended by L. 1887, ch. 284, and L. 1892, ch. 668. These provisions were superseded and re-enacted as section 180 of the Revised Tax Law of 1896, ch. 908, and are now embodied in the Consolidated Tax Law of 1909, ch. 62, retaining the same section number.

Laws of 1901, ch. 448, reduced the tax payable under this section from one-eighth to one-twentieth of one per cent.

The provision relieving railroad corporations from the payment of the organization tax at the time of filing the certificate of incorporation, and making such tax payable when the public service commissioner (formerly railroad commissioners) shall grant the certificate required by statute was added by L. 1897, ch. 369.

The sentence providing that when the capital stock is decreased and subsequently increased the tax is payable only on the amount, if any, in excess of the original capitalization, was inserted by L. 1906, ch. 524.

The tax imposed by section 180 not being a property tax, the power of the State to subject corporations to any conditions the legislature may see fit to impose cannot be questioned. People v. N. Y., C. & St. L. R. R. Co., 129 N. Y. 476 (1892).

Companies which have paid the tax have no greater rights than those which were incorporated before 1886, and, therefore, paid no tax. Peo. ex rel. N. Y. Phonograph Co. v. Rice, 57 Hun 486 (1890), aff'd., 128 N. Y. 591.

Under the provisions of this section as originally enacted by L. 1886, ch. 143, it was held that the organization tax was payable upon the consolidation of two or more corporations. Peo. ex rel. N. Y. Phonograph Co. v. Rice, 57 Hun 486 (1890), aff'd., 128 N. Y. 591. In 1892, chapter 668 amended the section by providing that upon the consolidation of two corporations the tax should be payable only upon the amount of capital stock in excess of the aggregate capitalization of the constituent corporations. Under this amendment it was held that two or more corporations might consolidate without pay-

ing an organization tax except upon the capital stock in excess of the total of the constituent corporations. Peo. ex rel. Eickemeyer-Field Co. v. Rice, 66 Hun 130 (1892), affd., 138 N. Y. 614. Thereafter the provisions of the law were amended to conform to the last-mentioned decision.

When a new corporation is formed by the consolidation of a domestic corporation with a foreign corporation, it is not required to pay an organization tax, even upon the capital stock in excess of the aggregate amount of capitalization of the constituent companies. Peo. v. Chicago & St. L. R. R. Co., 129 N. Y. 474, revsg. 61 Hun 66; Peo. v. Fitchburg R. R. Co., 129 N. Y. 654.

An organization tax must be paid upon a reorganization of a corporation under L. 1874, ch. 430, as amended by L. 1876, ch. 446 (now repealed and superseded by sec. 9, Stock Corp. Law, post). Peo. ex rel. Schurz v. Cook, 110 N. Y. 443, affd., 148 U. S. 397 (1893); Peo. ex rel. Mertens v. Cook, id., affd., 154 U. S. 512. In such case the right to be a corporation, possessed by the old corporation, was not mortgaged nor sold, and so did not pass to the purchasers. They obtain such right upon filing the certificate, and then only by direct grant of the State. Id.

A corporation reorganized under the provisions of section 4 of the Business Corporations Law is not required to pay an organization tax. In re Consolidated Kansas City S. & R. Co., 13 A. D. 50 (1897), overruling Matter of N. Y. & Suburban Investment Co., 16 N. Y. Supp. 213, 40 St. Rep. 139.

The authority conferred by L. 1874, ch. 430 (now Stock Corp. Law, § 9) upon purchasers at a foreclosure sale of a railroad, to organize a corporation to receive and hold the purchased property, creates no contract with the State. Peo. ex rel. Schurz v. Cook, 148 U. S. 397 (1893), affg. 110 N. Y. 443.

ORGANIZATION TAX TABLE, SHOWING ONE-TWENTIETH OF ONE PER CENT ON VARIOUS AMOUNTS.

Capital stock.	Tax.	Capital stock.	Tax.
$500	*$5 00	$7,500	*$8 00
600	*5 00	8,000	*5 00
700	*5 00	8,500	*5 00
800	*5 00	9,000	*5 00
900	*5 00	9,500	*5 00
1,000	*5 00	10,000	5 00
1,500	*5 00	12,000	6 00
1,800	*5 00	15,000	7 50
2,000	*5 00	18,000	9 00
2,500	*5 00	20,000	10 00
2,800	*5 00	25,000	12 50
3,000	*5 00	30,000	15 00
3,500	*5 00	35,000	17 50
4,000	*5 00	40,000	20 00
4,500	*5 00	45,000	22 50
5,000	*5 00	50,000	25 00
5,500	*5 00	55,000	27 50
6,000	*5 00	60,000	30 00
6,500	*5 00	65,000	32 50
7,000	*5 00	70,000	35 00

* The statute, Tax Law, § 180, as amended, provides that five dollars shall be the minimum amount of organization tax to be paid by any corporation.

Statutory Payments for Incorporation.

Capital stock.	Tax.	Capital stock.	Tax.
$75,000	$37 50	$675,000	$337 00
80,000	40 00	700,000	350 00
85,000	42 50	725,000	362 50
90,000	45 00	750,000	375 00
95,000	47 50	775,000	387 50
100,000	50 00	800,000	400 00
125,000	62 50	825,000	412 50
150,000	75 00	850,000	425 00
175,000	87 50	875,000	437 50
200,000	100 00	900,000	450 00
225,000	112 50	925,000	462 50
250,000	125 00	950,000	475 00
275,000	137 50	975,000	487 50
300,000	150 00	1,000,000	500 00
325,000	165 50	1,250,000	625 00
350,000	175 00	1,500,000	750 00
375,000	187 50	1,750,000	875 00
400,000	200 00	2,000,000	1,000 00
425,000	212 50	3,000,000	1,500 00
450,000	225 00	5,000,000	2,500 00
475,000	237 50	10,000,000	5,000 00
500,000	250 00	15,000,000	7,500 00
525,000	262 50	20,000,000	10,000 00
550,000	275 00	25,000,000	12,500 00
575,000	287 50	50,000,000	25,000 00
600,000	300 00	75,000,000	37,500 00
625,000	312 50	100,000,000	50,000 00
650,000	325 00	500,000,000	250,000 00

LICENSE TAX UPON FOREIGN CORPORATIONS.

PROVISIONS OF THE TAX LAW RELATIVE TO THE PAYMENT OF A LICENSE TAX BY FOREIGN CORPORATIONS.

[The following is section 181 of chapter 62, L. 1909, entitled "An act in relation to taxation, constituting chapter sixty of the consolidated laws." The provisions of the Consolidated Tax Law regulating the annual taxation of foreign corporations are published elsewhere in this volume. See the index under "Taxation."]

§ 181. License tax on foreign corporations. Every foreign corporation, except banking corporations, fire, marine, casualty and life insurance companies, co-operative fraternal insurance companies, and building and loan associations, authorized to do business under the general corporation law, shall pay to the state treasurer, for the use of the state, a license fee of one-eighth of one per centum for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized

capacity in this state, to be computed upon the basis of the capital stock employed by it within this state, during the first year of carrying on its business in this state; and if any year thereafter any such corporation shall employ an increased amount of its capital stock within this state, the same license fee shall be due and payable upon any such increase. The measure of the amount of capital stock employed in this state shall be such a portion of the issued capital stock as the gross assets employed in any business within this state bear to the gross assets wherever employed in business. For purposes of taxation, the capital of a corporation invested in the stock of another corporation shall be deemed to be assets located where the physical property represented by such stock is located. The amount of capital upon which such taxes shall be paid shall be fixed by the comptroller, who shall have the same authority to examine the books and records in this state of such foreign corporations, and the employees thereof, and the same power to issue his warrant for the collection of such taxes, as he now has with regard to domestic corporations. No action shall be maintained or recovery had in any of the courts in this state by such foreign corporation after thirteen months from the time of beginning such business within the state, without obtaining a receipt from the comptroller for the payment of the license fee upon the capital stock employed by it within this state during the first year of carrying on its business in this state.

V. p. 59.

Formerly § 181, ch. 908, L. 1896, as am'd by L. 1901, ch. 558; L. 1906, ch. 474; L. 1910, ch. 340.

The tax imposed by this section, especially since the amendment of 1906, chapter 474, is to be computed on the par value of the capital stock employed in this State. Peo. ex rel. Elliott-Fisher Co. v. Sohmer, 148 A. D. 514 (1911), affd. 206 N. Y. 634, distg. Peo. ex rel. Consolidated Ginseng Co. v. Kelsey, 105 A. D. 175, affd. 182 N. Y. 526 (1905).

In an action brought by a foreign corporation it is no defense that the license tax of such corporation was not paid by the plaintiff, as provided by this section, in the absence of an allegation and proof that the amount of such tax was ever fixed by the State Comptroller. No tax being computed, none was due, and the prohibition of the section does not in such case apply. Seibert v. Dunn, 70 Misc. 422 (1911).

By the amendment of 1901, chapter 558, the exemption theretofore existing in favor of foreign corporations "wholly engaged in carrying on manufactures in this State" was stricken out, and a provision inserted placing such corporations upon the same basis as other foreign corporations respecting this license tax. Another new provision is the requirement that when any corporation subject to this license tax shall employ an increased amount of capital stock within the State, the same license tax shall be payable upon such increase.

It will be noticed that the rate of this tax, payable by foreign corporations for the privilege of doing business within the State, remains at one-eighth of one per cent., while the rate for the organization of domestic corporations has been reduced to one-twentieth of one per cent., thereby intentionally discriminating in favor of the organization of corporations under the laws of the State of New York.

The General Tax Law was such a revision of and substitution for former statutes, general and special, on the subject of taxation as to supersede and repeal them by implication. Peo. ex rel. Roosevelt Hospital v. Raymond, 194 N. Y. 189 (1909), revsg. 126 A. D. 720.

This section is not intended to prohibit compliance after the time prescribed by law. Dunbarton F. S. Co. v. G. & J. Ry. Co., 87 A. D. 21.

The provisions of the foregoing section cannot avail as a defense to an action brought by the assignee of a foreign corporation which has not paid the license fee in question, where the defendant merely introduces inconclusive testimony tending to show that such corporation was doing business within the State at the time of the trial of the action, and offers no proof in this regard as to any anterior period. Stern v. Childs, 26 Misc. 419.

The fact that a foreign corporation, more than thirteen months after beginning to do business in the State, and at the time of commencing an action, had ceased to do business, does not exempt it from paying the license tax. Kinney v. Reid Ice-Cream Co., 57 A. D. 206.

Contracts are not rendered void because of non-compliance with this section, and they may be enforced in the Federal courts. Groton Bridge & Mfg. Co. v. Am. Bridge Co., 151 Fed. 871 (1907).

In determining the value of patents, the Comptroller is justified in concluding that they were worth the par value of the stock issued in payment therefor. Peo. ex rel. Automatic Vending Co. v. Kelsey, 90 A. D. 545 (1904).

Where a foreign corporation has been doing business within the State for more than thirteen months without having paid a license tax, it has no right to maintain an action in the courts of this State, and its assignee can have no standing in court, for the reason that the assignee cannot be in a better position than the assignor. Kinney v. Reid Ice-Cream Co., 57 A. D. 206. This case was decided prior to the enactment of chapter 538, Laws of 1901, amending section 15 of the General Corporation Law. Said amendment expressly provides that the assignee shall have no right of action in the State courts where the assignor, being a foreign corporation, has failed to comply with the provisions of said section.

An answer, interposed in an action upon a bond given to obtain an attachment, alleging that the plaintiff's assignor, a foreign corporation, although not doing business in the State at the time of the commencement of the action, had previously done so for over thirteen months, and had not paid the license tax, is not demurrable. Kinney v. Reid Ice-Cream Co., 57 A. D. 206.

The provisions of this section constitute a condition subsequent to the right of a foreign corporation to carry on business within the State, and a complaint in an action by such a corporation is not defective for failure to allege compliance with this section, non-compliance being a matter of defense to be availed of by answer; but the requirement of section 15 of the General Corporation Law is a condition precedent to the right of a foreign corporation to make enforceable contracts in the State and compliance must be pleaded. Wood & Selick v. Ball, 190 N. Y. 217 (1907), affg. 114 A. D. 743, and explaining Welsbach Co. v. Norwich G. & E. Co., 96 A. D. 52, affd., 180 N. Y. 533, and Parmele Co. v. Haas, 171 N. Y. 579. To same effect as 190 N. Y. 217, supra, see Halsey v. Jewett Dramatic Co., 190 N. Y. 231 (1907), revsg. 114 A. D. 420.

[Eight folios.]

LAWS OF NEW YORK.— By Authority.

Chap. 69.

AN ACT to amend the executive law, in relation to the fees to be collected by the secretary of state.

Became a law March 16, 1917, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section twenty-six of chapter twenty-three of the laws of nineteen hundred and nine, entitled "An act in relation to executive officers, constituting chapter eighteen of the consolidated laws," is hereby amended to read as follows:

§ 26. **Fees.** The secretary of state shall collect the following fees:

1. For entering a caveat, twelve and a half cents.

2. For searching the records in his office for any one year and for every other year in which such search is made, six cents.

3. For a copy of any paper or record not required to be certified or otherwise authenticated by him, ten cents per folio.

4. For a certified or exemplified copy of any law, record or paper, fifteen cents per folio, and one dollar additional for the certificate under seal of his office, attached thereto; and this fee shall be the same whether such copy be made by the secretary of state or previously prepared and presented to him for certification, any other law to the contrary notwithstanding.

5. For a certificate under the great seal of the state, two dollars.

6. For recording a certificate, notice or other paper required to be recorded, except as otherwise provided by this section, twenty-five cents per folio.

7. For a certificate as to the official character of a commissioner of deeds residing in another state or a foreign country, twenty-five cents, and for every other certificate under the seal of his office, two dollars.

The acceptance of a license tax by the State Treasurer, although seemingly implying an authority to do business in this State, would not constitute a waiver by the State of the requirements of sections 15 and 16 of the General Corporation Law, which make the issuance of a certificate of authority before the making of a contract, a prerequisite to the maintaining of an action thereunder. Emmerich Co. v. Sloane, 108 A. D. 330 (1905).

For provisions requiring foreign corporations to obtain a certificate of authority to do business within the State and the proof to be filed with the Secretary of State in order to procure said certificate see sections 15 and 16 of the General Corporation Law, and see also notes under said sections for numerous important decisions affecting such corporations.

Fees to Secretary of State and County Clerks.

SECRETARY OF STATE.— The fees to be collected by the Secretary of State, in connection with corporation certificates, are regulated by the Executive Law (L. 1909, chap. 23), section 26, which provides as follows:

Fees. The secretary of state shall collect the following fees:

* * * * * * * * * *

2. For searching the records in his office for any one year and for every other year in which such search is made, six cents.

3. For a copy of any paper or record not required to be certified or otherwise authenticated by him, ten cents per folio.

4. For a certified or exemplified copy of any law, record or paper, fifteen cents per folio, and one dollar additional for the certificate under seal of his office, attached thereto.

5. For a certificate under the great seal of the state, one dollar.

6. For recording a certificate, notice or other paper required to be recorded, except as otherwise provided by this section, fifteen cents per folio.

7. For a certificate of the official character of a commissioner of deeds residing in another state or a foreign country, twenty-five cents, and for every other certificate under the seal of his office, one dollar.

* * * * * * * * * *

12. For filing and recording the original certificate of incorporation of a railroad corporation for the construction of a railroad in a foreign country, fifty dollars; for filing the original certificates of every other railroad corporation, twenty-five dollars; for filing the original certificate of any other stock corporation, ten dollars; for filing any original certificate of incorporation drawn under article three of the membership corporations law, ten dollars,

13. For filing the certificate of a foreign corporation desiring to do business in the state, ten dollars.

* * * * * * * * * * *

17. For a certificate under subdivision three of section nine of the general corporation law, ten dollars.

Formerly Executive Law of 1892, ch. 683, § 26, as am'd by L. 1897, ch. 411; L. 1904, ch. 26; L. 1907, ch. 213.

The amendment of 1897 added the last clause prescribing a filing fee of ten dollars for certificates of incorporation drawn under article two of the Membership Corporations Law (L. 1895, ch. 559).

Subdivision 17, supra, was added by L. 1907, ch. 213.

The Executive Law, above mentioned, repealed the fee bill of 1882, ch. 156, which previously regulated the filing, recording and miscellaneous fees payable at the office of the Secretary of State.

Fees for Certifying Prepared Copies.

The Code of Civil Procedure, § 3305-a, added by L. 1914, ch. 345, provides as follows:

§ 3305-a. Fees for certifying prepared copies. Whenever there shall be presented to any public officer for certification or exemplification, a previously prepared legibly typewritten or printed copy of any document, paper, book or record in such officer's custody, the fees in such case, for certification or exemplification, shall be at the rate of three cents for each folio; but the minimum total charge for certification or exemplification in all cases shall be twenty-five cents.

At the office of the secretary of state there is also payable an additional fee of $1.00 for the certificate under seal annexed to the copy.

Fees to Comptroller.

Fees. The comptroller shall collect the following fees:

1. For copies of all papers and records not required to be certified or otherwise authenticated by him, ten cents per folio.

2. For certified or exemplified copies of all records and papers, fifteen cents per folio.

3. For every certificate under the seal of his office, one dollar.

* * * * * * * * * * *

Executive Law (L. 1909, ch. 23), § 42.

COUNTY CLERKS.— The provisions as to fees payable to county clerks are contained in the Code of Civil Procedure, section 3304, as amended by Laws of 1896, ch. 572, as follows:

§ **3304. Fees of county clerks generally.** A county clerk is entitled, for the services specified in this section, except where another fee is allowed therefor by special statutory provision, to the following fees to be paid in advance:

* * * * *. * * * * *

For a copy of an order, record, or other paper, entered or filed in his office, eight cents for each folio.

* * * * * * * * * *

For recording any instrument, which must or may legally be recorded by him, ten cents for each folio.

* * * * * * * * * *

For filing any paper required by law to be filed in his office, other than as expressly provided for in this section, six cents.

TRANSMISSION OF PAPERS AND PAYMENTS.

When corporation papers are transmitted by mail for filing at Albany, the most satisfactory and expeditious results will be secured by observing the following suggestions, to wit:

The tax of one-twentieth of one per cent. upon the capital stock for the privilege of organization of a stock corporation (or for an increase of capital stock) should be remitted directly to State Treasurer, Albany, N. Y. All such tax payments exceeding in amount the sum of twenty-five dollars, are required, by a rule of the Treasurer's office, to be made in cash or by certified check, New York draft, post-office money order or express order.

All corporation certificates should be mailed in a separate enclosure, addressed to Secretary of State, Albany, N. Y., together with the filing and recording fees of that office.

Do not forward to the State Treasurer any certificate intended for filing in the office of the Secretary of State, as is often done. On the other hand, do not send the organization tax to the Secretary of State. The statute provides for its payment to the State Treasurer, who will upon receiving such payment, if the same be in acceptable form, as above required, immediately notify the Secretary of State to that effect, and the latter official will simultaneously, if the certificate is unobjectionable, give notice to apply the tax and issue receipts therefor.

Consolidated Table of Fees.

The payments to be made to State and county officials for filing, recording or certifying papers authorized by the laws relating to stock corporations published in this book are as follows:

INCORPORATION.

(1) State Treasurer	Organization tax of one-twentieth of one per cent. on the amount of capital stock authorized in the certificate.

Statutory Payments for Incorporation.

(2) Sec'y of State	Filing charter of all stock corporations, except railroads, $10; *railroads, $25; recording either of the above, 15 cents per folio; certified copy, 15 cents per folio, plus $1 for the official certificate under seal; exemplified copy, for use in other States, the same fees as for a certified copy, plus $1 for the additional certificate under the Great Seal of the State.
(3) County Clerk	Filing fee, 6 cents; recording, 10 cents per folio; certified copy, 8 cents per folio.

PAYMENT OF ONE-HALF CAPITAL STOCK.

Sec'y of State	Fee for recording certificate, 15 cents per folio.
County Clerk	Filing fee, 6 cents; recording, 10 cents per folio.

MERGER OF CORPORATIONS.

Sec'y of State	A recording fee only, 15 cents per folio.
County Clerk	Filing fee, 6 cents; recording, 10 cents per folio.

CONSOLIDATION OF CORPORATIONS.

State Treasurer	An organization tax is payable only on the capitalization in excess of the aggregate capital stock of the constituent corporations.
Sec'y of State	Fees same as on filing and recording charter, except that the fee is $10 for a certificate, under G. C. L., § 9, subd. 3.
County Clerk	

OTHER SUPPLEMENTAL CERTIFICATES.

State Treasurer	No payments are to be made except upon an increase of capital stock of a tax of one-twentieth of one per cent. on the amount of such increase.
Sec'y of State	Upon the filing of any supplemental certificate no filing fee is payable; recording, certifying and other fees are the same as set forth in (2), supra.
County Clerk	The same fees as set forth in (3), supra.
Comptroller	A certificate reducing capital stock requires Comptroller's certificate of approval in duplicate. Fee, each certificate, $1.

CERTIFICATE OF INSPECTORS OF ELECTION.

County Clerk	Filing fee, 6 cents.

CONSENT TO MORTGAGE.

County Clerk	For filing stockholders' consent, 6 cents; recording fee, 10 cents per folio.

* There is a special fee of $50 for filing and recording the certificate of incorporation of a railroad to be constructed in a foreign country. See Executive Law, § 26, subd. 12, page 293.

Statutory Payments for Incorporation.

ANNUAL REPORTS.

Sec'y of State	No fee.
Comptroller	Tax report; no fee.
Local Assessors	Tax report; no fee.

DISSOLUTION BY INCORPORATORS, UNDER G. C. L. § 220.

Sec'y of State	No fee prescribed.
County Clerk	Filing fee, 6 cents; recording, 10 cents per folio.

DISSOLUTION WITHOUT JUDICIAL PROCEEDINGS, UNDER G. C. L. § 221.

Sec'y of State	No filing fee prescribed. Duplicate certificates of filing, $1 each.
County Clerk	For filing the certificate issued by the Secretary of State, 6 cents; recording fee, 10 cents per folio.

CHANGE OF CORPORATE NAME.

Sec'y of State	Certificate that proposed name does not conflict, $1; recording affidavit of publication of order, 15 cents per folio. No fee is payable for filing copy of petition and notice of motion, required to protect proposed name pending the proceedings, nor for filing copy of court order, certified by county clerk.
County Clerk	Filing order, 6 cents; recording, 10 cents per folio; certifying copy, 8 cents per folio; filing affidavit of publication of order, 6 cents, and recording same, 10 cents per folio.

FOREIGN CORPORATIONS, PAPERS REQUIRED BY G. C. L. §§ 15, 16.

Sec'y of State	Filing fee, $10; certificate of authority, $1. No fee is prescribed for filing revocation and designation of new agent, or notice of removal of agent's office.

TRANSFERS OF STOCK, TAX UPON.

After the original issue of stock all transfers are subject to a stamp tax of 2 cents on each $100 of face value or fraction thereof.

MORTGAGE TAX.

A recording tax of 50 cents for each $100 of the mortgage debt is payable to the county clerk or other recording officer.

See also, as to War Revenue Tax, page 314, post.

TAX ON TRANSFERS OF STOCK.

PROVISIONS OF THE TAX LAW RELATIVE TO THE PAYMENT OF A STAMP TAX ON TRANSFERS OF SHARES OF STOCK.

[The following sections of the Tax Law were added by L. 1905, chap. 241, and are now embodied in the Consolidated Tax Law of 1909, chap. 62.]

SECTION 270. Amount of tax.
271. Stamps how prepared and sold.
271a. Sale of stamps.

SECTION 272. Penalty for failure to pay tax.
273. Canceling stamps; penalty for failure.
274. Contracts for dies; expenses how paid.
275. Illegal use of stamps; penalty.
275a. Registration; penalty for failure.
276. Power of State Comptroller.
277. Civil penalties; how recovered.
278. Effect of failure to pay tax.
279. Application of taxes.
280. Refund of tax erroneously paid.

§ 270. Amount of tax. There is hereby imposed and shall immediately accrue and be collected a tax, as herein provided, on all sales, or agreements to sell, or memoranda of sales of stock, and upon any and all deliveries or transfers of shares or certificates of stock, in any domestic or foreign association, company or corporation, made after the first day of June, nineteen hundred and five, whether made upon or shown by the books of the association, company or corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of sale or transfer, whether intermediate or final, and whether investing the holder with the beneficial interest in or legal title to said stock, or merely with the possession or use thereof for any purpose, or to secure the future payment of money, or the future transfer of any stock, on each hundred dollars of face value or fraction thereof, two cents, except in cases where the shares or certificates of stock are issued without designated monetary value, in which cases the tax shall be at the rate of two cents for each and every share of such stock. It shall be the duty of the person or persons making or effectuating the sale or transfer to procure, affix and cancel the stamps and pay the tax provided by this article. It is not intended by this act to impose a tax upon an agreement evidencing the deposit of stock certificates as collateral security for money loaned thereon, which stock certificates are not actually sold, nor upon such stock certificates so deposited, nor upon mere loans of stock or the return thereof. The payment of such tax shall be denoted by an adhesive stamp or stamps affixed as follows: In the case of a sale or transfer, where the evidence of the transaction is shown only by the books of the association, company or corporation, the stamp shall be placed upon such books, and it shall be the duty of the person making or effectuating such sale or transfer to procure and furnish to the association, company or corporation the requisite stamps, and of

Changes in rates and basis for New York stock transfer tax. On and after June 1, 1933, transfers of stock that are subject to the New York stock transfer tax are taxable at 3 cents per share whether the stock be of par value or of non-par value, unless the shares involved in the transfer were sold for $20.00 or more per share, in which case the tax it at the rate of 4¢ per share whether of par value or of non-par value. (Chapter 643, approved by the Governor, May 1, 1933, effective June 1, 1933.)

where the sale is effected by delivery of the certificate [illegible] in blank, there shall be made and delivered by the seller to the buyer, a bill or memorandum of such sale to which the stamp provided for by this article shall be affixed and canceled. Every such bill or memorandum of sale or agreement to sell shall show the date of the transaction which it evidences, the name of the seller the stock to which it relates, and the number of shares thereof. All such bills or memoranda of sale shall bear a number upon the face thereof and no more than one such bill or memorandum of sale made by the seller on any given day shall bear the same number. The aforesaid identification number of the bill or memorandum of sale shall in all cases be entered and recorded in the book of account required to be kept by section two hundred and seventy-six of this chapter; and no further tax is hereby imposed upon the delivery of the certificate of stock, or upon the actual issue of a new certificate when the original certificate of stock is accompanied by the duly stamped memorandum of sale as herein provided.

Formerly § 315, added by L. 1905, ch. 241, as am'd by L. 1906, ch. 414; re-enacted by L. 1910, ch. 38, and am'd by L. 1911, ch. 352; L. 1912, ch. 292; L. 1913, ch. 779.

The 1906 amendment which imposed a tax of two cents on each share of stock irrespective of its par value is unconstitutional as an arbitrary discrimination in favor of one as against another of the same class. Peo. ex rel. Farrington v. Mensching, 187 N. Y. 8 (1907). Therefore the rule established by the original act imposing a tax of two cents to be payable "on each hundred dollars of face value or fraction thereof" is still effective. This defect was cured by the amendment of 1910.

The act does not violate the commerce clause of the Federal Constitution, because it taxes transfers of certificates of stock in foreign corporations made by non-residents in this State. Peo. ex rel. Hatch v. Reardon, 184 N. Y. 431 (1906), affg. 110 A. D. 821, aff'd., 204 U. S. 152.

This act does not impose a tax on the original issue of the shares of stock of a corporation. The words "sale" or "transfer" cannot be held to include the original issuance of certificates of stock. Peo. v. Duffy-McInnerney Co., 122 A. D. 336, aff'd., 193 N. Y. 636 (1908).

The tax imposed by this section is payable where shares covered by a mortgage to secure bonds are sold on foreclosure. Glynn v. Conklin, 127 A. D. 473 (1908).

The tax of two cents a share imposed on transfers of stock, made within the State of New York by the act of 1905, is not unconstitutional as making an arbitrary discrimination because only imposed on transfers of stock, or

Inc., 55 S. Ct. 591. James A. Greenwood, George W. Ferguson, and Richard J. Jackson, all of Cheyenne, for petitioners.

Directors and Officers

of

Commerce Clearing House, Inc.

At a meeting of the stockholders of Commerce Clearing House, Inc., on April 24, 1933, the men here named were elected directors of the company for the year: George L. Briscoe, William KixMiller, Norman J. MacGaffin, B. Stafford Martin, Kenneth K. [illegible]

penalties; now recovered.

278. Effect of failure to pay tax.

279. Application of taxes.

280. Refund of tax erroneously paid.

§ 270. Amount of tax. There is hereby imposed and shall immediately accrue and be collected a tax, as herein provided, on all sales, or agreements to sell, or memoranda of sales of stock, and upon any and all deliveries or transfers of shares or certificates of stock, in any domestic or foreign association, company or corporation, made after the first day of June, nineteen hundred and five, whether made upon or shown by the books of the association, company or corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of sale or transfer, whether intermediate or final, and whether investing the holder with the beneficial interest in or legal title to said stock, or merely with the possession or use thereof for any purpose, or to secure the future payment of money, or the future transfer of any stock, on each hundred dollars of face value or fraction thereof, two cents, except in cases where the shares or certificates of stock are issued without designated monetary value, in which cases the tax shall be at the rate of two cents for each and every share of such stock. It shall be the duty of the person or persons making or effectuating the sale or transfer to procure, affix and cancel the stamps and pay the tax provided by this article. It is not intended by this act to impose a tax upon an agreement evidencing the deposit of stock certificates as collateral security for money loaned thereon, which stock certificates are not actually sold, nor upon such stock certificates so deposited, nor upon mere loans of stock or the return thereof. The payment of such tax shall be denoted by an adhesive stamp or stamps affixed as follows: In the case of a sale or transfer, where the evidence of the transaction is shown only by the books of the association, company or corporation, the stamp shall be placed upon such books, and it shall be the duty of the person making or effectuating such sale or transfer to procure and furnish to the association, company or corporation the requisite stamps, and of

such association, company or corporation to affix and cancel the same. Where the transaction is effected by the delivery or transfer of a certificate, the stamp shall be placed upon the surrendered certificate and canceled; and in cases of an agreement to sell, or where the sale is effected by delivery of the certificate assigned in blank, there shall be made and delivered by the seller to the buyer, a bill or memorandum of such sale to which the stamp provided for by this article shall be affixed and canceled. Every such bill or memorandum of sale or agreement to sell shall show the date of the transaction which it evidences, the name of the seller the stock to which it relates, and the number of shares thereof. All such bills or memoranda of sale shall bear a number upon the face thereof and no more than one such bill or memorandum of sale made by the seller on any given day shall bear the same number. The aforesaid identification number of the bill or memorandum of sale shall in all cases be entered and recorded in the book of account required to be kept by section two hundred and seventy-six of this chapter; and no further tax is hereby imposed upon the delivery of the certificate of stock, or upon the actual issue of a new certificate when the original certificate of stock is accompanied by the duly stamped memorandum of sale as herein provided.

Formerly § 315, added by L. 1905, ch. 241, as am'd by L. 1906, ch. 414; re-enacted by L. 1910, ch. 38, and am'd by L. 1911, ch. 352; L. 1912, ch. 292; L. 1913, ch. 779.

The 1906 amendment which imposed a tax of two cents on each share of stock irrespective of its par value is unconstitutional as an arbitrary discrimination in favor of one as against another of the same class. Peo. ex rel. Farrington v. Mensching, 187 N. Y. 8 (1907). Therefore the rule established by the original act imposing a tax of two cents to be payable "on each hundred dollars of face value or fraction thereof" is still effective. This defect was cured by the amendment of 1910.

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The tax imposed by this section is payable where shares covered by a mortgage to secure bonds are sold on foreclosure. Glynn v. Conklin, 127 A. D. 473 (1908).

The tax of two cents a share imposed on transfers of stock, made within the State of New York by the act of 1905, is not unconstitutional as making an arbitrary discrimination because only imposed on transfers of stock, or

because based on par, and not market, value; nor does it deprive non-resident owners of stock transferring, in New York, shares of stock of non-resident corporations of their property without due process of law; nor is it as to such transfers of stock an interference with interstate commerce. New York ex rel. Hatch v. Reardon, 204 U. S. 152 (1907), aff'g. 184 N. Y. 431.

What Constitutes a Transfer.

Where a corporation as a consideration for the sale to it of the assets of another corporation, issues and delivers certificates of its stock to and in the name of the vendor corporation, the subsequent distribution of said stock by the latter corporation among its stockholders constitute taxable transfers. Opinion of Atty. Genl., Dec. 19, 1911, vol. 2, p. 697.

The term transfer as used in this act has reference to a transaction between living parties and not to cases of devolution of title by death. Opinion of Atty. Genl., Feb. 7, 1911, vol. 2, p. 107.

The transfer of a certificate of participation in a syndicate constitutes a transfer which is taxable. Opinion of Atty. Genl., Dec. 16, 1911, vol. 2, p. 692.

Transfers which operate to effect a change in the legal title to stock are taxable though the intermediate holder of the stock be acting merely as a trustee for the transferee. Opinion of Atty. Genl., Dec. 19, 1911, vol. 2, p. 695.

Taxable Transfers.

Where the stock of a corporation is held under a voting trust agreement, a transfer of certificates of beneficial interest issued by the trustee is taxable. Opinion of Atty. Genl., Jan. 27, 1911, vol. 2, p. 77.

Where stock is issued under an agreement whereby the subscriber is to return a portion thereof to the treasury of the corporation and the return is made accordingly, the latter transfer is taxable. Opinion of Atty. Genl., p. 554, 1911.

Transfers of stock to or from nominees are taxable under the law as amended by chapter 352, Laws of 1911. Opinion of Atty. Genl., July 5, 1911.

Under an agreement between a corporation and bankers whereby an increase of capital stock of such corporation was placed with such bankers pending the receipt of subscriptions of the stockholders who were entitled to preference in purchasing said stock, the transfer from the bankers to the stockholders is taxable. Opinion of Atty. Genl., April 14, 1911, vol. 2, p. 378.

A transfer of stock made subsequent to June 2, 1905, is taxable notwithstanding that an agreement to transfer the same was made prior to that date. Opinion of Atty. Genl., Mar. 9, 1911, vol. 2, p. 224.

Non-Taxable Transfers.

A change in the trustee of a naked trust having no beneficial interest in the stock transferred, is not a transfer taxable under the law. Opinion of Atty. Genl., March 9, 1911, vol. 2, 225.

A stock dividend issued by a corporation to its stockholders is an original issue of stock and therefore is not subject to the stamp tax. Opinion of Atty. Genl., August 18, 1910.

Merger of Corporations; Exchange of Stock not Taxable.

Upon the merger of two corporations and the surrender of stock by the stockholders to the merged corporation in exchange for stock of the latter no transfer tax is payable. Opinion of Atty. Genl., April 14, 1911, confirming opinion of Sept. 10, 1910.

Voting Trust.

In an action to recover from the State a sum paid for stock transfer stamps the facts were as follows: The plaintiff, a corporation, purchased the assets of other corporations, each of which was to be paid in stock of the plaintiff corporation. A voting trust agreement was made which provided that a trust company as voting trustee should vote all the stock to which the vendor corporations were entitled and a certificate for such shares was issued by the plaintiff to the trust company, which thus became the record owner of the stock for voting purposes. Thereafter the trust company issued to each stockholder a certificate that he, the stockholder, was the owner of a designated number of shares of stock of the plaintiff deposited with such trust company; held, that the certificates of the trust company were taxable under the statute. U. S. Radiator Co. v. State of New York, 208 N. Y. 144 (1913), affg. 151 A. D. 367.

Under the laws amended by chapter 362, Laws of 1911, transfers of stocks to voting trustees or nominees are taxable. Opinion of Atty. Genl., Aug. 16, 1911, Vol. 2, p. 616.

Stocks Held in Escrow.

Where a bank had possession of certificates of stock in escrow, which were received from the corporation for the purpose of delivery to the stockholders and such bank held no legal or beneficial interest therein, the issue is not complete until delivery to the stockholders, in which case there would be no tax; but if there was a valid original issue to the bank so that the bank held legal title for the stock and the original issue was thus complete then a change of title to individual stockholders would require the payment of a transfer tax. Opinion of Atty. Genl., Feb. 21, 1911, Vol. 2, p. 146.

§ 271. Stamps, how prepared and sold. Adhesive stamps for the purpose of paying the state tax provided for by this article shall be prepared by the state comptroller, in such form, and of such denominations and in such quantities as he may from time to time prescribe, and shall be sold by him to the person or persons desiring to purchase the same; he shall make provision for the sale of such stamps by such persons, in such place and at such times as in his judgment he may deem necessary.

He may from time to time and as often as he deems advisable provide for the issuance and exclusive use of stamps of a new design and forbid the use of stamps of any other design. In order to effect such a change and to discontinue the use of stamps of a former design he shall publish or cause to be published once in each week for each of three months immediately preceding the time for taking effect of such change, in one or more daily newspapers published in each of the first and second class cities of the state, a notice to the effect that after a certain day, which shall be at least three months after the first publication of said notice, none other than the new issue or design of stamps shall

be accepted or made use of in payment of the tax provided for by this article. After such date it shall be unlawful for any person to make use of any other than the new issue or design of stamps in payment of such tax. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

Any person lawfully in possession of unused stamps of an old or superseded issue or design may, within ninety days from the time when such change becomes effective as aforesaid, surrender the same to the comptroller together with a sworn statement setting forth the name and address of the owner and party surrendering said stamps, how, when and from whom the same were acquired and such other pertinent information as the comptroller may require; whereupon the comptroller shall redeem such unused and surrendered stamps by exchanging therefor stamps of a like denomination of the new issue or design. Failure or refusal of the Comptroller to redeem the same by such an exchange may be enforced by mandamus.

Thus am'd by L. 1913, ch. 811.

By the amendment of 1913 the second and third paragraphs were added.

§ 271-a. Sale of stamps. No person, firm, company, association or corporation other than a corporation organized under the banking law of this state or under the national bank act of the United States, or a duly authorized agent of the comptroller, shall sell or expose for sale any stamp issued pursuant to this article, and purchased or acquired by him after the time when this act shall take effect, without *his obtaining from the comptroller his written consent to sell such stamps, except that in connection with a sale of or agreement to sell stock a broker or agent of the principal making such sale or agreement to sell may supply and affix the stamp or stamps required by this article. No person shall sell any stamp so purchased or acquired for a sum less than the face value thereof without the written consent of the comptroller. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

New section, added by L. 1911, ch. 12, as am'd by L. 1913, ch. 811.

The above section, so far as it forbids the sale of stamps lawfully purchased before its passage by any person except those specially enumerated in the act itself, is unconstitutional and invalid. If the act applied in terms only to stamps purchased after the passage of the act, or if it made provision for the redemption of stamps lawfully purchased before its enactment, its

validity could be maintained, but the act does not discriminate between stamps purchased before it took effect and those purchased afterwards; therefore, it is wholly unconstitutional and invalid, and cannot be sustained as to any stamps, whether purchased before the act took effect or afterwards. Peo. ex rel. Isaacs v. Moran, 206 N. Y. 670 (1912), revsg. 150 A. D. 226, on dissenting op. of Scott, J.

§ 272. Penalty for failure to pay tax. Any person or persons liable to pay the tax by this article imposed, and any one who acts in the matter as agent or broker for such person or persons, who shall make any sale, transfer or delivery of shares or certificates of stock, without paying the tax by this article imposed, and any person who shall in pursuance of any sale, transfer or agreement, deliver any stock or evidence of the sale or transfer of or agreement to sell any stock, or bill or memorandum thereof, or who shall transfer or cause the same to be transferred upon the books or records of the association, company or corporation, and any association, company or corporation whose stock is sold or transferred, which shall transfer or cause the same to be transferred upon its books, without having the stamps provided for in this article affixed thereto, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned for not more than six months or by both such fine and imprisonment, in the discretion of the court.

Thus am'd by L. 1911, ch. 352; L. 1912, ch. 292.

§ 273. Canceling stamps; penalty for failure. In every case where an adhesive stamp shall be used to denote the payment of the tax provided by this article, the person using or affixing the same shall write or stamp thereupon the initials of his name and the date upon which the same shall be attached or used, and shall cut or perforate the stamp in a substantial manner, so that such stamp cannot be again used; and if any person makes use of an adhesive stamp to denote the payment of the tax imposed by this article, without so effectually canceling the same, such person shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than two hundred nor more than five hundred dollars or be imprisoned for not less than six months, or both, in the discretion of the court.

Thus am'd by L. 1911, ch. 352.

§ 274. Contracts for dies; expenses how paid. The state comptroller is hereby directed to make, enter into and execute for and in behalf of the state such contract or contracts for dies, plates and printing necessary for the manufacture of the stamps provided for by this article, and provide such stationery and clerk hire together with such books and blanks as in his discretion may be necessary for putting into operation the provisions of this article; he shall be the custodian of all stamps, dies, plates or other material or thing furnished by him and used in the manufacture of such state tax stamps, and all expenses incurred by him and under his direction in carrying out the provisions of this article shall be paid to him by the state treasurer from any moneys appropriated for such purpose.

§ 275. Illegal use of stamps; penalty. Any person who shall willfully remove or alter or knowingly permit to be removed or altered the canceling or defacing marks of any stamp provided for by this article with intent to use such stamp, or who shall knowingly or willfully buy, prepare for use, use, have in his possession or suffer to be used any washed, restored or counterfeit stamp, and any person who shall intentionally remove or cause to be removed or knowingly permit to be removed any stamp, affixed pursuant to the requirements of this article, shall be guilty of a misdemeanor and on conviction thereof shall be liable to a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned for not more than one year, or by both such fine and imprisonment, at the discretion of the court.

Thus am'd by L. 1911, ch. 12; L. 1912, ch. 292.

§ 275-a. Registration; penalty for failure. Every person firm, company, association or corporation engaged in whole or in part in the making or negotiating of sales, agreements to sell, deliveries or transfers of shares or certificates of stock, or conducting or transacting a stock brokerage business, and every stock association, company or corporation which shall maintain a principal office or place of business within the state or which shall keep or cause to be kept within the state of New York a place for the sale, transfer or delivery of its stock, shall within ten days after the amendment to this section shall take effect if such a certifi-

cate shall not have been theretofore filed, or if at the time this act shall take effect, not engaged in such business or maintaining such principal office or place of business or such a place for the sale or transfer of its stock, within ten days after engaging in such business or after establishing such principal office or place of business or such a place for the sale or transfer of its stock, as the case may be, file in the office of the comptroller a certificate setting forth the name under which such business is, or is to be, conducted or transacted, and the true or real full name or names of the person or persons conducting or transacting the same, with the postoffice address or addresses of said person or persons, unless the party so certifying be a corporation, in which event it shall set forth its said principal office or place of business and when and where incorporated. Said certificate shall be executed and duly acknowledged by the person or persons so conducting or intending to conduct said business or by the president or secretary of the corporation as the case may be.

In the event of a change in the persons composing such firm, company or association or of the address of any such person, firm, company, association or corporation, or termination of such business or relationship, a like certificate setting forth the facts with respect to such change or termination shall within ten days thereafter be filed in the office of the comptroller.

Any such person, firm, company, association or corporation who shall fail to comply with the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than one hundred dollars nor more than five hundred dollars or be imprisoned for not more than six months or by both such fine and imprisonment, in the discretion of the court.

New section, added by L. 1913, ch. 779, as am'd by L. 1914, ch. 206.

If a corporation either maintains a principal office or place of business within the State or keeps within the State a place for the sale, transfer or delivery of its stock, this section applies. Opinion of Atty. Genl., April 25, 1914.

§ 276. Power of state comptroller. Every person, firm, company, association or corporation, engaged in whole or in part in the making or negotiating of sales, agreements to sell, deliveries or transfers of shares or certificates of stock, or conducting or trans-

acting a brokerage business, shall keep or cause to be kept at some accessible place within the state of New York, a just and true book of account, in such form as may be prescribed by the comptroller, wherein shall be plainly and legibly recorded in separate columns, the date of making every sale, agreement to sell, delivery or transfer of shares or certificates of stock, the name of the stock and the number of shares thereof, the face value of the stock, the name of the seller or transferrer, the name of the purchaser or transferee and the number and face value of the adhesive stamps affixed and the identifying number of the bill or memorandum of sale used as provided for by section two hundred and seventy of this chapter.

Every association, company or corporation shall keep or cause to be kept at some accessible place within the state of New York, a stock certificate book and a just and true book of account, transfer ledger or register, in such form as may be prescribed by the comptroller, wherein shall be plainly and legibly recorded in separate columns the date of making every transfer of stock, the name of the stock and the number of shares thereof, the serial number of each surrendered certificate, the name of the party surrendering such certificate, the serial number of the certificate issued in exchange therefor, the number of shares covered by said certificate, the name of the party to whom said certificate was issued and evidence of the payment of the tax provided for by section two hundred and seventy of this chapter, which evidence, however, shall be provided in one of the following manners and not otherwise, to wit:

(a) By attaching to the stock certificate surrendered for transfer, the stamps required for such transfer, or

(b) If the stamps are not attached to the certificate, but are attached to the bill or memorandum of sale effecting or evidencing the transfer of such certificate, by attaching to said certificate the said bill or memorandum of sale with stamps attached, or

(c) If the stamps covering the transfer are attached to a bill or memorandum effecting a transfer of one or more certificates or to one or more certificates included in said transfer, a notation must be made upon such certificates, bill or memorandum, as the case may be, clearly specifying and identifying the certificate or certificates of stock to the sale or transfer of which the said stamps apply, or

(d) If the bill or memorandum bearing such stamps is not attached to the surrendered certificate or certificates to which it applies, a notation must be made upon such bill or memorandum stating the serial number or numbers of the certificates to which said bill or memorandum applies, as provided by section two hundred and seventy of this chapter. It shall also retain and keep all surrendered or canceled shares or certificates of its stock and all memoranda relating to the sale or transfer of any thereof. All such books of account, transfer ledgers, registers and stock certificate books, shall be retained and kept as aforesaid for a period of at least two years subsequent to the date of the last entry made therein as herein required; and all such surrendered or canceled shares or certificates of stock and memoranda relating to the sale or transfer of stock, shall be retained and kept for a period of at least two years from the date of the delivery thereof. For the purpose of ascertaining whether the tax imposed by this article has been paid, all such books of account, transfer ledgers, registers, stock certificate books, surrendered or canceled shares or certificates of stock and memoranda relating to the sale or transfer thereof, shall at all times between the hours of ten o'clock in the forenoon and three o'clock in the afternoon, except Saturdays, Sundays and legal holidays, be open to examination by the comptroller or his duly authorized representative.

The comptroller may enforce his right to examine such books of account and bills or memoranda of sale or transfer; and such transfer ledger, register and stock certificate books and surrendered or canceled shares or certificates of stock by mandamus. If the comptroller ascertains that the tax provided for in this article has not been paid, he shall bring an action in his name as such comptroller, in any court of competent jurisdiction for the recovery of such tax and for any penalty incurred by any person under the provisions of this article.

Every person, firm, company, association or corporation who shall fail to keep such book of account or bills or memoranda of sale or transfer, or transfer ledger, register or stock certificate book or surrendered or canceled shares or certificates of stock as herein required, or who alters, cancels, obliterates or destroys any part of said records, or makes any false entry therein, or who shall refuse to permit the comptroller or any of his authorized representatives freely to examine any of said books, records or

papers at any of the times herein provided, or who shall in any other respect violate any of the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall for each and every such offense pay a fine of not less than five hundred dollars nor more than five thousand dollars, or be imprisoned not less than three months nor more than two years, or both, in the discretion of the court.

Thus am'd by L. 1910, ch. 453; L. 1911, ch. 352; L. 1912, ch. 292; L. 1913, ch. 779.

The State Comptroller is authorized to examine the stock certificate book and the account book of a transfer agent. Civil action or criminal proceedings lie if the agent refuses such examination. Opinion of Atty. Genl., April 5, 1911.

The general provisions contained in this section prior to the amendment of 1910, authorizing the comptroller "to examine the books and papers of any person" was declared unconstitutional in People ex rel. Ferguson v. Reardon, 197 N. Y. 236 (1910), being in violation of section 6 of article 1 of the Constitution of the State of New York, which provides that "no person shall be compelled in any criminal case to be a witness against himself." The amendments of 1910, 1911 and 1912 were passed to obviate this objection and at the same time give the Comptroller authority to ascertain whether the statute was being violated. The right of examination is limited by the above section to the books of account directed to be kept and the bills or memorandum of sale or transfer of shares or certificates of stock.

§ 277. Civil penalties; how recovered. Any person, firm, company, association or corporation who shall violate any of the provisions of section two hundred and seventy or section two hundred and seventy-two of this chapter shall in addition to the penalties herein provided forfeit to the people of the state a civil penalty of ten dollars for each and every share of stock so sold or transferred, or transferred or entered upon the books of the corporation, as the case may be, without the payment of the tax by this article imposed thereon. Any person who shall violate any of the other provisions of this article shall in addition to the penalties hereinbefore provided forfeit to the people of the state a civil penalty of five hundred dollars for each and every such violation.

The state comptroller shall bring an action in his name as such comptroller in any court of competent jurisdiction for the recovery of any civil penalty; and all moneys collected by him shall be paid into the state treasury. In an action against a corporation or its transfer agent to recover a penalty because of its transfer of stock upon the books or records of the corporation

without requiring the payment of the tax by this article imposed, the failure of the corporation or its transfer agent, on the demand of the comptroller or his duly authorized representative, to produce the surrendered certificate or memoranda of sale with the required stamps attached, shall constitute prima facie proof of the nonpayment of the tax imposed by section two hundred and seventy of this chapter.

Thus am'd by L. 1912, ch. 292.

§ 278. Effect of failure to pay tax. No transfer of stock made after June first, nineteen hundred and five, on which a tax is imposed by this article, and which tax is not paid at the time of such transfer, shall be made the basis of any action or legal proceedings, nor shall proof thereof be offered or received in evidence in any court in this state.

Failure to Pay Tax Must be Pleaded as a Defense.

The failure to pay the tax is an affirmative defense to be pleaded and payment of the tax need not be alleged in the complaint. Bean v. Flint, 204 N. Y. 153 (1912).

Where stock is indorsed in blank and deposited in escrow under an agreement providing for its delivery to a purchaser after the payment of the price in weekly installments, the tax became payable by the vendor immediately upon such deposit and his failure to affix the stamps is a defense that can be pleaded in an action to recover an installment due under the contract. Phillips v. Grossman, 76 Misc. 497 (1912).

§ 279. Application of taxes. The taxes imposed under this article and the revenues thereof shall be paid by the state comptroller into the state treasury and be applicable to the general fund, and to the payment of all claims and demands which are a lawful charge thereon.

§ 280. Refund of tax erroneously paid. If any stamp or stamps shall have been erroneously affixed to any book, certificate of stock, or bill or memorandum of sale, the comptroller may, upon presentation of a claim for the amount of such stamp or stamps and upon the production of evidence satisfactory to him that such stamp or stamps was or were so erroneously affixed so as to cause loss to the person or persons making such claim, pay such amount, or such part thereof as he may allow, to such claimant out of any moneys appropriated for that purpose. Such claims shall be presented to the comptroller in writing, duly veri-

fied, and shall state the full name and address of the claimant, the date of such erroneous affixing, the face value of such stamp or stamps and shall describe the instrument to which the stamp or stamps were affixed and contain such evidence as may be available upon which the demand for such refund is based. Such claims shall be presented within ninety days after such erroneous affixing unless such affixing shall have taken place prior to the date on which this act shall take effect, in which case such claim shall be presented within ninety days after the date on which this act shall take effect. If the comptroller rejects a claim or any part thereof, the claimant may file a claim for the recovery of such sum as the comptroller shall have refused to allow, with the court of claims, which shall constitute a private claim against the state and shall be subject to all the provisions of law governing such claims, except that all claims so presented shall be filed with the court of claims within ninety days from the date on which such claim shall be rejected by the comptroller. For the purposes of this section, the comptroller's decision shall be deemed to have been made at the time of the depositing of a copy of such decision in the post-office inclosed in a duly post-paid wrapper and directed to the person making such claim at the address contained in the verified claim presented to the comptroller as hereinbefore provided.

New section, added by L. 1910, ch. 186.

Claims for refund for stamps erroneously affixed must be verified and contain in full the statements required by the foregoing section. They must also show that loss will accrue to the party making the claim from the erroneous affixing of the stamps. Evidence satisfactory to the Comptroller must be submitted before a refund is ordered. Opinion of Atty. Genl., Mar. 9, 1911.

RULINGS OF THE STATE COMPTROLLER.

GOVERNING THE COLLECTION OF

TAXES ON TRANSFERS OF STOCK.

For the information of the public the Comptroller on May 1, 1914, issued the following statement of the more general rules and regulations governing the imposition and collection of stock transfer taxes, prepared pursuant to the rulings made by the Attorney General:

1. The application and scope of the Stock Transfer Tax Law has been considerably broadened by the amendments thereto, effected by chapter 352

of the Laws of 1911, chapter 292 of the Laws of 1912, chapter 779 of the Laws of 1913, and chapter 206 of the Laws of 1914, with the result that the rulings heretofore made asserting exemptions from the tax are not now as a rule controlling.

2. By the statute as amended, a tax is imposed upon all sales or agreements to sell and upon all deliveries or transfers of shares or certificates of stock of any and all associations, companies and corporations, whether domestic or foreign at the rate of two cents on each hundred dollars of face value or fraction thereof, except where shares or certificates of stock are issued without designated monetary value, in which case the tax shall be two cents for each and every share of such stock.

3. The statute does not apply to the original issue of stock; but all sales or transfers made subsequent thereto, whether intermediate or final, are taxable.

4. It is not necessary to render it taxable that the transaction involve a sale. By the statute, as amended, a tax is imposed upon all sales or transfers of shares or certificates of stock, whether operating to convey the beneficial interest in or merely the legal title to said stock, or possession thereof for any purpose. *The only exceptions to this rule are those expressly provided for in section 270 of the law.*

5. The transfer to and from voting trustees is taxable, also the transfer of voting trust certificates.

6. The mere surrender of a certificate of stock for reissue in smaller denominations is not taxable; but if reissued in part to the original owner and in part to a third party it is taxable to the extent of the transfer to the third party.

7. Likewise the mere surrender of a certificate of stock held by a deceased person for issuance in the name of his executor or administrator is not taxable; but all transfers made by the latter, whether to trustees, legatees or other persons, are taxable.

8. The law applies to the stock of foreign as well as domestic corporations and to residents and non-residents alike.

9. While the law has no extra territorial operation, nevertheless, where it appears that the transfer of the stock on the corporate books within this State is essential to render the transfer effectual, it subjects it to a tax although in all other respects made without the State.

10. It is the duty of the person making or effectuating the sale or transfer to pay the required tax by procuring, affixing and canceling the stamps, except that where a sale or transfer is shown only by the books of the corporation, the person making the sale must secure, and the corporation affix and cancel the stamps to its books. (Sec 270.)

11. Where the sale or transfer is effected by the delivery or transfer of a certificate the stamp must be placed upon the surrendered certificate. In case of an agreement to sell, or where the sale is effected by the delivery of the certificate assigned in blank, there must be made and delivered by the seller to the buyer a bill or memorandum of such sale, to which the stamps shall be affixed and canceled. This bill or memorandum with stamp attached must be affixed to the certificate, or properly identified as provided by section 276, when presented for transfer.

A strict compliance with these requirements will be insisted upon.

12. Every such bill or memorandum of sale, agreement to sell or sales ticket must show:

(a) The date of the transaction which it evidences.

(b) The name of the seller.

(c) The stock to which it relates and the number of shares thereof; and all such memorandum of sale or sales ticket as are not used for the purpose of transfer must be kept by the broker for two years from their respective dates.

(d) And an identifying number as provided by section 270.

13. All persons liable for the payment of the tax and all persons acting as agents or brokers for any such persons or for the corporation whose stock is transferred, who in any manner assists in consummating a sale or transfer without payment of the required tax, are guilty of a misdemeanor.

14. Likewise corporations, and persons acting as transfer agents for corporations, are forbidden to transfer stock on the books of the corporation until the required tax has been paid; and for a failure to perform this duty they are guilty of a misdemeanor.

15. Every stamp used to denote the payment of the tax must be canceled by the user by writing or stamping thereon the initials of his name and the date upon which the stamp is attached or used. He must also cut or perforate the stamp in a substantial manner so that it cannot again be used. A failure so to do renders the party guilty of a misdemeanor.

16. Under no circumstances may a stamp erroneously attached to a certificate or memorandum be removed. An adequate remedy in such cases, in the nature of a refund, is provided by section 280 of the act.

17. Every broker is required to keep a just and true book of account in the form prescribed by the Comptroller (see form designated "account book to be kept by brokers" on page 2) wherein shall be plainly and legibly recorded in separate columns:

(a) The date of making every sale, agreement to sell, delivery or transfer of shares or certificates of stock.

(b) The name of the stock and the number of shares thereof.

(c) The face value thereof.

(d) The name of the seller or transferrer.

(e) The name of the purchaser or transferee.

(f) The identifying number of the bill or memorandum of sales as provided by section 270.

These books must be kept for a period of at least two years subsequent to the date of such entry made therein and are subject to examination by the Comptroller or his representatives at all times between 10 A. M. and 3 P. M. (Saturdays, Sundays and legal holidays excepted).

18. Every corporation or its transfer agent shall keep a just and true book of account in the form prescribed by the Comptroller (see form designated "account book to be kept by corporations and transfer agents" on page 2), wherein shall be plainly and legibly recorded in separate columns:

(a) The date of making every transfer of stock.

(b) The name of the stock and the number of shares thereof.

(c) The serial number of each surrendered certificate.

(d) The name of the party surrendering each certificate.

(e) The serial number of the certificate issued in exchange therefor.

(f) The number of shares represented by said certificate.

(g) The name of the party to whom said certificate was issued.

(h) The evidence of the payment of the tax as provided by section 276.

It shall also keep and retain a stock certificate book and all surrendered or canceled shares or certificates of its stock and memoranda relating to the sale thereof for a period of two years from the date of the delivery thereof.

All such books and papers are subject to the examination by the Comptroller or his representative at any time between the hours of 10 A. M. and 3 P. M. (Saturdays, Sundays and legal holidays excepted).

19. It is imperative that these books, records and memoranda be kept and retained strictly in the form and manner provided by the statute and severe penalties are imposed for a failure so to do.

20. Severe penalties, civil and criminal, are also provided by the act for the illegal sale or use of stamps, for the removal or re-use thereof, for the failure to pay the tax imposed and for the violation of the other requirements of the statute. Furthermore, the failure to pay the tax constitutes an absolute defense to an action to recover the purchase price of the stock.

21. Every person, firm, company, association or corporation engaged in whole or in part in the making or negotiating of sales, agreements to sell, deliveries or transfers of shares or certificates of stock, or conducting or transacting a stock brokerage business, shall within ten days after July 1, 1913, or within ten days after engaging in such business, file with the State Comptroller, either in Albany or New York city, a certificate setting forth the name under which such business is or is to be conducted or transacted and the true and real full names of the person or persons conducting or transacting the same, with the post-office address or addresses of said persons, or in the event of a change in the persons conducting such business or change of address, like certificate setting forth the facts shall within ten days thereafter be filed. Such certificate shall be duly acknowledged. A failure to perform this duty is a misdemeanor.

22. Every stock association, company or corporation which shall maintain a principal office or place of business within the State or which shall keep or cause to be kept within the State of New York a place for the sale, transfer or delivery of its stock shall within ten days after April 7, 1914, if such certificate shall not have been theretofore filed, or within ten days after engaging in or maintaining a place for such business, file with the State Comptroller, either in Albany or New York city, a certificate setting forth the name of the company, the place of business and when and where incorporated, or in the event of a change in the persons or change of address like certificate setting forth the facts shall within ten days thereafter be filed. Such certificates shall be duly acknowledged by the president or secretary of the corporation. A failure to perform this duty is a misdemeanor.

23. The Comptroller will be pleased at any time to advise interested parties as to the provisions and requirements of the law.

Stock transfer stamps are issued in the following denominations: 2c., 4c., 10c., 20c., 50c., $1, $2, $10, $20, and are on sale at the following places:

Empire Trust Co., 42 Broadway, New York city; National Commercial Bank, Albany, N. Y.; Utica Trust & Deposit Co., Utica, N. Y.; The Syracuse Trust Co., Syracuse, N. Y.; Rochester Trust & Safe Deposit Co., Rochester, N. Y.; The Peoples' Bank of Buffalo, Buffalo, N. Y.; Chemung Canal Trust Co., Elmira, N. Y.; The Northern New York Trust Co., Watertown, N. Y.; Broome County Trust Co., Binghamton, N. Y.; Bank of Jamestown, Jamestown, N. Y.; Poughkeepsie Trust Co., Poughkeepsie, N. Y.; First National Bank of Boston, Boston, Mass.; Empire Trust Co., London Branch, London, Eng.

WAR REVENUE TAX LAW

The United States statute, approved October 22, 1914, to take effect December 1, 1914, and expire December 31, 1915, so far as the same relates to stamp taxes upon bonds, debentures, or certificates of indebtedness and certificates of stock, reads as follows:

Section 22, Schedule A.

Stamp Taxes.

Bonds, debentures, or certificates of indebtedness issued on and after the first day of December, nineteen hundred and fourteen, by any association, company, or corporation, on each $100 of face value or fraction thereof, 5 cents, and on each original issue, whether on organization or reorganization, of certificates of stock by any such association, company, or corporation, on each $100 of face value or fraction thereof, 5 cents, and on all sales, or agreements to sell, or memoranda of sales or deliveries or transfers of shares or certificates of stock in any association, company, or corporation, whether made upon or shown by the books of the association, company, or corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, or to secure the future payment of money or for the future transfer of any stock, on each $100 of face value or fraction thereof, 2 cents.

Deposit of Stock as Collateral Security Not Taxable.

Provided, That it is not intended by this act to impose a tax upon an agreement evidencing a deposit of stock certificates as collateral security for money loaned thereon, which stock certificates are not actually sold, nor upon such stock certificates so deposited:

Where Stamps to be Affixed.

Provided further, That in case of sale where the evidence of transfer is shown only by the books of the company the stamp shall be placed upon such books; and where the change of ownership is by transfer certificate the stamp shall be placed upon the certificate; and in cases of an agreement to sell or where the transfer is by delivery of the certificate assigned in blank there shall be made and delivered by the seller to the buyer a bill or memorandum of

such sale, to which the stamp shall be affixed; and every bill or memorandum of sale or agreement to sell before mentioned shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers.

Penalty for Violation.

And any person or persons liable to pay the tax as herein provided, or anyone who acts in the matter as agent or broker for such person or persons, who shall make any such sale, or who shall in pursuance of any such sale deliver any such stock, or evidence of the sale of any such stock or bill or memorandum thereof, as herein required, without having the proper stamps affixed thereto, with intent to evade the foregoing provisions shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not exceeding $1,000, or be imprisoned not more than six months, or both, at the discretion of the court.

* * * * * * * * * *

Certificate of Profits.

Certificate of profits or any certificate or memorandum showing an interest in the property or accumulations of any association, company, or corporation, and on all transfers thereof, on each $100 of face value or fraction thereof, two cents.

Certificates of Incorporation and Supplemental Certificates.

Certificate of any description required by law not otherwise specified in this act, ten cents.

The foregoing provision requires that a 10-cent stamp shall be affixed to certificates and duplicate certificates of incorporation, supplemental, amended and any other certificate filed either in the office of the Secretary of State or county clerk, and also a like stamp to any certificate of a county clerk authenticating the act of a notary public.

Proxies at Corporate Elections.

Power of attorney or proxy for voting at any election for officers of any incorporated company or association, except religious, charitable, or literary societies, or public cemeteries, ten cents.

Power of Attorney to Sell Stocks, Bonds, Etc.

Power of attorney to sell and convey real estate, or to rent or lease the same, to receive or collect rent, to sell or transfer any

stock, bonds, scrip, or for the collection of any dividends or interest thereon, or to perform any and all other acts not hereinbefore specified twenty-five cents: *Provided,* That no stamps shall be required upon any papers necessary to be used for the collection of claims from the United States for pensions, back pay, bounty, or for property lost in the military or naval service.

Cancellation of Stamps; Penalty for Failure to Cancel.

Any person using or affixing stamps to instruments requiring the same shall write or stamp thereupon the initials of his name and the date upon which the stamp shall be attached or used, so that the same may not again be used. If any person shall fraudulently make use of an adhesive stamp to denote any tax imposed by the act without so effectually cancelling and obliterating such stamp shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not exceeding $500, or be imprisoned not more than six months, or both, at the discretion of the court.

Where to Obtain Stamps.

The adhesive stamps required by the act may be obtained from the several collectors of internal revenue, from designated United States depositaries and the various postmasters.

Opinion of Attorney-General.

The following is from an opinion of the Attorney-General of New York, dated December 2, 1914, to wit:

It is the duty of the Secretary of State to require tax stamps to be affixed upon the following instruments:

1. Certificates of incorporation presented for filing.

2. Certificates amendatory of or supplemental to certificates of incorporation presented for filing.

The following certificates when furnished to private citizens require stamps:

A. Certificates of authority under section 15 of the General Corporation Law.

B. Negative certificates as to name under section 60 of the General Corporation Law.

C. Certificates of dissolution under section 221 of the General Corporation Law.

D. Certificates attached to copies of documents on file in the office furnished for the purpose of making such copies evidence, pursuant to section 933 of the Code of Civil Procedure.

E. Negative certificates under section 921 of the Code of Civil Procedure.

STOCK CORPORATION LAW

Amended, May 24, 1923, Ch. 787.

Laws of 1909, Chapter 61, Entitled, "An Act Relating to Stock Corporations, Constituting Chapter Fifty-nine of the Consolidated Laws," as Amended to the Commencement of the Legislative Session of 1915.*

CHAPTER 59 OF THE CONSOLIDATED LAWS

Stock Corporation Law

Article 1. Short title (§ 1).
2. General provisions (§§ 5–23).
3. Directors and officers (§§ 25–35).
4. Stock and stockholders (§§ 50–70).
5. Laws repealed; when to take effect (§§ 80, 81).

ARTICLE 1

Short Title

Section 1. Short title.

§ 1. Short title. This chapter shall be known as the "Stock Corporation Law."

Formerly L. 1890, ch. 564, § 1, part, as am'd by L. 1892, ch. 688.

ARTICLE 2

† General Provisions

Section 5. Application of article.
6. Power to borrow money and mortgage property.
7. Validating corporate mortgages.
8. Power to guarantee bonds of other corporations.
9. ‡ Reorganization upon sale of corporate property.
10. Contents of plan or agreement.

* The numerous provisions affecting different kinds of stock corporations were, for the first time, grouped and embodied into a single statute, designated as the Stock Corporation Law, by an act passed June 7, 1890, chapter 564, to take effect May 1, 1891. By the Laws of 1892, chapter 688, passed May 18, to take effect immediately, said law was amended and entirely re-enacted, and during subsequent legislative sessions was variously amended until its re-enactment as one of the chapters of the Consolidated Laws in 1909.

† Consolidators' Note.—Title of article changed by Consolidated Laws of 1909 by leaving out words "powers: reorganization." and substituting "provisions." This article, as heretofore amended, did not relate solely to general powers and reorganization, but to other matters, and the proposed title "General Provisions" more accurately describes the matter contained in the article and makes the title uniform with other statutes.

‡ So in the original.

SECTION 11. Sale of property; possession of receiver and suits against him.
12. Municipalities may assent to plan of readjustment.
13. Change of place of business.
14. Combinations prohibited.
15. Merger.
16. Voluntary sale of franchise and property.
17. Rights of non-consenting stockholders on voluntary sale of franchise and property.
18. Alterations or extension of business.
*19. Issuance of shares of stock without nominal or par value.
20. Commencement of business; authorized debts.
21. Taxation.
22. Increase or reduction of shares or capital.
23. Amount of capital stock and of shares within meaning of other laws.

§ 5. Application of article. This article except sections eight, fifteen, sixteen, seventeen and eighteen thereof, shall not apply to moneyed corporations.

Formerly L. 1890, ch. 564, § 1, part, as am'd by L. 1892, ch. 688.

CONSOLIDATOR'S NOTE.— The words "except sections 8, 15, 16, 17 and 18 thereof" added by Laws of 1909 for the reason that article 2 does not apply to moneyed corporations, but as sections 8, 15, 16, 17 and 18 are general in scope and substance, applying to moneyed corporations as well as others, and are now placed in article 2 (where they properly belong), they have been excepted from the limitation of the effect of the article in regard to moneyed corporations.

A moneyed corporation is one formed under or subject to the Banking or the Insurance Law. Gen. Corp. Law, § 3, ante.

The Stock Corporation Law does not authorize the formation of corporations thereunder, except by the purchasers of corporate property and franchises, as provided in section 9, post. This law contains provisions which are specially applicable to all stock corporations. For the laws pertaining to the formation of different kinds of stock corporations, reference should be had to the Business Corporations Law, the Railroad Law and the Transportation Corporations Law, each of which also contains provisions peculiar to, and having special bearing upon the particular class of companies provided for.

m'd., May 1923, ch. 305.

§ 6. Power to borrow money and mortgage property. In addition to the powers conferred by the general corporation law, every stock corporation shall have the power to borrow money and contract debts, when necessary for the transaction of its business, or for the exercise of its corporate rights, privileges or franchises, or for any other lawful purpose of its incorporation; and it may

* Article 2 of this law, prior to the amendment of chapter 351, Laws of 1912, contained only eighteen sections. By said amendment sections 19 to 23, both inclusive, were added, relative to the issuance of shares of stock without nominal or par value. By reason of the enactment of said new section the abstract of contents at the beginning of this article becomes automatically amended so as to include a reference to the additional sections, pursuant to the General Construction Law, section 81, post.

issue and dispose of its obligations for any amount so borrowed, and may mortgage its property and franchises to secure the payment of such obligations, or of any debt contracted for said purposes. Every such mortgage, except purchase-money mortgages and mortgages authorized by contracts made prior to May first, eighteen hundred and ninety-one, shall be consented to by the holders of not less than two-thirds of the capital stock of the corporation, which consent shall be given either in writing or by vote at a special meeting of the stockholders called for that purpose, upon the same notice as that required for the annual meetings of the corporation; and a certificate under the seal of the corporation that such consent was given by the stockholders in writing, or that it was given by vote at a meeting as aforesaid, shall be subscribed and acknowledged by the president or a vice-president and by the secretary or an assistant secretary, of the corporation, and shall be filed and recorded in the office of the clerk or register of the county wherein the corporation has its principal place of business. When authorized by like consent, the directors under such regulations as they may adopt, may confer on the holder of any debt or obligation, whether secured or unsecured, evidenced by bonds of the corporation, the right to convert the principal thereof, after two and not more than twelve years from the date of such bonds, into stock of the corporation; and if the capital stock shall not be sufficient to meet the conversion when made, the directors shall from time to time, authorize an increase of capital stock sufficient for that purpose by causing to be filed in the office of the secretary of state, and a duplicate thereof in the office of the clerk of the county where the principal place of business of the corporation shall be located, a certificate under the seal of the corporation, subscribed and acknowledged by the president and secretary of the corporation setting forth,

1. A copy of such mortgage; or resolution of directors authorizing the issue of such bonds;

2. That the holders of not less than two-thirds of the capital stock of the corporation duly consented to the execution of such mortgage or resolution of directors authorizing the issue of such bonds by such corporation;

3. A copy of the resolution of the directors of the corporation authorizing the increase of the capital stock of the corporation necessary for the purpose of such conversion;

4. The amount of capital theretofore authorized, the proportion thereof actually issued and the amount of the increased capital stock.

If the corporation be a railroad corporation the certificate shall have indorsed thereon the approval of the public service commission having jurisdiction thereof. When the certificate herein provided for has been filed, the capital stock of such corporation shall be increased to the amount specified in such certificate.

Formerly L. 1890, ch. 564, § 2, as am'd by L. 1892, chs. 337, 688; L. 1901, ch. 354; L. 1905, ch. 745.

For history of this section and a discussion of several adjudicated cases interpreting the provisions thereof, see opinion of Judge Clarke in Black v. Ellis, 129 A. D. 140 (1908).

For forms of corporate mortgages, bonds thereunder, interest coupons, stockholders' consent to mortgage, certificate of consent to mortgage, counsel's opinion as to legality of bond issue, guarantee of bonds, etc., see Forms Nos. 336–351.

For form of certificate of indebtedness, see Form No. 352.

For form of promissory note of corporation and resolution authorizing the same, see Forms Nos. 235, 236.

For form of receiver's certificate and proceedings for authority to issue the same, see Forms Nos. 361–363.

For forms of testimonium clauses to be appended to corporate instruments, see Forms Nos. 353–360.

Scope of Section.

This section relates to all stock corporations, except banking and insurance corporations (see § 5 of this law) and railroad corporations (see the Railroad Law, § 4, subd. 10).

Amendments of 1901.

By the terms of this section, as amended in 1901, the consent to mortgage may be given by holders of at least two-thirds of the capital stock, either in writing or by vote, cast in person or by proxy (see Gen. Corp. Law, § 26) at a special meeting called for that purpose, upon the same notice as that required for annual meetings. In either event a certificate under the corporate seal must be executed setting forth that such consent was given by the stockholders in writing, or by vote at such special meeting, which certificate is to be signed by the president or a vice-president and by the secretary or an assistant secretary of the corporation and filed and recorded in the office of the clerk or register of the county where the principal place of business is located.

Tax on Mortgages.

The Tax Law, article 11, imposes a tax upon mortgages at the rate of fifty cents for each one hundred dollars, as provided in section 253 of said law, which reads as follows:

§ 253. Recording tax. A tax of fifty cents for each one hundred dollars and each remaining major fraction thereof of principal debt or obligation which is, or under any contingency may be secured at the date of the execu-

tion thereof or at any time thereafter by mortgage on real property situated within the state recorded on or after the first day of July, nineteen hundred and six, is hereby imposed on each such mortgage, and shall be collected and paid as provided in this article. If the principal debt or obligation which is or by any contingency may be secured by such mortgage recorded on or after the first day of July, nineteen hundred and seven, is less than one hundred dollars, a tax of fifty cents is hereby imposed on such mortgage, and shall be collected and paid as provided in this article.

Public Service Commission.

Railroad corporations and other common carriers, gas and electrical corporations, steam heating corporations, telephone and telegraph corporations, proposing to issue bonds, notes or other evidences of indebtedness payable at periods of more than twelve months after the date thereof, must first obtain an order authorizing such issue from the Public Service Commission. See Public Serv. Com. Law, sections 55, 69, 82 and 101, respectively, post. For the definition of "common carrier" for the purpose of construing said law, see section 2, subdivision 9 thereof. In addition to such definition a stage coach company operating in the city of New York is to be included in the term "common carrier." Transp. Corp. Law, § 24, post.

A railroad corporation which has issued its bonds in defiance of an order of the Public Service Commission may not plead its ultra vires act as a defense to a suit on the bonds brought by one who had received them in good faith, as the statute (Pub. Serv. Law, § 55), does not provide that bonds issued without the authority of the commission shall be void in the hands of bona fide holders. Goldan v. Delaware & Eastern Ry. Co., 144 A. D. 78 (1911).

In an action against a railroad company, its officers and directors, for fraud in the issuance of bonds which were represented to be valid obligations but which were issued in violation of an order of the Public Service Commission, the plaintiff must allege that the bonds were payable more than twelve months from the date thereof. Goldan v. Delaware & Eastern Ry. Co., 144 A. D. 78 (1911).

Section Not Applicable to a Foreign Corporation.

This section does not apply to a foreign corporation doing business in the State of New York; therefore, a mortgage executed by such a corporation upon its real property located in this State, and otherwise valid, is not rendered void because it was not authorized by the consent of stockholders. In re Heffron Co., 216 Fed. 642 (Sept., 1914). Nor does the fact that the foreign corporation was doing business in the State of New York without having obtained a certificate of authority from the Secretary of State invalidate a mortgage executed by the corporation on its property in this State. Id.

Removal of Debt Limit.

The amendment of 1901 enlarged the power to borrow money secured by mortgage, the maximum limitation upon the mortgage indebtedness having been stricken out, enabling the corporation to incur mortgage indebtedness for lawful purposes to any extent that its credit and security will permit, without reference to capitalization.

The decisions in New Britain Nat. Bk. v. A. B. Cleveland Co., 91 Hun 447, and Beebe v. Richmond Light, Heat & Power Co., 13 Misc. 737, respectively, so far as relates to an overissue of bonds, are superseded by the amendment made by L. 1901, ch. 354.

Heretofore provisions which were essentially a continuation of the former limitations of this section were contained in former section 24 of this law, which prescribed as a penalty upon directors voting for an overissue of bonds personal liability to the holders of the bonds illegally issued for the amount held by them, and to all persons sustaining damage by such illegal issues for any damages caused thereby, but said section 24 was repealed by L. 1901, ch. 354, so as to leave nothing in conflict with the liberalized features of the foregoing section.

In connection with the above section, see, also, the next succeeding section (added by L. 1901, ch. 354), which provides that when a mortgage recites that it has been duly authorized by holders of the requisite amount of stock, such recital shall be presumptive evidence that the law has been complied with, and if the mortgage has been recorded for one year and interest has been paid thereon, it becomes valid, even though irregular in its execution. This provision prevents the security of underlying corporate bonds being invalidated, and thereby protects the purchasers.

Stockholders' Consent.

Where, in order to prevent a threatened foreclosure of a third mortgage not made or assumed by it, a corporation assigned to the holder of such mortgage the rents of the mortgaged property it is not a violation of this section requiring the assent of stockholders. Hirsch v. Twelfth Ward Bk., 66 Misc. 290 (1910).

The proviso, in respect to the assent of shareholders, is for their protection. Greenpoint Sugar Co. v. Whitin, 69 N. Y. 328 (1877); Rochester Sav. Bk. v. Averell, 26 Hun 643 (1882); Lord v. Yonkers Fuel Gas Co., 99 N. Y. 547 (1885); Hamilton Trust Co. v. Clemes, 17 A. D. 152 (1897), affd., 163 N. Y. 423; Black v. Ellis, 129 A. D. 140 (1908). The statement of Hardin, J., in Rochester Sav. Bk. v. Averell, supra, p. 646, that it is also for the protection of bona fide creditors, is not supported by the authorities cited by him, and does not appear to be the law. Market & Fulton Nat. Bk v. Jones, 7 Misc. 207 (1894), affd., 90 Hun 605.

It is doubtful if any but stockholders can complain that the statutory assent was not given and filed. Id.; Paulding v. Chrome S. Co., 94 N. Y. 334 (1884); Atlantic Trust Co. v. Crystal Water Co., 72 A. D. 539 (1902). It is, however, incumbent on a receiver to investigate the validity of a mortgage lien when creditors object that the statutory consent was not given. Matter of Wendler Mach. Co., 2 A. D. 16 (1896).

For the purposes of assent the amount of stock actually issued and owned should be considered the amount of capital stock. Greenpoint S. Co. v. Whitin, 69 N. Y. 328, 20 Hun 355 (1877); Lyceum v. Ellis, 30 St. Rep. 242 (1890); Swan v. Stiles, 94 A. D. 117, 124 (1904); Atlantic Trust Co. v. Crystal Water Co., 72 A. D. 539, 545 (1902).

The right to assent to mortgaging property is collective, to be exercised in common with other shareholders, pursuant to the method prescribed by law. Campbell v. Am. Zylonite Co., 122 N. Y. 455 (1890).

The assent is valid though some of the shares have not been paid for, or only in services, and certificates have not been issued to stockholders. McComb v. Barcelona Ap. Assn., 31 N. E. 613, 45 St. Rep. 784, affd., 134 N. Y. 598 (1892).

Since the proviso in respect to assent of shareholders is solely for their protection if there are but two stockholders and both consent, it is sufficient, though the corporation was required to have at least three directors who should be stockholders of the company. Welch v. Importers' & Traders' Nat. Bk., 122 N. Y. 177 (1890); Castle v. Lewis, 78 N. Y. 131 (1879).

Stock owned by the corporation cannot be included to make up the requisite two-thirds. Vail v. Hamilton, 85 N. Y. 453 (1881). But an assent by two-thirds of the issued stock is sufficient. Id.; Lyceum v. Ellis, 30 St. Rep. 242 (1890).

A defective assent, in the absence of fraud, or of objection by stockholders, must be such that intention to consent to mortgage cannot be inferred from the instrument. Greenpoint S. Co. v. Whitin, 69 N. Y. 328 (1877).

A mortgage executed without assent is validated by subsequent assent if there are no intervening rights. Rochester Sav. Bk. v. Averell, 96 N. Y. 467 (1884); Martin v. Niag. F. Paper Co., 122 N. Y. 165 (1890); Greenpoint S. Co. v. Whitin, 69 N. Y. 328 (1877).

Under a former statute it has been held that written consent of stockholders owning at least two-thirds of the stock of the corporation, duly obtained and filed, is an indispensable condition to a valid mortgage. Vail v. Hamilton, 85 N. Y. 453 (1881).

The validity of a mortgage is not affected by the fact that it was authorized by persons holding the indebtedness to be secured where such indebtedness was valid and binding. Rettenhouse v. Winch, 133 N. Y. 678 (1892); affg. 32 St. Rep. 506. See also Lord v. Yonkers F. G. Co., 99 N. Y. 547 (1885); Star P. Co. v. Andrews, 9 N. Y. Supp. 731, 31 St. Rep. 188; Carpenter v. Black H. G. M. Co., 65 N. Y. 43; Denike v. N. Y. & R. Lime Co., 80 N. Y. 599.

Consent to mortgage the real and personal property does not include the corporate franchises vested in the corporation by virtue of its organization as such. Lord v. Yonkers Fuel Gas Co., 101 N. Y. 614 (1885).

A person who has executed a corporation mortgage containing a recital that the requisite assent of stockholders had been obtained, or one accepting a conveyance subject to the mortgage, or the mortgagor who has sold the mortgaged premises, cannot require proof of such assent. Beebe v. Richmond Light, Heat & Power Co., 3 A. D. 334. See also Same v. Same, 13 Misc. 737 (1895).

A mortgage given by a corporation to perform a legal obligation to give a first mortgage upon its assets, under a contract entered into by its directors with another corporation, and fully performed by it, is valid in equity as against junior judgment creditors, even upon the assumption that there was a failure to observe certain statutory requirements. Hamilton Trust Co. v. Clemes, 163 N. Y. 423 (1900), affg. 17 A. D. 152.

Filing Consent.

In order to validate a corporation mortgage it is essential not only that stockholders owning two-thirds of the stock should give their consent, but also that such consent should be filed in the proper clerk's office. Matter of Wendler Mach. Co., 2 A. D. 16 (1896). But as to filing, see contra, Black v. Ellis, 129 A. D. 140 (1908).

The assent and mortgage may be filed and recorded simultaneously. Roch. Sav. Bk. v. Averell, 96 N. Y. 467 (1884); Everson v. Eddy, 36 St. Rep. 764; Welch v. Imp. & T. Nat. Bk., 122 N. Y. 177 (1890).

But without such filing the mortgage is valid as against a subsequent mortgagee or purchaser, with notice. Roch. Sav. Bk. v. Averell, 96 N. Y. 467 (1884).

The refiling of a mortgage executed by a corporation, upon a leasehold interest in real property and also upon chattels, which has been once duly recorded and filed, is not necessary to continue the lien upon the leasehold, as the leasehold interest is a chattel real and not within the scope of the words "goods and chattels," used in chapter 279 of the Laws of 1833. State

Trust Co. v. Casino Co., 19 A. D. 344 (1897), 46 N. Y. Supp. 492, affg. 18 Misc. 327.

A mortgage given by a railroad corporation covering after-acquired personal property need not be filed as a chattel mortgage. Platt v. N. Y. & Sea Beach Ry. Co., 9 A. D. 87, affd., 153 N. Y. 670 (1897).

The provision requiring filing is merely to perpetuate evidence. If the consent has actually been given, the fact that it was not filed will not invalidate the mortgage. Black v. Ellis, 129 A. D. 140 (1908).

Filing Mortgage.

Prior to the enactment of the Lien Law, the recording of mortgages executed by railroad corporations was regulated by chapter 779, Laws of 1868, as amended by chapter 529, Laws of 1895, while the recording of mortgages executed by telegraph, telephone or electric light companies was regulated by chapter 171, Laws of 1891. Said acts were repealed by the Lien Law (L. 1897, ch. 418), now L. 1909, ch. 38, section 231 of which embodies the subject of mortgages creating a lien upon real and personal property of corporations, and reads as follows:

§ 231. Corporate mortgages against real and personal property.— Mortgages creating a lien upon real and personal property, executed by a corporation as security for the payment of bonds issued by such corporation, or by any telegraph, telephone or electric light corporation, and recorded as a mortgage of real property in each county where such property is located or through which the line of such telegraph, telephone or electric light corporation runs, need not be filed or refiled as chattel mortgages. [L. 1909, ch. 38, § 231.]

The operations of the acts superseded by the foregoing section were restricted to mortgages executed by railroad, telegraph, telephone or electric light companies, but the scope of the foregoing section of the Lien Law has been extended so as to include mortgages executed by any corporation. That was doubtless the intention in enacting the amendatory act of 1895, ch. 529; Guaranty Trust Co. v. Troy Steel Co., 33 Misc. 484 (1900), but this purpose failed by reason of an omission to amend the title of the original act. See State Trust Co. v. Casino Co., 19 A. D. 344, overruling in effect Same v. Same, 5 A. D. 381.

It should be noted that mortgages covering both real and personal property not given to secure an issue of bonds must be filed and refiled as a chattel mortgage. Fitzgerald v. Atlantic Home Ins. Co., 61 A. D. 350, 356 (1901). Mortgages of public service corporations are further affected by the provisions of the Public Service Commissions Law (L. 1907, ch. 429). See §§ 55 and 69 thereof, post.

Filing and Refiling of Chattel Mortgage; When Unnecessary.

A corporate mortgage upon real and personal property given as security for a bond and recorded as a mortgage of real property in each county where such property is located, need not be filed or refiled as a chattel mortgage, although the mortgage secured only one, non-negotiable bond. Clement v. Congress Hall, 72 Misc. 519 (1911).

Chattel Mortgage; Sufficiency of Description of Personal Property.

A mortgage of personal property describes with sufficient certainty the mortgaged property in the following words: "the undivided one-half part of, in and to all of the fixtures, furniture and personal property located in or upon the premises (described), or now or heretofore used in connection with the hotel known as Congress Hall, and the premises above described, which fixtures

and personal property where owned by Clement and Cox in common." Clement v. Congress Hall, 72 Misc. 519 (1911).

Renewal of Purchase Money Mortgage; Stockholders Consent Not Required.

Where a corporation acquired personal property subject to a purchase money chattel mortgage which contained a covenant to renew each year, a new mortgage executed pursuant to such covenant cannot be set aside on the ground that stockholders had not consented thereto. The statute applies to a new incumbrance and not to keeping alive a mortgage on property acquired subject thereto and under agreement to continue the lien. Black v. Ellis, 197 N. Y. 402 (1910).

An agreement to execute a renewal of a chattel mortgage, which is assumed by a corporation, will be specifically enforced, even if all stockholders oppose. Black v. Ellis, 197 N. Y. 402 (1910).

Where property was transferred to a corporation, subject to a chattel mortgage, and thereafter a renewal was drawn up to replace the then expiring mortgage, and this new mortgage was properly executed and recorded, but without the consent of holders of two-thirds of the stock of the corporation, the mortgagee, upon the bankruptcy of the corporation, is left as a general creditor for the amount of the debt, unless the mortgage in question be a purchase money mortgage. In re Eagle Steam Laundry Co., 176 Fed. 740 (1910). If the corporation attempted to question the mortgage, it might be estopped, under the doctrine of Hamilton Trust Co. v. Clemes, 17 A. D. 152, affd., 163 N. Y. 423, but creditors are not subject to such equitable estoppel. Id.

"Lawful Purposes" for Mortgaging Property.

A mortgage upon all the corporate property to secure creditors is not invalid as being for a purpose foreign to the lawful business of the corporation. New Britain Nat. Bk. v. A. B. Cleveland Co., 91 Hun 447, affd., 158 N. Y. 722 (1899).

A corporation cannot make a scrip dividend in one year, and in the next issue bonds to pay it. Merz v. Interior Conduit & Insulation Co., 87 Hun 430 (1895).

There is nothing malum in se or malum prohibitum in the act of a corporation lending its credit to its president, or in mortgaging its property for his debt. If stockholders do not assail its validity and no rights of creditors intervene, there can be no legal objection. Osborn v. Montelac Park, 89 Hun 167, affd., 153 N. Y. 672 (1897). See also Quee Drug Co. v. Plaut, 55 A. D. 87 (1900).

By reason of the removal of the maximum limit of corporate indebtedness the case of Flynn v. Coney Island & Brooklyn R. R. Co., 26 A. D. 416, considering the legality of a mortgage, not limited in its amount, given to secure bonds to be used in taking up outstanding issues, and also to secure further bonds, which are only to be issued with the consent of stockholders, is obsolete.

Mortgages Made by Insolvent Corporations.

The fact that mortgages were given to secure just obligations against a corporation, and were not fraudulent as against creditors, is immaterial, where it appears that the mortgagees knew that they were executed in contemplation of its insolvency. Munson v. Genesee Iron & Brass Works, 37 A. D. 203 (1899).

A mortgage executed by an insolvent corporation, in excess of the value of its property, to secure a bond issue, so as to give such bonds in payment of its debts to creditors who would accept them, and to pay non-consenting creditors the proceeds of remaining bonds, or leave them to their legal remedies against the equity of redemption of the mortgage, is invalid, its effect being to coerce creditors into extending the time for the payment of their debts, by leaving non-consenting creditors without security. Jenkins v. John Good Cordage & Mach. Co., 56 A. D. 573; affd., 168 N. Y. 679 (1901).

Mortgages executed in violation of section 48 (now section 66) of this law may be attacked by a person who, after such mortgages were recorded, but, on the same day, obtains judgment in an action brought against the corporation to recover damages for personal injuries. Munson v. Genesee Iron & Brass Works, 37 A. D. 203 (1899).

Where directors have, upon a statement to stockholders showing solvency, obtained their consent to the issue of bonds to procure an alleged necessary loan, the conduct of such directors in subsequently voting to one of their number a very large bonus, to be shared by other directors and under the claim that it was necessarily paid to float the loan, as the corporation was practically insolvent, is unconscionable, being an attempt by trustees to enrich themselves at the cost of their trust. Com'l Nat. Bk. v. Syracuse R. T. Ry. Co., 25 Misc. 36 (1898).

Officers, Duties and Liabilities.

See, also, "Promissory Notes of Corporations," post.

Where two individuals sign a promissory note, and after their respective names write "President" and "Treasurer," it is their individual obligation and not a corporate obligation if there is nothing in the body of the note to indicate that it is a corporate obligation, even though the name of the corporation be printed on the margin. First Nat. Bk. of Bklyn. v. Wallis, 150 N. Y. 455 (1896), affg. Same v. Same, 84 Hun 376, and Same v. Stuetzer, 80 Hun 435; Casco Nat. Bk. v. Clark, 139 N. Y. 307; Merchants' Nat. Bk. v. Clark, 139 N. Y. 314 (1893). As between the original parties and those having notice, however, the consideration and the conditions under which the note was given may be shown. Megowan v. Peterson, 173 N. Y. 1 (1902); First Nat. Bk. v. Wallis, supra, distgd.

Where an officer who practically owns the corporation, and has power to raise money upon its negotiable bonds, receives a loan upon them, the advances thus made, although further secured by the individual note of the officer, will be deemed to have been made to the corporation and not to the individual. Buffalo Loan, T. & S. D. Co. v. Medina Gas & Elec. Lt. Co., 12 A. D. 199; affd., 162 N. Y. 67 (1900).

An officer may own mortgage bonds, but he cannot buy them directly from the corporation below par, except at the peril of avoidance by the court. Coman v. Lackey, 80 N. Y. 345 (1880), 88 N. Y. 1 (1881); Harpending v. Munson, 91 N. Y. 650 (1883).

Mortgage Covering After-acquired Property.

Where a municipality had granted a franchise to a trolley company under which it was entitled to charge a ten-cent fare and thereafter granted it an additional franchise on condition of a reduced fare over that portion of the road covered by the first franchise, and the additional franchise was accepted by the company, this constituted a valid contract and the old franchise was superseded by the new contract so far as the municipality was interested therein. Pub. Service Com. v. Westchester St. R. R. Co., 206 N. Y. 209

(1912). Where such latter franchise was granted after the execution of a mortgage on the property of the trolley company, which mortgage by its terms covered property to be thereafter acquired, and the trustee under such mortgage elected to enforce such lien against such subsequently acquired property and secured a judgment directing the sale thereof the mortgagee thereby affirmed the act of the mortgagor in obtaining the additional franchise and the terms on which it was secured, and a purchaser of the property is chargeable with notice of these facts and takes the property subject to the terms of the second franchise for a reduced fare although he did not buy the later acquired property. Id.

The lien of a mortgage upon property subsequently acquired by the mortgagor is superior to the title acquired by purchasers on the foreclosure of a mechanic's lien on the property, which lien was filed after the acquisition of the fee by the mortgagor. U. S. Mortgage & Trust Co. v. Eastern Iron Co., 120 A. D. 679 (1907), affd., 195 N. Y. 589 (1909).

A corporate mortgage may not only cover after-acquired property, but may also include an interest which the corporation has in property purchased by it under a contract which provides that the title to such property shall remain in the vendor until full payment of the purchase price; and in case of non-payment to such vendor, and foreclosure of the mortgage, he is entitled to be first paid out of the proceeds of the sale. Washington Trust Co. v. Morse Iron Works & Dry Dock Co., 106 A. D. 195 (1905).

Title acquired under foreclosure of a mortgage which expressly covered after-acquired property is sufficient to support an equitable action by the purchaser to impose a trust upon the real property, although the same was not specifically described in the mortgage. N. Y. Water Co. v. Crow, 110 A. D. 32, 36 (1905).

A corporate mortgage covering all real and personal property which the corporation had or should thereafter acquire, attaches to after-acquired property, and the lien of the mortgage upon such property is prior to the lien of subsequent attaching or judgment creditors. Platt v. N. Y. & Sea Beach Ry. Co., 9 A. D. 87, affg. 17 Misc. 22; affd., 153 N. Y. 670 (1897).

A chattel mortgage cannot be given future effect as a lien upon personal property which at the time of the delivery of the mortgage was not in existence, when rights of creditors of the mortgagor have intervened. Roch. Distilling Co. v. Rasey, 142 N. Y. 570 (1894); distgd. in Platt v. N. Y. & Sea Beach Ry. Co., 9 A. D. 87 (1896); McDonnell v. Buffalo L., T. & S. D. Co., 193 N. Y. 92 (1908); Zartman v. First Nat. Bk., 189 N. Y. 267 (1907).

Where a mortgage of all its property, made by a corporation to secure principal and interest of bonds, includes future earnings, and provides that, until default, the mortgagor shall have use of the earnings in conducting its business, and that upon default the trustee may go into possession, and appropriate the earnings to payment of the mortgage debt, the mortgage does not, as against general creditors, operate as a lien upon earnings until actual entry and possession under it. N. Y. Security & Trust Co. v. Saratoga Gas & Electric Light Co., 159 N. Y. 137, revsg. 30 A. D. 89 (1899).

A mortgage by a business corporation, under the act of 1875, upon real and personal property, covers only personal property in existence when the mortgage was given. Beebe v. Richmond Light, Heat & Power Co., 13 Misc. 737 (1895).

Refunding Mortgage to Retire Prior Bonds.

A corporation, having outstanding an issue of underlying bonds, executed a new refunding mortgage, which provided for the delivery of refunding bonds

in exchange for the underlying bonds on the delivery of the latter before or after maturity, and provided that refunding bonds should be authenticated and delivered by the trustee in exchange for underlying bonds paid or purchased by the corporation; held, that the corporation, on paying underlying bonds at maturity out of its general fund, and cancelling and depositing them with the trustee pursuant to the mortgage securing them, with a demand that the trustee certify and deliver in exchange therefor refunding bonds of equal value, was entitled to refunding bonds. Charleston Illuminating Co. v. Knickerbocker Trust Co., 138 A. D. 107 (1910), affd., 203 N. Y. 529; on the authority of Twin State Gas & Elec. Co. v. Knickerbocker Trust Co., 138 A. D. 467 (1909).

Where a consolidated mortgage, executed for the purpose of refunding prior mortgages and meeting other indebtedness, provides that a certain number of bonds thereby secured shall be used to retire prior bonds until the same shall be paid and the mortgage securing them be canceled, and that the trustees shall hold the first mortgage bonds presented for retirement as further security for payment of the consolidated mortgage bonds until all first mortgage bonds are presented or paid, and in either event the prior bonds shall thereupon be canceled, a holder of bonds secured by the prior mortgage which have been paid and canceled from a sinking fund, is not entitled to receive in exchange bonds secured by the consolidated mortgage, but is only entitled to such exchange upon surrendering uncanceled bonds. Havana Elec. Ry. Co. v. Central Trust Co., 122 A. D. 829 (1907), affd., 197 N. Y. 534.

Where the terms of a railroad mortgage given to secure refunding bonds are not unreasonable, the corporation should be held strictly to its engagements, when any doubt arises. St. Louis & San Francisco R. R. Co. v. Guaranty Trust Co., 205 N. Y. 609 (1912), affg. 144 A. D. 440.

Purchase Money Mortgages.

Independent of the statute on principles of equity a mortgage to secure the purchase price of property may be executed by a corporation without the consent of its stockholders. Coman v. Lakey, 80 N. Y. 345 (1880); Farmers' Loan & Trust Co. v. Equity Gas Light Co., 84 Hun 373 (1895); In re Beaver Knitting Mills, 154 Fed. 320 (1907).

The provision for consent of stockholders to a mortgage of corporate property does not apply to a purchase money mortgage. Clement v. Congress Hall, 72 Misc. 519 (1911).

Guaranty of Bonds.

See section 8, post, and collection of authorities thereunder.

Sale and Pledge of Bonds.

Where bonds are taken from a director in pledge for a precedent debt, the pledgee takes no better title than his pledgor. Duncomb v. N. Y., Housatonic & Northern R. R. Co., 84 N. Y. 190 (1881).

The transfer of bonds by the secretary of the corporation to the mortgage trustee, as collateral security for an individual loan to him by the latter, after the trustee certified the bonds, is an unlawful diversion of the same, notwithstanding that such secretary owned all but two shares of the capital stock. Buffalo Loan, T. & S. D. Co. v. Medina Gas & Elec. Lt. Co., 162 N. Y. 67 (1900), affg. 12 A. D. 199.

When a corporation authorizes an issue of bonds to be sold for its benefit and does not specify which officers are to sell them, the president who has received the bonds for sale and has turned over some of them to the vice-president to sell is not accountable to the corporation for the bonds so turned over, in the absence of proof of negligence or collusion against the interests of the corporation in so doing. Such president has sufficiently accounted for said bonds by showing that he turned them over to the vice-president for sale. Owego Gas Lt. Co. v. Boyer, 111 A. D. 140 (1906).

The issue of debenture bonds to be subscribed for by stockholders and paid for in part by surrender of stock is invalid as not complying with sections 23 and 42 (now sections 28 and 55) of this law, which require the issue of bonds for money, labor, or property. Merz v. Interior Conduit & Insulation Co., 20 Misc. 378 (1897).

It has been held in construing a New Jersey statute, nearly identical with section 55, Stock Corp. Law, that an issue of stock to be given as a bonus on the sale for their par value of the bonds of the corporation is illegal, and will be restrained at the suit of a stockholder, although the value of the bonds together with the stock so given, does not exceed the full par value of the bonds. Kraft v. Griffin Co., 82 A. D. 29 (1903), and cases cited.

A corporation may dispose of its bonds by pledge as well as sale. Duncomb v. N. Y., Housatonic & Northern R. R. Co., 84 N. Y. 190 (1881).

Where an officer, by means of forged documents, causes registered bonds belonging to the corporation to be sold and converts the proceeds, the corporation can recover the bonds unless he acted within the scope of his authority. Clarkson Home v. Missouri, K. & T. R. Co., 182 N. Y. 47 (1905), affg. 92 A. D. 617.

Bonds Issued at Less than Par.

The issuance of corporate bonds for a price less than their par value does not violate section 55 of the Stock Corporation Law, in view of the amendment of 1901, chapter 354. MacQuoid v. Queens Estates, 143 A. D. 134 (1911), 127 N. Y. Supp. 867. Even prior to such amendment, the issuance of corporate bonds at less than their par value was valid, in the absence of fraud or breach of fiduciary duty, because the repeal of the usury law as to corporations enabled them to issue bonds at a discount. Gamble v. Queens Co. Water Co., 123 N. Y. 91, 108 (1890).

Distinctions Between Bonds and Preferred Stock.

So-called debenture bonds issued by a corporation which contain a clause providing that they should be subordinate to the claims of general business creditors, that upon liquidation or dissolution such creditors would be entitled to priority of payment over the holders of such bonds, that the bonds should bear cumulative interest payable out of the earnings before any dividends should be paid on the stock, and that upon liquidation or dissolution the bonds after the payment of corporate debts should be entitled to the whole residue of the corporate assets, are in effect preferred stock, since the distinguishing feature of a bond is an obligation to pay a fixed sum with stated interest, while the distinguishing feature of stock is a part ownership of the assets and a right to participate in the management and share in the surplus profits and in surplus assets upon dissolution. In re Fechheimer-Fishel Co., 212 Fed. 357 (1914).

The fact that an instrument is called a bond does not determine its character. The distinguishing feature of a bond is that it is an obligation to pay a fixed sum with stated interest. It may or may not be secured, but if it is,

and the security proves to be insufficient, the indebtedness is not thereby wiped out. The distinguishing feature of stock is that it confers upon the holder a part ownership of the assets and right to participate according to the amount of his stock in the surplus profits of the corporation, and ultimately, on its dissolution, in the assets remaining after the payment of its debts. A stockholder, whether common or preferred, cannot have a lien on the property of the corporation even though the stock by its terms is accorded a lien: therefore, where an instrument denominated a bond contains a promise to pay a stated sum of money at a fixed time, and to pay meanwhile a stated rate of interest, but also provides that after certain fixed dividends have been paid on the common and preferred stock the holder of the bond is "entitled to a proportionate share in the surplus income, if any," it is a species of preferred stock. Cass v. Realty Securities Co., 148 A. D. 96 (1911), affd., 206 N. Y. 649.

Distinctions Between Bondholders and Stockholders.

Where a trust agreement for an issue of corporate bonds provided that the holders of said bonds shall be entitled to receive the full payment of the principal thereon and interest, and also an equal share with the stockholders of the balance of assets, such distribution of corporate assets, after payment of the bonds will be restrained at the suit of a minority stockholder, as inequitable and unjust and destructive of rights of stockholders in the surplus assets of the corporation. The distinction between stockholders and bondholders is that stockholders are partners in the enterprise, while bondholders are creditors. Smith v. Westchester Bronxville Realty Co., 78 Misc. 75 (1912), affd., 156 A. D. 920.

Lost or Destroyed Bonds.

A corporation mortgage provided for both coupon and registered bonds, and for the issuance of new bonds only to replace bonds which had been mutilated or destroyed, and that the bearer of any unregistered bond or coupon may be treated as the absolute owner thereof, notice to the contrary notwithstanding. Upon the loss of two of such bonds the corporation, when furnished with a bond of indemnity, may be required only to issue a certificate of indebtedness reciting the loss of the bonds, that it is given to replace them, and conditioned to become void if the bonds are found. Switzerland Gen. Ins. Co. v. N. Y. Central & H. R. R. R. Co., 152 A. D. 70 (1912).

Where registered coupon bonds are lost or destroyed the owner is entitled to duplicates upon giving a proper indemnity bond. Rogers v. Chicago & No'western Ry. Co., 6 Abb. N. C. 253 (1878); see also Hibbs v. Brown, 112 A. D. 214, affd., 190 N. Y. 167 (1907).

Coupons.

Coupons attached to a bond are part thereof and are affected by its infirmities as well as endowed with its strength, and their character is not changed by detaching them from the bond if done without authority from a purchaser thereof. Hudson Valley Ry. Co. v. O'Connor, 95 A. D. 6 (1904).

Interest coupons, payable to bearer, and attached to bonds, are negotiable promissory notes, and, if lost, the owner may maintain an action thereon, under section 1917 of the Code of Civil Procedure, upon giving a bond of indemnity, although the mortgage requires their presentation and surrender for payment. Rolston v. Central Park, North & East R. R. R. Co., 21 Misc. 439 (1897), affg. 20 Misc. 656.

The detachment of interest coupons from bonds secured by a trust mortgage does not deprive the holders of the coupons of the security of the mortgage. L. I. Loan & Trust Co. v. L. I. City & N. R. R. Co., 85 A. D. 36; affd., 178 N. Y. 588 (1903).

A guarantee of the payment of a bond does not accompany a coupon which has been severed and transferred to another person. Clokey v. Evansville & T. H. R. R. Co., 16 A. D. 304 (1897). See contra, City of Kenosha v. Lamson, 9 Wall. 484; Clark v. Iowa City, 20 Wall. 583.

Where an action is brought upon a coupon of a negotiable bond, the corporation is entitled to show that the plaintiff received the bond, knowing that it was stolen and that he did not part with value for it. Wisner v. Osteyee Bros., 24 Misc. 706 (1898), revsg. 23 Misc. 123. The burden rests upon the plaintiff to show that he was an innocent holder for value. Id.

Upon foreclosure of a corporation mortgage, the terms of which gave a preference to past-due interest coupons, a purchaser at the sale with notice must redeem such coupons. Holland Trust Co. v. Thomsen-Houston Elec. Co., 9 A. D. 473 (1896).

Interest is not collectible upon past-due coupons while they are held by the owner of the bond which they accompany. Although an exception to the rule exists where the coupons have become separated and are independent instruments, interest will not be allowed unless claimant pleads and proves the circumstances bringing the case within the exception. Klein v. East River Elec. Lt. Co., 33 Misc. 596 (1901), revsg. 32 Misc. 774. See also Same v. Same, 182 N. Y. 27 (1905).

Coupons, which prior to the issue and delivery of the bonds are detached by the mortgagor and delivered to a third person, some of them being so detached and delivered and becoming due before the mortgage was acknowledged and some of them after it was acknowledged and some of which matured at a date subsequent to the time at which they were detached and subsequent to the date of the issue and delivery of the bonds, do not represent the interest accruing upon the bonds and are not entitled to payment out of the proceeds of the sale of the mortgaged premises. Holland Trust Co. v. Thomson-Houston Co., 62 A. D. 300 (1901).

In determining the character of coupons as negotiable instruments the court must examine each o fthe securities executed simultaneously by the corporation, viz., the mortgage, the bonds, and the coupons to discover the meaning of the contract made thereby. Reference in coupons to the mortgage and the bonds charges the holder with notice of conditions contained in both instruments. McClelland v. Norfolk Southern Ry., 110 N. Y. 469 (1888).

For an instructive note on coupons as negotiable instruments see 1 L. R. A. 299.

Bondholders.

The holders of unregistered bonds secured by a trust mortgage need not be given personal notice of an application made in the bankruptcy court to sell the lands of the bankrupt mortgagor free of the lien of the mortgage, if their trustee, made a party to the proceeding, appeared therein and objected to the sale in their behalf. Equitable Trust Co. v. Vanderbilt Realty Imp. Co., 155 A. D. 723 (1913).

Corporate bonds do not stand dishonored and deprived of negotiability so far as to prevent a transferee from acquiring the status of a bona fide holder, because eight coupons representing past-due interest are attached thereto, notwithstanding that the bonds provide that principal and interest

shall become due, upon default in payment of any installment of interest for six months after maturity and demand. Buffalo Loan, Trust & Safe Deposit Co. v. Medina Gas & El. Lt. Co., 162 N. Y. 67 (1900), affg. 12 A. D. 199.

The court will not, to deprive one of the status of a bona fide holder of corporate bonds, assume that a demand for the payment of past-due interest had been made so as to mature the bonds before the purchase merely because of the commencement, before that time, of a suit to foreclose the mortgage securing the bonds, which, for some undisclosed reason, was discontinued. Buffalo Loan, Trust & Safe Deposit Co. v. Medina Gas & El. Lt. Co., 162 N. Y. 67 (1900), affg. 12 A. D. 199.

The holder of a negotiable bond is regarded as is the holder of a bill or note of the same character. Atlantic Trust Co. v. Crystal Water Co., 72 A. D 539 (1902).

Bondholders' Actions.

In a suit by a bondholder against a corporation and its directors, setting forth against the corporation a cause of action to recover proceeds of a mortgage foreclosure sale, and against the directors one to recover moneys claimed as wasted because of their wrong, the complaint is demurrable because of misjoinder of causes of action and that there was no cause of action against directors, for, under the circumstances, the action was derivative and plaintiff was not qualified to sue the directors not having exhausted his remedies against the corporation. Cass v. Realty Securities Co., 148 A. D. 96 (1911), affd., 206 N. Y. 649 (1912).

Directors are not liable for mere errors of judgment so long as they have not acted with corrupt intent and this is true whether the mistake of judgment refers to the law or the facts; therefore, an action by a bondholder is not maintainable against the directors individually where by mistake they have paid the proceeds of a sale under a prior mortgage to the general creditors of the corporation in alleged violation of the lien of a junior mortgage. Cass v. Realty Securities Co., 148 A. D. 96 (1911), affd., 206 N. Y. 649; Seymour v. Spring Forest Cem. Assn., 4 A. D. 359, affd., 157 N. Y. 697; Peo. v. Equitable Life Assur. Soc., 124 A. D. 714, 731 (1908).

Whatever rights, against the mortgagor, are vested in the trustee, inure to the benefit of the bondholder and are enforcible by him, upon refusal or neglect by the trustee to act for him upon request. O'Beirne v. Allegheny & Kinzua R. R. Co., 151 N. Y. 372 (1897), affg. 80 Hun 570.

When a demand upon a trustee of a corporate mortgage to foreclose the same would be futile, because of absence abroad or insanity, a bondholder, as the real party in interest, may appear as plaintiff in an action to foreclose. Ettlinger v. Persian Rug & Carpet Co., 142 N. Y. 189 (1894).

When a mortgage given by a railroad corporation and its organizers to a trustee to secure its bonds provides that the organizers shall convey to the trustee other property as additional security, a bondholder may maintain an action for specific performance where the trustee neglects or refuses, on request, to bring it, and to such an action the railroad company is a proper party. O'Beirne v. Allegheny & Kinzua R. R. Co., 151 N. Y. 372 (1897), affg. 80 Hun 570.

As to the right of a bondholder to maintain an action upon a guaranteed bond issued under a trust mortgage see Townsend v. Col. F. & I. Co., 16 A. D. 314 (1897).

A corporation cannot acquire the majority of the stock of another corporation, control its affairs, divert its income, refuse business which would have enabled it to pay interest on its bonds, and then institute an action in

equity to enforce the defaulted obligations, with the avowed purpose of obtaining entire control of its property to the injury of minority stockholders. Farmers' Loan & Trust Co. v. N. Y. & Northern Ry. Co., 150 N. Y. 410 (1896), revsg. 78 Hun 213.

Stockholders' Actions.

An individual stockholder cannot maintain an action for damages resulting from an alleged conspiracy entered into by the majority stockholders of a corporation to wreck it by refusing to accept business that would enable it to pay interest on its bonds, thereby causing a foreclosure sale, as such damages belong to the corporation, and not to the stockholder. Niles v. N. Y. C. & H. R. R. R. Co., 176 N. Y. 119 (1903), affg. 69 A. D. 144. Such an action must be brought by the corporation or its receiver or by any stockholder after demand on behalf of the corporation. Id. The measure of damages in such an action would be the value of the property and franchises of the corporation as it existed prior to the unlawful acts, less the amount realized on the foreclosure sale. Id.

Whether a corporation shall redeem its property from mortgages and, by so doing, practically abandon its business and appropriate its property to the payments of its debts, is a question for the directors, acting in good faith, to decide and a stockholder may not maintain an action in the right of the corporation to redeem the property. Lefi v. Nachod, 64 Misc. 497 (1909).

Invalidity of Mortgage as a Defense.

A corporation, when sued for goods to which the plaintiff claims the title under a chattel mortgage executed by the defendant, may defend on the grounds that the mortgage, not being a purchase-money mortgage, was executed without the consent of stockholders, as required by this section. London Realty Co. v. Coleman Stable Co., 140 A. D. 495 (1910).

In order to take advantage of the invalidity of a mortgage, executed without the statutory requirements having been observed, it is not necessary that the objection should be raised by a stockholder or creditor. The defense is available not only to a stockholder or creditor but to the corporation itself. Lord v. Yonkers Fuel Gas Co., 99 N. Y. 547 (1885); London Realty Co. v. Coleman Stable Co., 140 A. D. 495 (1910).

Estoppel to Deny Validity of Mortgage.

Since its enactment by L. 1901, ch. 354, the provisions of S. C. L. § 7, affect certain irregularities in recorded corporate mortgages.

A corporation and its creditors are estopped as against the mortgagee, so long as it holds the benefit of property acquired under a mortgage, from raising the objection that the necessary consents of stockholders were not given. Hamilton Trust Co. v. Clemes, 17 A. D. 152, aff'd., 163 N. Y. 423 (1900).

A creditor who assented to the execution of a corporate mortgage and remained silent until after it was foreclosed and rights of third parties have intervened, is estopped from attacking the validity of such mortgage. New Britain Nat. Bk. v. A. B. Cleveland Co., 91 Hun 447 (1895).

A stockholder cannot set up as a defense to an action to foreclose a corporate mortgage that it was not properly executed nor authorized, where interest has been regularly paid upon the bonds for twelve years to the knowledge of such stockholder. Warren v. Bigelow Blue Stone Co., 74 Hun 304 (1893).

On the foreclosure of a mortgage executed by a corporation, which subsequently consolidated with another corporation under an agreement that the

mortgage should be the obligation of the consolidated company as to the entire issue of bonds, the court without deciding whether the provision in the mortgage subjected any after-acquired property to the mortgage lien, held that the provisions of the consolidation agreement with reference to the mortgage were conclusive upon the stockholders who voted for such agreement. Drake v. N. Y. Suburban Water Co., 36 A. D. 275 (1899).

Mortgage Based on Fraud; Cancellation.

Where a mortgage was given to promoters, without the knowledge of subscribers and stockholders, to enable such promoters to reap secret profits, and subscribers to stock to the extent of $67,000 were privy to the fraud and other subscribers to the extent of $48,000 relied upon fraudulent representations or were defrauded by concealments as to such mortgage and it was assigned for value without knowledge on the part of the assignees that it was subject to any defenses; held, that an equitable result may be obtained by ascertaining who were defrauded and directing that they have their remedy through the plaintiff corporation; that the mortgage be cancelled unless the damages of those defrauded be paid, in which latter case the moneys should be held by the plaintiff as trustee for distribution to the persons defrauded. Hyde Park Terrace Co. v. Jackson Bros. Realty Co., 161 A. D. 699 (1914).

Where the owners of property promote the organization of a corporation so that they may dispose of the property to it and make a secret arrangement with two of the directors whereby they are to divide between themselves the difference between the actual value of the property and the purchase price, the corporation, upon the discovery of the fraud, may rescind the sale. Finck v. Canadaway Fertilizer Co., 152 A. D. 391 (1912), modfd. on other grounds, 208 N. Y. 607. In an action by the owners to foreclose a mortgage given by the corporation to secure the balance of the purchase price of the property and it is shown that the plaintiffs were guilty of conspiracy, the conveyance and the mortgage will be set aside. Id.

Power of Business Corporation to Issue Certificates of Indebtedness.

The defendant, a domestic business corporation, issued certificates of indebtedness which provided that in consideration of the payment thereon of certain monthly installments it would, at the expiration of ten years, pay a certain sum to the owner of a certificate, and in addition such portion of the corporate profits as the directors may consider just and equitable. The plaintiff who had paid several monthly installments and then demanded re-payment, which was refused, brought an action to recover such payments before the certificate became due, on the ground that defendant was not empowered to receive the moneys. The plaintiff's contention that such business was that of a banking corporation was not sustained and in the absence of proof to the contrary it is to be presumed that such certificates are within the powers of the defendant. Jacobs v. Monaton Realty Inv. Corpn., 212 N. Y. 48 (1914).

Receivers' Certificates Issued to Pay Interest on Mortgage Bonds.

Certificates issued in a sequestration action to pay interest on a mortgage to prevent a default are void because the court has no power to authorize such issue and the holders thereof are not entitled to payment as against bondholders out of a fund arising from a foreclosure sale. Knickerbocker Trust Co. v. Oneonta, C. & R. S. Ry. Co., 201 N. Y. 379 (1911), affg. 138 A. D. 687. The bondholders are not estopped by receipt of the interest by the trustee from attacking the validity of the certificates. Id.

Liability of Trustee of Mortgage.

Where the subscription agreement for bonds of a railroad company provided for installment payments to the railroad at the office of the trustee of the mortgage which was to be thereafter executed, such trustee receives the money as agent of the railroad company, and when it was understood that the money was to be used as needed in constructing the railroad, the trustee is not liable for the moneys so paid because in violation of a first mortgage which had never been executed. Elliot v. Guardian Trust Co., 145 A. D. 166 (1911), modfd. 204 N. Y. 212.

Where a trust mortgage provided that the proceeds of any sale of bonds thereunder should be applied to the payment of a prior mortgage and the trustee agreed to so apply them, but upon receiving such proceeds suffered the mortgagor to withdraw them instead of discharging the prior mortgage, there was a violation of the covenant upon the part of the trustee and it became liable to a holder of bonds issued as paid-up who was injured thereby because of the foreclosure of the prior mortgage. Patterson v. Guardian Trust Co., 144 A. D. 863 (1911).

A trust company is not liable for representations of its vice-president that a mortgage under which the company was trustee was a first mortgage when the mortgage was in fact subject to existing prior mortgages. Davidge v. Guardian Trust Co., 203 N. Y. 331 (1911).

For construction of an agreement binding a trust company, holding pledged bonds as collateral security, to bid at any mortgage foreclosure sale of the property of the railroad and to become the purchaser at any such sale, and conferring certain discretionary power upon such trust company, see Bean v. Trust Co. of America, 136 A. D. 69 (1910).

Distribution of Proceeds of Foreclosure Sale.

A holder of corporate bonds pledged as collateral for his debts, who takes up the coupons as they mature to protect the credit of the company, is not entitled to have them participate in the proceeds of a mortgage foreclosure as against the pledgee, but they may participate as against all other parties in interest. Atlantic Trust Co. v. Kinderhook & Hudson R. Ry. Co., 17 A. D. 212 (1897).

Corporate bonds not actually issued and past-due coupons cut from bonds at the time they were issued, and retained by the company, cannot participate in the distribution of the proceeds of a sale of the mortgaged property. Atlantic Trust Co. v. Kinderhook & Hudson R. Ry. Co., 17 A. D. 212 (1897).

A person cannot acquire good title to bonds originally diverted by being pledged by him to an innocent holder by thereafter personally assuming the obligation for which the pledge was made of the bonds and taking an assignment. Holders who purchased part of the bond issue for value were entitled to preference in payment out of the proceeds of the foreclosure sale. Shaw v. Saranac Horse Nail Co., 78 Hun 7 (1894), affd. with modifications not affecting point cited, 144 N. Y. 220 (1894).

The rights of stockholders are subordinate to those of creditors, and the courts will not approve any judgment which directs a sale of all the corporate property in the interest of a stockholder, or of one particular class of stockholders, which makes no provision for the payment of creditors. Drake v. N. Y. Suburban Water Co., 26 A. D. 499 (1898).

Where a corporation is in the hands of a receiver appointed in foreclosure proceedings under a mortgage given to secure its bonds, a holder of past-due coupons gains no preference by levying under a judgment obtained by him upon such coupons, on personalty of the corporation included in the said

mortgage, when it has been duly recorded where its real estate is located, as under L. 1868, ch. 779, am'd by L. 1895, ch. 529 (now Lien Law, § 231), such recorded mortgage need not be filed or refiled as a chattel mortgage. Guaranty Trust Co. v. Troy Steel Co., 33 Misc. 484 (1900).

Coupons, which prior to the issue and delivery of the bonds are detached by the mortgagor and delivered to a third person, some of them being so detached and delivered and becoming due before the mortgage was acknowledged and some of them after it was acknowledged, and some of which matured at a date subsequent to the time at which they were detached and subsequent to the date of the issue and delivery of the bonds, do not represent the interest accruing upon the bonds and are not entitled to payment out of the proceeds of the sale of the mortgaged premises. Holland Trust Co. v. Thomson-Houston Co., 62 A. D. 300 (1901).

Special Clauses and Agreements.

Where a corporation was unable to pay an installment on a mortgage, an agreement was made whereby the mortgagee agreed to accept less than the principal in full payment, if paid at a fixed date, and the corporation agreed, in case of default of payment, to deliver a deed of the mortgaged premises to the mortgagee in satisfaction of the debt. Held, said agreement was valid; that the act of the trustees in executing the deed was not ultra vires. Wolf v. Arminus C. M. Co., 6 Misc. 562 (1894), distg. Abbott v. Hard Rubber Co., 33 Barb. 580 (1861).

Under a guarantee of punctual payment of principal and interest of bonds "when and as the same shall become due and payable," the guarantor is liable for the principal where the mortgage trustee, pursuant to the terms of the mortgage and deeds, declares the same due and payable because of non-payment of interest. Dougan v. Evansville & T. H. R. R. Co., 15 A. D. 483 (1897).

A railroad mortgage, which provides that, on a prescribed default in the payment of interest, the trustee might take possession of the mortgaged property and operate the road to pay the interest and principal of the bonds, entitles such trustee as against a permanent receiver appointed upon a dissolution of a corporation, to operate the road. Matter of New Paltz & Wallkill V. R. R. Co., 26 Misc. 324 (1899).

An agreement between the receivers of a railroad company and a trustee of a mortgage given by such company to secure its bonds, to prevent competition at a foreclosure sale, is void. Atkins v. Judson, 33 A. D. 42 (1898).

When a trust mortgage covering all the property of a corporation, executed to secure its bonds, contains a provision that the mortgagor has power "to have, hold, use, possess and enjoy" the mortgaged property then owned or thereafter acquired and "to receive the income and profits thereof to its own use and benefit," etc., it vitiates the mortgage as against the claims of general creditors. Zartman v. First Nat. Bk. of Waterloo, 109 A. D. 406 (1905), affd., 189 N. Y. 267.

Promissory Notes of Corporations.

See, also, "Officers, Duties and Liabilities," ante.

Although a corporation has no power to make or endorse notes for the accommodation of others, yet it is bound if it makes or endorses commercial paper for the accommodation of another in respect to a bona fide holder who discounts it before maturity on the faith of its being business paper. Jacobus v. Jamestown Mantel Co., 211 N. Y. 154, 160 (1914). This rule, however, does not apply where the corporate officers do not have authority to sign commercial paper in the ordinary course of the business of the corporation. Id.

Even if proof of the execution of a promissory note by the president and treasurer were sufficient to bind the corporation on a note made for its benefit, such rule does not prevail if the note was in fact accommodation paper, and the plaintiff knew of this defect. Nat. Bk. of Newport v. H. P. Snyder Mfg. Co., 107 A. D. 95 (1905).

A business corporation having the general power to bind itself by promissory notes and contracts of endorsement, a plaintiff is entitled to recover, if he is a holder of the notes for value and without notice that they were endorsed for the accommodation of the makers and not in the usual course of business. Nat. Park Bk. v. German-Am. Mutual Warehousing & Security Co., 116 N. Y. 281, 292 (1889).

A note given by a corporation in payment of its own stock in good faith and at a time when the corporation was solvent, cannot be enforced as against the corporation where the corporation was insolvent at maturity, the note being in effect a promise to pay out of surplus profits if payment could be made without prejudice to creditors. In re Fechheimer-Fishel Co., 212 Fed. 357 (1914).

Where a promissory note has been signed in the corporate name by the treasurer and vice-president as such and is made payable to one of such persons, the form of such note is sufficient to put a party on inquiry as to the authority of the corporation to execute it and as to its consideration, and he is chargeable with such knowledge as he might have acquired. Newman v. Newman, 160 A. D. 331 (1914).

If the issuance of negotiable paper is authorized by a corporation and the obligation is executed in the form and manner required by the authority conferring the power, the corporation will be liable even though its officer or agent should divert it and appropriate the proceeds of discounting the paper to his own use. Miners & Merch. Bk. v. Ardsley Hall Co., 113 A. D. 194, 200 (1906), citing 93 A. D. 442.

A corporation is liable upon its note countersigned by its president on money loaned to it which was used for the purchase of claims against the corporation, which claims when paid were assigned to the president personally, and in such case the president holds the claims in trust for the corporation. Gaitley v. Albany Foundry Co., 157 A. D. 10 (1913).

A corporate note signed by the president, but not countersigned by the treasurer as required by the by-laws, is valid against the corporation and indorser where such note went into the hands of a bona fide holder and the corporation received the benefit of the proceeds. Nat'l Spraker Bk. v. Geo. C. Treadwell Co., 80 Hun 363 (1894); Bigelow Co. v. Automatic Gas Producer Co., 56 Misc. 389 (1907).

The principle, that where an officer or agent of a corporation makes a corporate obligation payable to himself, it bears upon its face sufficient notice of his incapacity to issue it, when he attempts to deal with it for his own benefit, does not apply where an officer or agent deals with a corporate note, executed by himself as such officer or agent, but originally payable to a third party, and which, so far as appears upon its face, had been regularly issued to the original payee and by him transferred to a firm of which the officer is a member and for which he acted in dealing with the note. Cheever v. Pittsburg, Shenango & L. E. R. R. Co., 150 N. Y. 59 (1896).

The purchaser of a promissory note, purporting to have been issued by a corporation, who makes the purchase under circumstances which devolve upon him the duty of inquiry as to its validity, assumes the risk, by failing to inquire, of proving that the facts he could have discovered, had he made inquiry, would have protected him. Wilson v. Met. Elev. Ry. Co., 120 N. Y.

145 (1890); Rochester & Charlotte Turnpike Rd. Co. v. Paviour, 164 N. Y. 281, 286 (1900).

There seems to be a distinction between actions on promissory notes of business and religious corporations with respect to what evidence is sufficient to establish a prima facie case that the paper was issued by corporate authority. People's Bank v. St. Anthony's R. C. Church, 109 N. Y. 512; Karsch v. Pottier & Stymus Mfg., etc., Co., 82 App. Div. 230. The weight of authority is that a recovery cannot be had against either a religious or a business corporation on commercial paper unless the evidence shows or warrants a finding not only that the paper was issued by corporate officers, but that its issuance was authorized by the by-laws, or by a resolution of the directors, or by a course of dealing by which the corporation held them out as authorized to issue it and would be deemed estopped from questioning their authority, or of ratification by acceptance and retention of some benefit from the unauthorized act or otherwise. Miners & Merchants' Bk. v. Ardsley Hall Co., 113 A. D. 194, 199 (1906).

It has been considered doubtful whether the mere fact that a corporate note was signed by the president and treasurer is sufficient to establish the validity of the note. People's Bk. v. St. Anthony's R. C. Ch., 109 N. Y. 512 (1888); Bangs v. Nat'l Macaroni Co., 15 A. D. 522, 524 (1897). It has been held that there should be proof of the specific authority to affix the corporate name to the note as its obligation, or that the corporation received the avails of the note, or that there was a course of business which justified the person in accepting it as the obligation of the corporation, Nat'l Bk. of Newport v. H. P. Snyder Mfg. Co., 107 A. D. 95, 97 (1905); Bigelow Co. v. Automatic Gas Producer Co., 56 Misc. 389, 392 (1907); Nat'l Spraker Bk. v. Geo. C. Treadwell Co., 80 Hun 363 (1894). The strict rule enunciated in the foregoing cases has been modified in a later case, where it was held that a third party taking negotiable paper made by a corporation is justified in assuming that the officers had authority to execute it and is not bound by any limitation placed upon the powers of the officers unless such limitation has been brought to his knowledge. Bacon v. Montauk Brewing Co., 130 A. D. 737, 743 (1909), citing Miners & Merch. Bk. v. Ardsley Hall Co., 113 A. D. 195. The trend of modern decisions with respect to the authority of the officers, when the interests of third parties dealing with the corporation come into question, has been to extend rather than to restrict their powers, and the former strict rule announced in Bangs v. Nat'l Macaroni Co., 15 A. D. 522, and cases cited, has not been adhered to. Id.

Where the language of a negotiable promissory note, given for the debt of a corporation, fails to disclose the corporate obligation, and the signatures are in the names of individuals, who are in fact officers of the corporation, a bona fide holder, without notice of the circumstances of its making, is entitled to hold it as the personal obligation of its signers, although they have affixed to their signatures the title of their respective offices, because this will be regarded as descriptive of the persons and not of the character of the liability. In the absence of proof showing or charging knowledge in the holder as to the character of the obligation, it must be regarded as the contract of its ostensible maker and not of some other party not disclosed by its language or manner of execution. Casco Nat. Bk. v. Clark, 139 N. Y. 307 (1893).

A promissory note, bearing the words "we promise to pay," signed with the name of a corporation, followed by the individual signature of one who is its president, is ambiguous, thus:

"$1,750. NEW YORK, *April* 27, 1906.

"On July 2nd after date we promise to pay to the order of Dunbar Box & Lumber Company, seventeen hundred and fifty dollars at Phenix National Bank, 49 Wall Street. Value received.

"VARICK CONTRACTING COMPANY,
"John L. Martin."

Evidence is admissible for the purpose of showing that such note was a corporate obligation and not an individual note nor the joint note of the corporation and its president. Dunbar Box & Lumber Co. v. Martin, 53 Misc. 312 (1907).

Usury not a Defense.

Corporations are prohibited from interposing the defense of usury by the General Business Law (L. 1909, ch. 25), section 374, which is a re-enactment of L. 1850, ch. 172, and reads as follows:

§ 374. **Corporations prohibited from interposing defense of usury.**—No corporation shall hereafter interpose the defense of usury in any action. The term corporation, as used in this section, shall be construed to include all associations, and joint-stock companies having any of the powers and privileges of corporations not possessed by individuals or partnerships. Gen. Bus. Law, § 374.

This statute is retrospective in its operation upon the contracts of corporations; and it is no objection to a statute repealing a penal enactment that it does so operate. Curtis v. Leavitt, 15 N. Y. 9 (1857); Southern Life Ins. & Trust Co. v. Packer, 17 N. Y. 51 (1858).

No matter what the discount may be, usury cannot grow out of buying paper from a corporation, even where the paper is made for the corporation's accommodation. Farrow v. Holland Trust Co., 74 Hun 585 (1893).

The prohibition against setting up the defense of usury applies to foreign as well as domestic corporations. Southern Life Ins. Co. v. Packer, 17 N. Y. 52 (1858).

Neither the corporation maker of a note nor its indorsers can plead usury as a defense to the note. Ludington v. Kirk, 17 Misc. 129 (1896).

Neither the corporation nor a stockholder thereof can maintain a suit to set aside a corporate obligation on the ground that it provided for usurious interest. McQuoid v. Queens Estates, etc., 143 A. D. 134 (1911); 127 N. Y. Supp. 867.

Where a corporation was organized by executors to take over the property of an estate and to continue the business of the testator, which corporation, under a special legislative act was endowed with the power to act as administrator of the estate, such facts do not separate the corporation from the corporation as administrator; therefore, the statute prohibiting the defense of usury is applicable, under the theory that the estate could not avail itself of the privileges conferred by law upon a corporation and at the same time repudiate the restrictions placed by law upon a corporation. De Moltke-Huitfeldt v. Garner & Co., 145 A. D. 766 (1911).

Days of Grace Abolished.

The act of 1894, ch. 607, abolishing days of grace, was repealed and superseded by the Negotiable Instruments Law, ch. 612, L. 1897 (now L. 1909, ch. 43), section 145 of which reads as follows:

§ 145. **Time of maturity.**—Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon

Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due or becoming payable on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.

§ 7. **Validating corporate mortgages.** Whenever any mortgage affecting property or franchises within this state heretofore or hereafter executed by authority of the board of directors in behalf of any stock corporation, domestic or foreign, of any description, recites or represents in substance or effect that the execution of such mortgage has been duly consented to, or authorized by stockholders, such recital or representation in any such mortgage, after public record thereof within this state, shall be presumptive evidence that the execution of such mortgage has been duly and sufficiently consented to, and authorized by stockholders as required by any provision of law. After any such mortgage heretofore or hereafter shall have been publicly recorded for more than one year in one or more of the counties of this state containing the mortgaged premises or any part thereof, and the corporation shall have received value for bonds actually issued under and secured by such mortgage, and interest shall have been paid on any of such bonds according to the terms thereof, such recital or representation of such mortgage so recorded shall be conclusive evidence that the execution of such mortgage has been duly and sufficiently consented to, and authorized by stockholders as required by any provision of law, and its validity shall not be impaired by reason of any defect or insufficiency of consent or authority of stockholders or in filing or recording such consent or authority, and such mortgage shall be valid and binding upon the corporation, and those claiming under it, as security for all valid bonds issued or to be issued thereunder, unless such mortgage shall be adjudged invalid in an action begun as hereinafter, in this section, provided. Notwithstanding the foregoing provisions of this section, the invalidity of any such mortgage heretofore recorded because of insufficiency of consent by stockholders may be adjudged in any action for such purpose begun before the first day of April, nineteen hundred and two, and the invalidity of any such mortgage hereafter recorded, because of insufficiency of consent by stockholders, may be adjudged in any action for such purpose begun, within one year after the earliest record of such mortgage in any county in this state,

provided in either case that such action shall have been so begun by or in behalf of the corporation by direction of the board of directors acting in their own discretion, or upon the written request of the holders of not less than one-third of the capital stock of the corporation; and in any such action so begun by or in behalf of the corporation, the recitals or representations of the mortgage shall be presumptive evidence only as first above provided. Whenever hereafter, in compliance with any law of this state, the officers of any corporation shall have made and filed and recorded a certificate that the execution of a mortgage hereafter made by the corporation has been duly consented to by stockholders, such certificate shall be conclusive evidence as to the truth thereof, in favor of any and all persons who in good faith shall receive or purchase, for value, any bond or obligation purporting to be secured by such mortgage, at any time when said certificate shall remain of record and uncanceled. Nothing in this section contained shall affect any right or any remedy in respect of any such right of any creditor accrued before this enactment nor shall it dispense with the necessity of obtaining the consent of the public service commission having jurisdiction thereof to any mortgage by a railroad corporation.

Formerly § 8, being the new provisions added by L. 1901, ch. 354.

CONSOLIDATORS' NOTE.— This section was formerly section 8. It contained no heading and so the heading "Validating corporate mortgages" has been added. It was made section 7 so that it would follow the other matter relating to corporate mortgages contained in section 6, in order to have all matter relating to the same subject-matter as closely together as possible. The advantage of such transpositions is readily seen, and wherever the same thing could be accomplished in other portions of the statute, it has been done.

The foregoing section applies to both foreign and domestic corporations. For other provisions in relation to foreign corporations, see the index.

In explanation of the foregoing section the text of the memorandum supporting the same and filed with the legislative committee prior to the enactment of this section is given herewith, to wit:

"This section undertakes to prescribe a period (not less than one year from the passage of this act) after the expiration of which it shall be conclusively presumed that any mortgage, executed by the authority of the board of directors of any domestic or any foreign stock corporation, has been authorized by the stockholders, if such mortgage, having been publicly recorded for more than one year, contains a recital to that effect. In other words, the bill proceeds upon the theory that though the consent of stockholders is necessary to the execution of any mortgage heretofore or hereafter made by a stock corporation under section 2 (now section 6) of the Stock Corp. Law, or by a railroad corporation under section 4, subdivision 10 of the Railroad Law, the acquiescence of stockholders for a long period after the publication of such a mortgage containing a recital of stockholders' assent, shall constitute a bar to their right to contest the mortgage purporting to secure bonds which have been negotiated and issued and upon which interest has been paid.

"This is in exact accordance with the prevailing public policy of this State, recognizing and applying the doctrine of estoppel by acquiescence. Kent v. Quicksilver Mining Co., 78 N. Y. 159; New Britain Nat. Bk. v. A. B. Cleveland Co., 91 Hun 447, 158 N. Y. 722, 159 N. Y. 528.

"It also accords with the long-established policy of this State, which from an early date has discountenanced technical defenses by corporations to the enforcement of their obligations; as, for instance, the act prohibiting corporations from pleading usury (now Gen. Bus. L. of 1909, ch. 25, § 374), and the section of the Code denying to corporations in certain cases the right to interpose a demurrer except by the express leave of the court (Code, § 1778).

"That acquiescence for a long period should estop stockholders from disputing the directors' publicly recorded declaration that stockholders have duly assented to a mortgage upon the faith of which bonds have been sold to the public, is a proposition which for its support seems to require no argument.

"But to constitute an estoppel out of such acquiescence, legislative authority is necessary, if under the corporation laws the mortgage is void unless assented to by stockholders; for it is familiar law that as against a void instrument, no lapse of time constitutes an estoppel (see 98 Fed. Rep. 666–671); and it is the declared law of this State that without stockholders' assent, as required by statute, a corporate mortgage is absolutely void. Vail v. Hamilton, 85 N. Y. 456; The Vigilancia, 73 Fed. Rep. 452–457.

"Originally, the requirement of stockholders' assent was of limited application; for, at first, it prevailed only in respect of manufacturing corporations. Their financial transactions were small in comparison with those of the present time, when the bonds of industrial corporations, both domestic and foreign, have become a familiar and extensive form of investment. * * *

"When it is considered that an assent, perfect in form, may be subject to vitiation because of some latent and undisclosed technical irregularity, it is obvious that sound public policy, as well as the interest of the investing public, requires that at some time there should arise a statutory bar to the possibility of pleading or proving any latent technical defect.

"This is not less obvious when it is recalled that by recent legislation, the savings banks — which are the favored institutions of the State — have been authorized to invest in the corporate bonds of railroad companies.

"The new section provides, first that the directors' recital in a mortgage publicly recorded, shall constitute presumptive evidence; and, secondly, that after the expiration of a year from the public record of a mortgage containing such a recital, the valid assent of stockholders shall be conclusively presumed, if bonds have been issued for money actually received by the corporation and interest paid thereon.

"Inasmuch as very properly the amendment applies both to past and future mortgages, the concluding paragraphs of the section protect existing rights by giving to the board of directors, or to one-third of the stockholders of a corporation, the opportunity at any time within a year after the public record of the mortgage, or within a year after this enactment, to contest the same for lack of stockholders' assent; and the existing rights of creditors also are preserved.

"The constitutionality of a retroactive statute providing that certain instruments shall constitute presumptive proof, is recognized in the case of Howard v. Moot, 64 N. Y. 262–268.

"The constitutionality of legislation constituting a short statute of limitations, has been established by the Court of Appeals in the cases of People v. Turner, 117 N. Y. 227, 145 N. Y. 459, and Meigs v. Roberts, 162 N. Y. 371–378.

"This section also provides that the certificate hereafter filed by the officers under section 2 (now section 6) shall be conclusive in favor of bona fide purchasers of bonds who become such while said certificates shall remain of record and uncancelled."

§ 8. **Power to guarantee bonds of other corporations.** Any stock corporation may, in pursuance of a unanimous vote of its stockholders voting at a special meeting called for that purpose by notice in writing signed by a majority of the directors of such corporation stating the time and place and object of the meeting, and served upon each stockholder appearing as such upon the books of the corporation, personally or by mail at his last-known post-office address at least sixty days prior to such meeting, guarantee the bonds of any other domestic corporation engaged in the same general line of business; and any stock corporation owning the entire capital stock of any other domestic stock corporation engaged in the same general line of business may in pursuance of a two-thirds vote of its stockholders voting at a special meeting called for that purpose by notice in writing signed by a majority of the directors of such corporation, stating the time and place and object of the meeting and served upon each stockholder appearing as such upon the books of the corporation personally, or by mail, at his last-known post-office address, at least sixty days prior to such meeting, guarantee the bonds of such other corporation.

Formerly L. 1890, ch. 564, part of § 40, as am'd by L. 1892, ch. 688; L. 1902, ch. 601.

For forms of guarantee of corporate bonds, see Forms Nos. 282–284.

CONSOLIDATORS' NOTE.— Portion of former section 40 has been transferred to article 2 because it is a general provision regulating the powers of stock corporations.

The last clause, permitting a corporation owning the entire capital stock of another corporation to guarantee the bonds of the latter pursuant to a two-thirds vote of the stockholders, was added by L. 1902, ch. 601.

No statute of this State makes it illegal for a foreign corporation to guarantee the payment of bonds of another corporation. Dougan v. Evansville & T. H. R. R. Co., 15 A. D. 483, 44 Supp. 503 (1897).

In an action against a corporation upon a guaranty of another corporation's bonds, an allegation in the complaint that the guaranty was made by defendant "having authority so to do," is one of fact and not a conclusion of law. Bryce v. Louisville, N. A. & C. Ry. Co., 73 Hun 233 (1893).

Where stock was purchased upon condition that a guaranty was to be given in respect thereto, but such guaranty was not delivered until several

days after the purchase, held that the purchase of stock and the guaranty were parts of the same transaction, and the purchase of stock was a sufficient consideration to sustain the guaranty. Oppenheim v. Waterbury, 86 Hun 122 (1895), affd., 155 N. Y. 684.

Where a corporation whose obligations were guaranteed became bankrupt a demand upon it is not a condition precedent to an action against a guarantor. First Nat. Bk. of Waterloo v. Story, 131 A. D. 472 (1909).

Guaranty of Bonds Construed.

Where debenture bonds contain a clause giving to holders the right to declare the principal due in case the obligor thereafter mortgages its property to secure any future issue of bonds, a guarantor of the payment of such debentures "at the time and in the manner therein specified," is liable on the execution of a mortgage by the obligor, and the obligation of the guarantor is not deferred until the due date named in such debentures, as the guaranty applies to payment on the earlier date arising from the execution of the mortgage and the election of holders to declare the debentures due. Dwight v. Guanajuato Cons. Mining & M. Co., 142 A. D. 354 (1911); 126 N. Y. Supp. 1083.

Contract of Guaranty; Presumption of Authority.

A contract by a corporation written on bonds issued by another corporation, which it controlled by stock ownership, providing that it "hereby endorses the within bond and guarantees to the holder * * * the payment in full of the principal and interest as provided thereby," to secure which it gave a collateral mortgage on its own property, is a contract of guaranty, and not of indorsement, and is within the powers of the corporation if authorized by the stockholders as required by this section. Gay v. Hudson River Elec. Power Co., 190 Fed. 773 (1911). Where such a guarantee recites that the guarantor has voted and agreed to indorse and guarantee the payment of the within bond, the presumption is that the guaranty was authorized by vote of the stockholders as required by statute. Id.

§ 9. Reorganization upon sale of corporate property and franchises. When the property and franchises of any domestic stock corporation shall be sold by virtue of a mortgage or deed of trust, duly executed by it, or pursuant to the judgment or decree of a court of competent jurisdiction, or by virtue of any execution issued thereon, and the purchaser, his assignee or grantee shall have acquired title to the same in the manner prescribed by law, he may associate with him any number of persons, not less than the number required by law for an incorporation for similar purposes at least two-thirds of whom shall be citizens of the United States and one shall be a resident of this state, and they may become a corporation and take and possess the property and franchises thus sold, and which were at the time of the sale possessed by the corporation whose property shall have been so sold, upon making and acknowledging and filing in the offices where certifi-

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cates of incorporation are required by law to be filed, a certificate in which they shall describe by name and reference to the law under which it was organized, the corporation whose property and franchises they have acquired, and the court by whose authority the sale had been made, with the date of the judgment or decree authorizing or directing the same, and a brief description of the property sold, and also the following particulars:

1. The name of the new corporation intended to be formed by the filing of such certificate; and the place where its principal office is to be located.

2. The maximum amount of its capital stock and the number of shares into which it is to be divided, specifying the classes thereof, whether common or preferred, and the amount of and rights pertaining to each class.

3. The number of directors, not less nor more than the number required by law for the old corporation, who shall manage the affairs of the new corporation, and the names and post-office addresses of the directors for the first year. They may insert in such certificate any provisions relating to the new corporation, or its management, contained in any plan or agreement which may have been entered into as provided in section ten of this chapter. Such corporation shall be vested with, and be entitled to exercise and enjoy, all the rights, privileges and franchises, which at the time of such sale belonged to, or were vested in the corporation last owning the property sold, or its receiver, and shall be subject to all the provisions, duties and liabilities imposed by law on that corporation. Any proceedings heretofore taken in substantial compliance with this section as hereby amended, and any and all incorporations based thereon are hereby ratified and confirmed.

Formerly L. 1890, ch. 564, § 3, as am'd L. 1892, ch. 688; L. 1901, ch. 354; L. 1902, ch. 80; L. 1904, ch. 706.

Scope of Section.

This right of reorganization was formerly conferred only upon railroad corporations under L. 1873, ch. 469; L. 1874, ch. 430, and L. 1876, ch. 446, each of which is now repealed and superseded by the above and the three immediately succeeding sections, by the terms of which the right is extended to all domestic stock corporations, except banks and insurance corporations, the latter being excluded by section 5 of this law.

Amendments of 1901 and 1902.

By L. 1901, ch. 354, the provision that a majority of the persons reorganizing the corporation must be citizens of the United States and residents

of the State of New York, was modified so as to provide that at least two-thirds must be citizens of the United States and at least one a resident of the State, thus conforming these qualifications to those prescribed in regard to incorporation of companies de novo.

The words, "his assignee or grantee" in the fifth line, were inserted by the amendment of 1902, and the last sentence was also added, ratifying and confirming incorporations theretofore based on proceedings under this section.

Filing and Recording Certificate.

The certificate above provided for must be filed and recorded in the office of the Secretary of State, and a duplicate original, or a copy certified by the Secretary of State, must also be filed and recorded in the office of the clerk of the county in which the office of the new corporation is to be located. Gen. Corp. Law, § 5.

Organization Tax.

The tax of one-twentieth of one per cent. for the privilege of organization must be paid by the reorganized corporation, as it is a new corporation within the meaning of the Organization Tax Law. Peo. ex rel. Schurz v. Cook, 110 N. Y. 443, affd., 148 U. S. 397; Peo. ex rel. Mertens v. Cook, id. (1888), affd., 154 U. S. 512.

Public Service Commission.

Formation of a new corporation by the purchaser at a foreclosure sale of independent parts of property of an insolvent railway company, and persons associated with him, without having first entered into a plan or agreement in anticipation of the readjustment of the respective interests of creditors and others interested in the corporation, is not a reorganization of the insolvent corporation within the meaning of the Stock Corporation Law, sections 9 and 10. Peo. ex rel. Westchester St. R. R. Co. v. Pub. Serv. Com., 210 N. Y. 456 (1914), modfg. 158 A. D. 251. Such new corporation is subject to the authority of the Public Service Commission as provided by section 55 of the Public Service Commissions Law. Id.

The provisions of sections 9 and 10 are not inconsistent with sections 53, 54 and 55 of the Public Service Commissions Law. The two statutes are not in conflict and must be construed together. A public service corporation reorganized in accordance with sections 9 and 10 must first secure an order authorizing an issue of stocks and bonds under section 55 of the Public Service law. Peo. ex rel. Third Ave. Ry. Co. v. Pub. Service Com., 203 N. Y. 299 (1911), affg 145 A. D. 318. The commission is not justified in refusing to consent to the issue of securities under a plan of reorganization after foreclosure because the value of the mortgaged property and the amount of new capital to be invested is less than the amount of securities to be issued. Development expenses are taken into consideration in determining the value of railroad property as a whole for the purpose of capitalization. Id.; Peo. ex rel. Third Ave. R. R. Co. v. Tax Comrs., 157 A. D. 731, 749 (1913).

Reorganization and Reincorporation.

Any number of persons may purchase the property for themselves and organize a new corporation, which will possess all the powers, rights, privileges and franchises of the prior corporation. Vatable v. N. Y., L. E. & W. R. R. Co., 96 N. Y. 49 (1884). See, also, Pratt v. Munson, 84 N. Y. 582; Thornton v. Wabash Ry. Co., 81 N. Y. 462 (1880).

The right to be a corporation, which the old corporation had, was not

mortgaged or sold, and so did not pass to the purchasers. They obtain such right upon filing the certificate mentioned, and then only by direct grant from the State. Peo. ex rel. Schurz v. Cook, supra. See, also, Metz v. Buffalo, Corry & Pittsb. R. R. Co., 58 N. Y. 61 (1874).

If the promoter of the reorganization of a railroad controlled by him contracts with another to deliver to him, upon completion of the road, a certain amount of bonds and stock of the reorganized road, for services to be performed in connection with the reorganization, and the promisee performs such services, he will not be deprived of his right to compensation merely because the reorganization and completion were not accomplished by the agencies or in the manner first seelcted by the promoter and embodied in a contract between him and a third party. Babbitt v. Gibbs, 150 N. Y. 281 (1896), revsg. 76 Hun 613.

A promise by one holding receiver's certificates to furnish the money for a reorganization agreement which he did not sign, in consideration of the validity of his certificates, which were being disputed, is rendered binding by the prompt amendment of the decree of foreclosure to that effect and discontinuance of a pending suit to test the validity of such certificates. Cox v Stokes, 156 N. Y. 491 (1898), revsg. 78 Hun 331.

This section does not prevent a sale or transfer by a purchaser to a corporation already existing and capable of holding the property and exercising the franchises. Peo. v. Brooklyn, Flatbush & C. I. Ry. Co., 89 N. Y. 75 (1882).

Reorganization Committees.

When a reorganization committee has received bonds under an agreement for the purchase of property at a foreclosure sale failure to observe all the details of the agreement will not subject its members to liability in tort although there may be a remedy for breach of contract. Industrial & General Trust v. Todd, 170 N. Y. 233 (1902), revsg. 52 A. D. 195.

A reorganization agreement limits and defines the powers of the committee, and they cannot change such agreement without consent of the bondholders. Cox v. Stokes, 156 N. Y. 491 (1898), revsg. 78 Hun 331.

A plan for the reorganization of a corporation, prepared by a voluntary committee and tendered to bondholders, who accept it, should be strictly construed against the committee. United Water Works Co., Ltd. v. Omaha Water Co., 164 N. Y. 41, revsg. 29 A. D. 630 (1900).

An agreement by a bondholding committee to purchase a railroad at foreclosure sale and convey it is not void as stifling competition at the sale. Munson v. Magee, 22 A. D. 333; affd., 161 N. Y. 182 (1900).

The fact that the members of a reorganization committee, holding in trust, a controlling interest of the stock of a railroad, with power to vote thereon, until such time, not to exceed five years from the date of sale, as the condition of the road should, in their judgment, warrant the distribution thereof among the bondholders, have disposed of stock of the road held by them individually, does not affect their authority as members of the committee to act as directors and to hold and vote upon the trust stock. Haines v. Kinderhook & Hudson Ry., 33 A. D. 154, affg. 23 Misc. 605 (1898).

A stockholder, permitted ex gratia to participate in a bondholders' agreement for the reorganization of an insolvent railroad and who has failed to comply with the regulations of the plan lawfully established by its reorganization committee, has no status to procure a modification thereof. Miller v. Dodge, 28 Misc. 640 (1899).

On a demurrer to a complaint of a stockholder of a corporation, who had joined in a plan of reorganization, deposited his stock with a depositary,

and a reorganization committee was appointed to act as agents and trustees for carrying out a plan of reorganization by forming a new corporation; held that a fiduciary relation existed between the depositors and the members of such committee. Mawhinney v. Bliss, 117 A. D. 255 (1907), affd., 189 N. Y. 501.

Rights of Stockholders.

The rights of each stockholder of the prior corporation will be cut off by foreclosure and sale. The only property interest left to him is in the surplus, if any, after satisfying the mortgage and other preferential claims. Vatable v. N. Y., L. E. & W. R. R. Co., 96 N. Y. 56 (1884). If, however, the purchasers buy in pursuance of a plan for adjustment of the respective interests of the mortgage creditors and stockholders, then such plan must be embodied in the certificate to be filed. Id. In such case the statute secures to a stockholder the option to join the new company by compliance with the terms of the plan. Id.

A minority stockholder cannot maintain an action for damages his stock sustained by defendant's tortious acts in improperly forcing foreclosure of a mortgage upon corporate property. If the corporation which has been injured refuses to sue, it is a necessary party to an action brought in behalf of plaintiff and all others similarly situated. Niles v. N. Y. C. & H. R. R. R. Co., 35 Misc. 69, affd., 69 A. D. 144, affd., 176 N. Y. 119 (1903).

Rights of Bondholders.

Bondholders in a railroad owe no active duty toward each other; and where a trust mortgage permits any bondholder to purchase upon a foreclosure, a profitable purchase on its foreclosure, made by a committee organized by a majority of the bondholders to protect their interest and open to all bondholders who chose to come in, cannot be successfully attacked by a bondholder who did not act with such committee. Moss v. Geddes, 28 Misc. 291 (1899).

Upon reorganization of a corporation after foreclosure, non-assenting bondholders are only entitled to their distributive share in the proceeds of the sale of the mortgaged property where the directors of the new company merely assume the debts and obligations of the old company, excepting its mortgage bonds. Fernschild v. Yuengling Brewing Co., 154 N. Y. 667 (1898), affg. 15 A. D. 29.

Rights of Creditors.

The property of a corporation was purchased at foreclosure sale by a bondholders' reorganization committee for a new corporation which issued $7,000,000 in bonds, $4,000,000 preferred stock, and subsequent to these $3,250,000 common stock, which the stockholders of the old corporation were privileged to purchase at $10 for each $100 share. In a suit against the old corporation by a judgment creditor to reach a sum that the new corporation had realized from the new common stock taken by stockholders of the old corporation, it was held that the property foreclosed could not be reached by the plaintiff and that his only claim would be upon surplus after paying incumbrances; that the new corporation had a right to sell its common stock at any price it saw fit to ask for it. Ferguson v. Ann Arbor R. R. Co., 17 A. D. 336 (1897).

A corporation which holds as trustee a fund to pay the floating indebtedness of its predecessor is chargeable, after a reasonable time, with interest on a just claim which it refused or unreasonably neglected to pay. Davidson v. Mexican National R. R. Co., 11 A. D. 28 (1896).

§ 10. Contents of plan or agreement. At or previous to the sale the purchasers thereat, or the persons for whom the purchase is to be made, may enter into a plan or agreement, for or in anticipation of the readjustment of the respective interests therein of any creditors, mortgagees, stockholders, or any of them, of the corporation owning such property and franchises at the time of the sale, and of holders of claims for materials, supplies and equipment furnished, and for injuries and damages sustained, in and about the operation, maintenance or construction of any or all the property formerly owned or leased to said corporation, and for the representation of such interests in the bonds or stock of the new corporation to be formed, and may therein regulate voting by the holders of the preferred and common stock at any meeting of the stockholders, and may provide for, and regulate voting by the holders and owners of any or all of the bonds of the corporation, foreclosed, or of the bonds issued or to be issued by the new corporation; and such right of voting by bondholders shall be exercised in such manner, for such period, and upon such conditions, as shall be therein described. Such plan or agreement must not be inconsistent with the laws of the state and shall be binding upon the corporation, until changed as therein provided, or as otherwise provided by law. The new corporation when duly organized, pursuant to such plan or agreement and to the provisions of law, may issue its bonds and stock in conformity with the provisions of such plan or agreement, and may at any time within six months after its organization, compromise, settle or assume the payment of any debt, claim or liability of the former corporation or any claims for materials, supplies and equipment furnished, or any claims for injuries and damages sustained, in and about the operation, maintenance or construction of any or all the property formerly owned or leased to said corporation, upon such terms as may be lawfully approved by a majority of the agents or trustees intrusted with the carrying out of the plan or agreement of reorganization, and may establish preferences in favor of any portion of its capital stock and may divide its stock into classes; but the capital stock of the new corporation shall not exceed in the aggregate the maximum amount of stock mentioned in the certificate of incorporation.

Formerly L. 1890, ch. 564, § 4, as re-enacted by L. 1892, ch. 688, and am'd by L. 1901, ch. 354; L. 1911, ch. 858.

AMENDMENT OF 1901.— The only change, except in phraseology, made in this section by the amendment of 1901, was the striking out of the maximum limitation as to the amount of bonded indebtedness permitted, so as to harmonize the section with the provisions of section 6, ante.

When the plan for readjustment of interest has been embodied in the certificate filed for the organization of the new corporation it constitutes notice to stockholders of its general features. Vatable v. N. Y., L. E., etc., Co., 96 N. Y. 59 (1884).

Demand for relief by bondholders of the old corporation considered. White v. Woods, 129 N. Y. 527 (1892).

Limitation upon Right to Vote.

The right to vote, incident to stock ownership, is a property right. To absolutely deprive a stockholder of the right to vote is to deprive him of an essential attribute of his property, and to so undermine that right as to essentially affect the stockholder's right of protection in voting for directors undermines the right to property involved in the ownership of stock. Lord v. Equitable Life Assur. Soc., 194 N. Y. 212, 229 (1909), citing Stokes v. Continental Trust Co., 186 N. Y. 285 (1906). But it is lawful to provide in the certificate of incorporation in which different classes of stock are provided for that one class shall have no vote upon all or certain questions relating to the management of the corporation. Peo. ex rel. Browne v. Koenig, 133 A. D. 756, 759 (1909); 118 N. Y. Supp. 136, citing with approval, State ex rel. Frank v. Swanger, 190 Mo. 561.

§ 11. Sale of property; possession of receiver and suits against him. The supreme court may direct a sale of the whole of the property, rights and franchises covered by the mortgage or mortgages, or deeds of trust foreclosed at any one time and place to be named in the judgment or order, either in case of the non-payment of interest only, or of both the principal and interest due and unpaid and secured by any such mortgage or mortgages or deeds of trust. Neither the sale nor the formation of the new corporation shall interfere with the authority or possession of any receiver of such property and franchises, but he shall remain liable to be removed or discharged at such time as the court may deem proper. No suit or proceeding shall be commenced against such receiver unless founded on wilful misconduct or fraud in his trust after the expiration of sixty days from the time of his discharge; but after the expiration of sixty days the new corporation shall be liable in any action that may be commenced against it, and founded on any act or omission of such receiver for which he may not be sued, and to the same extent as the receiver, but for this section would be or remain liable, or to the same extent that the new corporation would be had it done or omitted the acts complained of.

Formerly L. 1890, ch. 564, as re-enacted by L. 1892, ch. 688.

In an action against a receiver of a corporation who was discharged more than sixty days before the commencement thereof, plaintiff is prevented from maintaining it, but a new corporation succeeding to the franchises is subject to the same liability as existed against the receiver. Abbott v. Jewett, 25 Hun 603 (1881). An amendment is allowable in such case substituting the new corporation in the place of the receiver as defendant. Id.; Tighe v. Pope, 16 Hun 180 (1878).

See note on amendment of summons, 1 Ann. Cas. 34.

§ 12. Municipalities may assent to plan of readjustment. The commissioners, corporate authorities or proper officers of any city, town or village, who may hold stock in any corporation, the property and franchises whereof shall be liable to be sold, may assent to any plan or agreement of reorganization which lawfully provides for the formation of a new corporation, and the issue of stock therein to the proper authorities or officers of such cities, towns or villages in exchange for the stock of the old or former corporation by them respectively held. And such commissioners, corporate authorities or other proper officers may assign, transfer or surrender the stock so held by them in the manner required by such plan, and accept in lieu thereof the stock issued by such new corporation in conformity therewith.

Formerly L. 1890, ch. 564, § 6, as am'd by L. 1892, ch. 688; L. 1901, ch. 354.

The amendment of 1901 changed the foregoing section by striking out a clause which read as follows: "Every stockholder in any corporation, the franchises and property whereof shall have been thus sold, may assent to the plan of readjustment and reorganization of interests pursuant to which such franchises and property shall have been purchased at any time within six months after the organization of the new corporation, and by complying with the terms and conditions of such plan become entitled to his pro rata benefits therein."

§ 13. Change of place of business. Any stock corporation now existing or hereafter organized under the laws of this state, except moneyed corporations, may at any time change its principal office and place of business from the city, town or county named in its certificate of incorporation, or to which it may have been changed under the provisions of this section, to any other city, town or county in this state, in which it may desire to actually transact and carry on its regular business from day to day, provided that such change has been authorized, either by unanimous consent of the stockholders expressed in writing and duly acknowledged and filed in the office of the secretary of state, or by a vote

of the stockholders of said corporation at a special meeting of stockholders called for that purpose. When such change shall be authorized by the stockholders as herein provided, the president and secretary and a majority of the directors of such corporation shall sign a certificate stating the name of said corporation, the city, town and county where its principal office and place of business was originally located, and to which it may have been subsequently changed, and the city, town and county to which it is desired to change its said principal office and place of business, and that it is the purpose of said corporation to actually transact and carry on its regular business from day to day at such place, and that such change has been authorized as herein provided, and the names of the directors of said corporation and their respective places of residence, which certificate shall be verified by the oaths of all the persons signing the same, and when so signed and verified, shall be filed in the office of the secretary of state and a duplicate thereof in the office of the clerk of the county from which said principal office and place of business is about to be removed or changed, and another in the office of the clerk of the county to which said removal or change is to be made, and thereupon the principal office and place of business of such corporation shall be changed as stated in said certificate.

Formerly § 50, as added by L. 1896, ch. 929, and am'd by L. 1905, ch. 489.

For forms of certificate of change of place of business, see post, Forms Nos. 245-247.

CONSOLIDATOR'S NOTE.—Former § 59 has been transferred as above to article 2, where it properly belongs, because relating to general powers.

The provision permitting a change of place of business by unanimous consent was added by L. 1905, ch. 489.

Failure to File Certificate of Change of Location in Proper County.

Where a resolution was adopted by the stockholders and directors changing the principal place of business of the corporation to another county and as a matter of fact the business was thereafter actually carried on in such other county, although no proper certificate thereof had been filed, it was held that a change of location was thereby effected when it was sought to impose a penalty (under a statute now repealed) for a failure to file an annual report in the county clerk's office, because such report was filed in a county other than that stated in the certificate of incorporation. Uptegrove v. Schwarzwaelder, 46 A. D. 20 (1899), affd. 167 N. Y. 587; citing Wallace v. Walsh, 125 N. Y. 33.

§ 14. Combinations prohibited. No domestic stock corporation and no foreign corporation doing business in this state shall combine with any other corporation or person for the creation

of a monopoly or the unlawful restraint of trade or for the prevention of competition in any necessary of life.

Formerly L. 1890, ch. 564, § 7, as am'd by L. 1892, ch. 688; L. 1897, ch. 384.

CONSOLIDATORS' NOTE.—Attention is here called to the fact that section 14 (former section 7), prohibiting monopolies and unlawful combinations does not apply to moneyed corporations, i. e., banks, trust companies, insurance companies, etc., as the law now stands, but no good reason is apparent why that class of corporations should be excepted from the general prohibition.

By the amendment of 1897 the scope of this section was extended so as to include foreign corporations doing business in this State. For reference to other provisions affecting such corporations, see the index under the heading "Foreign Corporations."

Combinations of certain public service corporations are affected by the Pub. Ser. Com. L. §§ 54 and 70, which see, post.

The consolidation of public lighting companies, even if effected for the purpose of preventing competition, does not create a monopoly within the meaning of the statute, for no exclusive right is thereby attained, nor can the price of gas or electricity be arbitrarily fixed by the corporation, both of these matters being under control of the Legislature which may fix the maximum rate and compel production and sale to consumers. Matter of Attorney-General, 124 A. D. 401 (1908).

The validity of a purchase of the business to prevent competition, if supported by a consideration, will depend upon its reasonableness as between the parties. Diamond Match Co. v. Roeber, 106 N. Y. 473 (1887); however, see Todd v. Gross, 127 N. Y. 480 (1891); Richardson v. Buhl, 43 N. W. Rep. 1102. These cases are distinguished and reconciled in Excelsior Quilting Co. v. Creter, 36 Misc. 698 (1902).

Contracts Declared Unlawful.

An agreement, between producers controlling practically the entire output of Hudson river blue stone, to fix prices and apportion profits is void as against public policy, in that it threatens a monopoly whereby trade in a useful article may be restrained and its price unreasonably enhanced. Cummings v. Union Blue Stone Co., 164 N. Y. 401 (1900), and cases cited.

A corporation which controls the market and requires its stockholders to fix prices of a commodity is a combination inimical to trade and commerce, and unlawful. People v. Milk Exchange, Ltd., 145 N. Y. 267 (1895).

An agreement between manufacturers of eighty-five per cent. of the envelopes of the country and an outside manufacturer, providing that the selling price should be fixed by an agent of the combination, threatens a monopoly, and is, therefore, invalid. Cohen v. Berlin & Jones Env. Co., 166 N. Y. 292 (1901), revsg. 38 A. D. 499.

Combination to advance price of food is unlawful. Leonard v. Poole, 114 N. Y. 371 (1889).

Corporations cannot enter into a combination similar to a partnership, massing stock, and sharing profits and losses, without express authority by charter. People v. North River Sugar Ref'g Co., 121 N. Y. 582, 3 N. Y. Supp. 401 (1890); Mallory v. Hanaur Oil Works, 86 Tenn. 598.

When a corporation is organized for the purpose of forming a combination to unlawfully fix the price of an article and limit the supply thereof, proceedings to forfeit its charter may be instituted by the Attorney-General. People v. The Milk Exchange, Ltd., 133 N. Y. 565 (1892).

A combination of all the manufacturers in the U. S., of an implement necessary to agriculture, which absolutely regulates prices and controls production is restrictive of competition and illegal. Strait v. Nat'l Harrow Co., 18 N. Y. Supp. 224 (1891).

Contracts Upheld.

Where the defendants, engaged in producing grand operas in this State, sold their business and good will to the plaintiff, a corporation engaged in a similar business within this State, and agreed not to produce grand opera in certain cities of this and another State within ten years, the defendant may be restrained from violating the agreement. Metropolitan Opera Co. v. Hammerstein, 162 A. D. 691 (1914). Such contract does not violate the Sherman Anti-Trust Law. Id.

Federal statutes forbidding unlawful combinations in restraint of trade apply only to interstate or foreign commerce and for a violation of their provisions redress must be sought in the Federal courts, which alone have jurisdiction. The common law and State statutes determine the illegality of such combinations when attacked in the State courts. Locker v. Am. Tobacco Co., 121 A. D. 443 (1907).

The mere fact that one defendant, controlling ninety per cent. of the trade, has appointed a sole selling agent in this State who has refused to sell goods to the plaintiff, does not show a violation of the State statute. It is the inherent right of every person to refuse to maintain trade relations with any other person for any reason or no reason, and what one may do of his own right, he may do through an agent. Locker v. Am. Tobacco Co., 121 A. D. 443 (1907).

A contract between manufacturers of patent medicines and an association of wholesale dealers establishing a uniform jobbing price to dealers who agreed to maintain the price fixed by the manufacturers is not unlawful, although it does away with competition among dealers as to prices when it places no restriction upon them as to quantity or territory. Park & Sons Co. v. Nat. Wholesale Druggists Assn., 175 N. Y. 1 (1903).

Not all combinations in trade are condemned. Self-preservation may justify the prevention of undue and ruinous competition when the prevention is sought by fair and legal methods. U. S. Vinegar Co. v. Foehrenbach, 148 N. Y. 58 (1895), discussing 143 N. Y. 537, affg. 74 Hun 435; Rafferty v. Buf. Gas Co., 37 A. D. 618 (1899).

It is not against public policy for two corporations engaged in the same general line of business to consolidate. Cameron v. N. Y. & Mt. V. Water Co., 62 Hun 269 (1891), affd. on other grounds, 133 N. Y. 336; Holmes & Griggs Mfg. Co. v. Holmes & W. M. Co., 127 N. Y. 252 (1891).

If the business of a corporation is threatened with competition it is not illegal if it can persuade a competitor to abandon an enterprise in which both cannot succeed. Oakes v. Cattaraugus Water Co., 143 N. Y. 430 (1894).

An agreement by which a person promises that he will not directly or indirectly engage in, or become associated with, any business of a similar character to that of the other party, either as principal, agent, employe, or in any other relation or capacity, or as stockholder, director, trustee, agent, officer or employee of any corporation, other than one specified, in any State or Territory of the United States, except the State of Washington is not illegal as in general restraint of trade. Nat. Wall Paper Co. v. Hobbs, 90 Hun 288 (1895), citing Diamond Match Co. v. Roeber, 106 N. Y. 473.

A contract whereby a competitor is removed, but not excluding all competition, is not objectionable. Leslie v. Lorillard, 110 N. Y. 519 (1888).

An association of corporations to use a patented article, there being no community of profits and losses, is not unlawful. Good v. Daland, 121 N. Y. 1 (1890).

As to transportation agreements, see Tonawanda V. R. R. Co. v. N. Y., L. E. & W. R. R. Co., 123 N. Y. 640, and page 361 (1890).

Miscellaneous Cases.

It seems that an action by the Attorney-General to annul a charter, or a criminal prosecution, is the only mode of redress to individuals for injuries occasioned by unlawful combinations. Thomas v. Musical Mut. Prot. Union, 121 N. Y. 45 (1890).

As to rights of certificate holders where a trust has been dissolved, see Cameron v. Havemeyer, 12 N. Y. Supp. 126 (1890); Gray v. Oxnard Bros. Co., 59 Hun 387 (1891).

A corporation engaged in an illegal trust combination is estopped from setting up the illegality in an action against the receiver of the trust. Pittsburgh Carbon Co., Ltd., v. McMillin, 119 N. Y. 46 (1890).

Donnelly Act to Prevent Monopolies.

Another law to prevent monopolies was enacted by L. 1893, ch. 716, and amended by L. 1896, ch. 267; but said act was superseded by L. 1897, ch. 383. The latter act was repealed and superseded by L. 1899, ch. 690, and this statute was repealed by the General Business Law of 1909, ch. 25 (Consolidated Laws, ch. 20), article 22, sections 340–346 of which now contain identical provisions, as follows:

§ 340. **Contracts for monopoly illegal and void.** Every contract, agreement, arrangement or combination whereby a monopoly in the manufacture, production or sale in this state of any article or commodity of common use is or may be created, established or maintained, or whereby competition in this state in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within this state of the manufacture, production or sale of any such article or commodity, the free pursuit in this state of any lawful business, trade or occupation is or may be restricted or prevented, is hereby declared to be against public policy, illegal and void.

§ 341. **Penalty.** Every person or corporation, or any officer or agent thereof, who shall make or attempt to make or enter into any such contract, agreement, arrangement or combination, or who within this state shall do any act pursuant thereto, or in, toward or for the consumption thereof, wherever the same may have been made, is guilty of a misdemeanor, and on conviction thereof shall, if a natural person, be punished by a fine not exceeding five thousand dollars, or by imprisonment for not longer than one year, or by both such fine and imprisonment; and if a corporation, by a fine of not exceeding twenty thousand dollars. An indictment based on a violation of any of the provisions of this section must be found within two years after its commission. Thus am'd by L. 1910, ch. 633.

§ 342. **Action to restrain and prevent.** The attorney-general may bring an action in the name and in behalf of the people of the state against any person, trustee, director, manager or other officer or agent of a corporation, or against a corporation, foreign or domestic, to restrain and prevent the doing in this state of any act herein declared to be illegal, or any act in, toward or for the making or consummation of any contract, agreement, arrangement or combination herein prohibited, wherever the same may have been made.

§ 343. **Procedure; application for order.** Whenever the attorney-general has determined to commence an action or proceeding under this article, he may present to any justice of the supreme court, before beginning such action or proceeding, an application, in writing, for an order directing the persons proceeding, an application to appear before a justice of the supreme court, or a referee designated in such order, and answer such questions as may be put to them or to any of them, and produce such papers, documents and books concerning any alleged illegal contract, arrangement, agreement or combination in violation of this article; and it shall be the duty of the justice of the supreme court, to whom such application for the order is made, to grant such application. The application for such order made by the attorney-general may simply show upon his information and belief that the testimony of such person is material and necessary. The provisions of the code of civil procedure, chapter nine, title three, article one, relating to the application for an order for the examination of witnesses before the commencement of an action and the method of proceeding on such examinations, shall not apply except as herein prescribed. The order shall be granted by the justice of the supreme court to whom the application has been made, with such preliminary injunction or stay as may appear to such justice to be proper and expedient, and shall specify the time when and place where the witnesses are required to appear, and such examination shall be held either in the city of Albany, or in the judicial district in which the witness resides, or in which the principal office within this state, of the corporation affected, is located. The justice or referee may adjourn such examination from time to time and witnesses must attend accordingly. The testimony of each witness must be subscribed by him, and all must be filed in the office of the clerk of the county in which such order for examination is filed.

§ 344. **Order for examination.** The order for such examination must be signed by the justice making it, and the service of a copy thereof, with an indorsement by the attorney-general, signed by him, to the effect that the person named therein is required to appear and be examined at the time and place, and before the justice or referee specified in such indorsement, shall be sufficient notice for the attendance of witnesses. Such indorsement may contain a clause requiring such person to produce on such examinaion all books, papers and documents in his possession, or under his control, relating to the subject of such examination. The order shall be served upon the person named in the indorsement aforesaid, by showing him the original order, and delivering to and leaving with him, at the same time, a copy thereof indorsed as above provided, and by paying or tendering to him the fee allowed by law to witnesses subpœnaed to attend trials of civil actions in a court of record in this state.

§ 345. **No person excused from answering.** No person shall be excused from attending and testifying, or from producing any books, papers or other documents before any court, magistrate or referee, upon any investigation, proceeding or trial, pursuant to or for a violation of any of the provisions of this article, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture, for or on account of any transaction, matter or thing concerning which he may so testify, or produce evidence, documentary or otherwise. And no testimony so given or produced shall be received against him upon any criminal investigation, proceeding or trial. (Thus am'd by L. 1910, ch. 394.)

The complaint may specify numerous contracts made by the defendant in violation of our statutes forbidding combination in restraint of trade, as

the people should be permitted to prove any violation of the law by the defendant. Peo. v. Am. Ice Co., 135 A. D. 180 (1909). Unless specific acts are alleged the complaint is subject to demurrer. Id.

§ 346. **Powers of referee.** A referee appointed as provided in this article possesses all the powers and is subject to all the duties of a referee appointed under section ten hundred and eighteen of the code of civil procedure, so far as practicable, and may punish for contempt a witness duly served as prescribed in this article for non-attendance or refusal to be sworn or to testify or to produce books, papers and documents according to the direction of the indorsement aforesaid, in the same manner, and to the same extent as a referee appointed to hear, try and determine an issue of fact or of law.

The foregoing act is popularly known as the "Donnelly Anti-Trust Law." It applies to both foreign and domestic corporations. For other provisions in relation to foreign corporations, see the index.

See Matter of Davies, 168 N. Y. 89 (1901), revsg. 55 A. D. 245, 32 Misc. 1.

In an action brought under L. 1899, ch. 690, to avoid contracts alleged to have been made by a defendant corporation with a view to establish a monopoly, etc., an inspection of the defendant's books and papers should not be limited to records covering the present administration if the corporate acts are not acts of any particular set of officers, and, although prior contracts may not be now in force, they may be relevant upon the intent and purpose of contracts thereafter made. Peo. v. Am. Ice Co., 120 A. D. 234 (1907), but an examination of papers to show profits, or the unreasonableness of prices should not be granted, because in such action it is immaterial whether the contracts were profitable or not, the real issue being whether they were made to create a monopoly. Id. Nor in such action should an inspection of the stock books be allowed to show that defendant acquired stock of other corporations, for that fact will not be shown by the list of the defendants' stockholders. Id.

A corporation sued for the rent of a distillery cannot escape liability upon the ground that it is engaged in a combination to create a monopoly, when there is no defense that the landlord was a party to the combination. The statute does not prevent one from selling or leasing property nor does it prevent one buying or leasing property to prevent competition. It is designed to prevent controllers of property from combining to regulate production and maintain prices. Brooklyn Distilling Co. v. Standard Distilling Co., 120 A. D. 237 (1907), aff'd., 193 N. Y. 551.

Conspiracies to Control Transportation.

An act affecting foreign corporations engaged in the transportation business (formerly L. 1899, ch. 727), has been embodied in the General Business Law, as article 23 thereof, and reads as follows:

§ 350. **Conspiracies to control transportation prohibited.** Any corporation not organized under the laws of this state engaged in the transportation business, and transacting or conducting the said business or any part thereof in this state, or any partnership, or other association or person whatsoever, so engaged and transacting business as aforesaid, who shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person or association of persons, to control the volume of transportation between this country and Europe, or to control, limit, regulate or fix the rates thereof, or who shall refuse to sell to any person, either for himself or another, on demand therefor, transportation between the United States and Europe, either eastbound or westbound, at the usual and

legal rates, shall be deemed and adjudged guilty of a misdemeanor, and be subject to the other penalties hereinafter provided in this article.

Any contract or agreement in violation of any provision of this section shall be absolutely void.

§ 351. **Penalty for conspiring to control transportation.** Any corporation created or organized by or under the laws of any other state or country which shall violate any provision of this article shall thereby forfeit its right and privilege thereafter, to do any business in this state, and upon proper proof thereof in any court of competent jurisdiction in this state its rights and privileges to do business in this state shall be declared forfeited; and in all proceedings to have such forfeiture declared, proof that any person who has been acting as the agent of such foreign corporation in transacting its business in this state, has been, while acting as such agent, and in the name, behalf or interest of such corporation, violating any provision of this article shall be received as prima facie proof of the act of the corporation itself; and it shall be the duty of the clerk of said court to certify the decree thereof to the secretary of state, who shall take notice and be governed thereby as to the corporate powers and rights of said corporation.

It is unlawful for railroad companies to refuse to handle grain from an independent elevator on the same terms as grain from elevators controlled by an elevator association. Kellogg v. Sowerby, 93 A. D. 124.

Sherman Anti-Trust Law.

Besides the foregoing provisions of State laws upon this subject, an act of the United States generally called the "Sherman Anti-Trust Law," was passed by Congress July 2, 1890, ch. 647, and entitled: "An act to protect trade and commerce against unlawful restraints and monopolies," the full text of which is as follows:

SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises,

§ 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpœnas to that end may be served in any district by the marshal thereof.

§ 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law.

§ 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

§ 8. That the word "person," or "persons," whenever used in this act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

§ 15. Merger. Any domestic stock corporation and any foreign stock corporation authorized to do business in this state lawfully owning all the stock of any other stock corporation organized for, or engaged in business similar or incidental to that of the possessor corporation may file in the office of the secretary of state, under its common seal, a certificate of such ownership, and of the resolution of its board of directors to merge such other corporation, and thereupon it shall acquire and become, and be possessed of all the estate, property, rights, privileges and franchises of such other corporation, and they shall vest in and be held and enjoyed by it as fully and entirely and without change or diminution as the same were before held and enjoyed by such other corporation, and be managed and controlled by the board of directors of such pos-

sessor corporation, and in its name, but without prejudice to any liabilities of such other corporation or the rights of any creditors thereof. Any bridge corporation may be merged under this section with any railroad corporation which shall have acquired the right by contract to run its cars over the bridge of such bridge corporation.

Formerly § 58, as added by L. 1896, ch. 932, and am'd by L. 1900, ch. 476; L. 1902, ch. 98.

CONSOLIDATORS' NOTE.— This section has been placed in article 2, because it is a general provision. The heading is new.

Prior to the amendment of 1902 the provisions of this section applied only to domestic corporations.

For form of certificate of merger, see Form No. 257.

In view of the provisions of Gen. Corp. Law, § 5 the certificate must be filed and recorded in the office of the county clerk as well as in the office of the Secretary of State.

Remedy of Creditor of Merged Corporation.

A creditor of the merged corporation cannot maintain an action against the possessor corporation to collect a debt due from the merged corporation if the possessor corporation has not assumed such obligation, inasmuch as the above section does not create such cause of action against the possessor corporation. Irvine v. N. Y. Edison Co., 207 N. Y. 425 (1913).

The creditor of the merged corporation should take judgment against it and issue execution thereon against property of such merged corporation which has been taken over by the possessor corporation. If such property cannot be reached by execution and legal remedies have been exhausted the judgment creditor may maintain an equitable action to sequester the property of the merged corporation. Irvine v. N. Y. Edison Co., 207 N. Y. 425 (1913).

Where after a suit is commenced against a corporation the defendant is merged in another corporation, the plaintiff is entitled under the Code, section 756, to have the second corporation substituted in place of the original defendant. Burrow v. Marceau, 132 A. D. 797 (1909).

Unauthorized Merger.

The Secretary of State should not file a certificate for the merger of a corporation, organized under the Railroad Law, with an electric light and railroad company, organized under the Transportation Corporations Law. Opinion of Atty. Genl., Jan. 24, 1912.

Merger and Consolidation Distinguished; Effect of Merger.

Yale L. Rev., May 1929.

There is a distinction between a consolidation and merger of corporations. Upon a consolidation a new corporation comes into existence, and the constituent or prior corporations cease to exist. Upon a merger the existence of one of the corporations is continued without the formation of a new corporation, the others being merged in it. The continuing corporation becomes the successor of the corporation which has been merged subject to the rights and obligations imposed by statute. Matter of Bergdorf, 149 A. D. 529 (1912), affd. 206 N. Y. 309.

19 ABA. J. 633.

§ 16. Voluntary sale of franchise and property. A stock corporation, except a railroad corporation and except as otherwise provided by law, with the consent of two-thirds of its stock, may sell and convey its property, rights, privileges and franchises, or any interest therein or any part thereof to a domestic corporation, engaged in a business of the same general character, or which might be included in the certificate of incorporation of a corporation organizing under any general law of this state for a business of the same general character, and a domestic corporation the principal business of which is carried on in, and the principal tangible property of which is located within a state adjoining the state of New York, may with the consent of the holders of ninety-five per centum of its capital stock, sell and convey its property situate without the state of New York, not including its franchises, to a corporation organized under the laws of such adjoining state, and such sale and conveyance shall, in case of a sale to a domestic corporation, vest the rights, property and franchises thereby transferred, and in case of a sale to a foreign corporation the property sold, in the corporation to which they are conveyed for the term of its corporate existence, subject to the provisions and restrictions applicable to the corporation conveying them. Before such sale or conveyance shall be made such consent shall be obtained at a meeting of the stockholders called upon like notice as that required for an annual meeting.

Part of former § 33, added by L. 1893, ch. 638, as am'd by L. 1901, ch. 130.

CONSOLIDATORS' NOTE.—Former section 33 has been transferred to article 2, section 16, as it is a general provision. It has been divided into two sections so that its provisions will stand out plainly. The word "voluntary" has been added to the heading to distinguish it from sale under mortgage or judgment provided for by section 11.

The amendment of 1901 added the provision permitting a domestic corporation owning property in an adjoining State to sell such property to a corporation organized in such adjoining State. This new feature was undoubtedly inserted to meet a special case.

The right to be a corporation, or the corporate right of life, is inseparable from the corporation itself. It is a part of it and cannot be sold or assigned. That franchise is general and dies with the corporation, for it cannot survive dissolution or repeal. On the other hand, grants to do something in the public streets or special franchises are not a part of the corporation. They can be made to an individual with the same legal force or effect as to a corporation. Unless there is some legislative restriction they can be mortgaged and sold. Lord v. Equitable Life Assur. Soc., 194 N. Y. 212 (1909), revsg. 126 A. D. 937.

A provision in a certificate of incorporation that the directors may, with the consent of the holders of two-thirds of the capital stock sell,

assign, transfer or otherwise dispose of the whole property of the corporation, not including franchises, to any person or corporation, domestic or foreign, is contrary to this section, which governs the power of a corporation to sell its property, for the section provides that the transfer of an entire property requires the consent of 95 per centum if made to a foreign corporation, and transfer to domestic corporations can only be made if the transferee is engaged in a business of the same general character. People ex rel. Barney v. Whalen, 119 A. D. 749, affd., 189 N. Y. 560 (1907); Same v. Same, 56 Misc. 278.

The title to corporate property is in the corporate entity and a personal bill of sale of such property made by the president of the corporation does not transfer title, although he owns substantially all the stock. Palmer v. Ring, 113 A. D. 643 (1906); Saranac & Lake Placid R. R. Co. v. Arnold, 167 N. Y. 368 (1901), revsg. 41 A. D. 482.

The title to the corporate property is in the fictitious entity called the corporation and if all the stock were owned by one person he could not by his conveyance affect the legal title; its officers and agents only have authority to act for it. Buffalo Loan, Trust & Safe Deposit Co. v. Medina Gas & Elec. Lt. Co., 162 N. Y. 67 (1900), affg. 12 A. D. 199.

A pledgee of stock cannot maintain an action to set aside a sale and transfer of the stock and property of a corporation authorized by an agreement between all the stockholders, including the pledgor, and also authorized by the directors. Elyea v. Lehigh Salt Mining Co., 169 N. Y. 29 (1901), affg. 45 A. D. 231.

A corporation cannot sell all of its property to a foreign corporation, organized through its procurement for the purpose of taking its place and its assets and carrying on its business, as this is a practical dissolution of the corporation. People v. Ballard, 134 N. Y. 269 (1892), revsg. 56 Hun 125; reargument denied, 136 N. Y. 639.

A transfer by a corporation of its entire property, even with unanimous consent of its stockholders, to another corporation, in consideration for which the capital stock of the purchasing corporation is issued to the stockholders of the vendor corporation, is invalid as against creditors of the latter corporation, since the creditor has the right to rely upon its assets for payment, and has an equitable lien thereon, both as against stockholders and all transferees, except those purchasing in good faith and for value. Hurd v. N. Y. & Com'l Laundry Co., 167 N. Y. 89 (1901), revsg. 52 A. D. 467; Cole v. Millerton Iron Co., 133 N. Y. 164 (1892).

Corporate debts constitute an equitable lien upon its assets. McNeal v. Hayes Machine Co., 118 A. D. 130 (1907).

Where the rights of bona fide purchasers have not attached, a domestic corporation, which has taken over all the assets and liabilities of a practically extinct foreign corporation which was controlled by substantially the same officers and stockholders and which also had its principal office in New York, will be held liable upon an outstanding merchandise debt contracted by the foreign corporation. Clokey v. Internat'l Rubber Clothing Co., 28 Misc. 326 (1899).

A corporation may, with the consent of all its stockholders, sell its plant to another corporation and retire from business, taking payment in the stock of the other corporation. Holmes & G. Mfg. Co. v. Holmes & W. Metal Co., 127 N. Y. 252 (1891).

Sales of Unprofitable Corporate Business to Avoid Further Losses.

Relative to a contract whereby a corporation sold out its business to another corporation and ceased operations, it was held that where such

contract was made in good faith and all the creditors have been provided for it will be sustained. In a review of the decisions upon agreements in which corporations transfer their business and assets and cease operations three different rules have been recognized, to wit: first, that a hopelessly insolvent corporation must wind up its affairs in the manner prescribed by law; second, that a corporation doing a profitable and paying business owes some duty to the public to continue to exercise the functions conferred upon it; third, where a corporation is not insolvent, but is doing a losing business and unable to continue without further loss, it has the right to sell out its business to another corporation and to cease operations, and that a contract to that effect, made in good faith and for the best interests of the creditors and stockholders, is valid and binding. Raymond v. Security Trust & Life Ins. Co., 111 A. D. 191 (1906); Skinner v. Smith, 134 N. Y. 240 (1892).

The rule that a hopelessly insolvent corporation must wind up its affairs in the manner prescribed by law, and the other rule that a corporation doing a profitable and paying business owes some duty to the public to continue to exercise the functions conferred upon it, are both recognized; but another rule exists, not in conflict with either of the others, and that is, that where a corporation is not insolvent, but is doing a losing business and unable to continue without further loss, it has the right to sell out its business to another corporation and to cease operations, and a contract to that effect, in the absence of fraud or bad faith, where the assets were not sacrificed or sold for less than their value, is valid and binding. Levin v. Mayer, 86 Misc. 116 (1914), and cases there cited.

At common law neither the directors nor a majority of the stockholders have power to sell or otherwise transfer all the property of a going, prosperous corporation as against the dissent of a single stockholder; but, where the corporation is without available capital and without the means of procuring it and with its de jure corporate existence at an end, where the further transaction of its business would be unprofitable, if not impracticable, the closing of its business and the sale of its corporate property is justified. Under such circumstances, no rights of creditors interfering, it was in furtherance of the interests of the corporation to pay its debts and close its affairs on terms deemed most advantageous. Hoag v. Edwards, 69 Misc. 237 (1910), citing Skinner v. Smith, 134 N. Y. 240, 250 (1892).

Rights of Creditors Upon Sale of Entire Corporate Property.

In an action by a judgment creditor of a corporation to recover the amount of his judgment from its directors and from another corporation, to which the corporate assets were sold, if the complaint does not allege that the transferee knew of plaintiff's claim, or that it was concerned in a fraudulent attempt to injure him, or that he did not pay full value for the assets, a demurrer by the transferee on the ground of insufficiency will be sustained. But if the complaint joins as defendants the judgment debtor, its directors and the transferee of the assets and alleges that the directors distributed the proceeds of the sale of the assets among the stockholders without paying or providing for plaintiff's claim, a demurrer on the ground that causes of action have been improperly united is not well taken. Teague v. Ridgway Co., 145 A. D. 277 (1911).

Directors cannot effect a voluntary dissolution of a corporation by selling and transferring all of its assets and distributing the proceeds among the stockholders without providing for the payment of creditors, even though the purchaser assumes the payment of the corporate debts. Directors who so dispose of the corporate property are liable under this section in a suit

by creditors to compel payment of any money or the value of any property so misapplied. Flaum v. Kaiser Bros. Co., 66 Misc. 586 (1910), citing Darcy v. Bklyn. & N. Y. Ferry Co., 196 N. Y. 199; Cole v. Millerton Iron Co., 133 N. Y. 167.

The assets of a corporation constitute a trust fund for the payment of its debts, and a creditor cannot be deprived of his equitable lien thereon by an agreement between the corporation and a transferee of the property that the latter shall assume and pay all the corporate debts. The consent of the creditor to accept the substituted debtor is essential to make such an agreement valid as against him. Darcy v. Bklyn. & N. Y. Ferry Co., 196 N. Y. 99 (1909), affg. 127 A. D. 167.

Unlawful Transfer of Corporate Property to Another Corporation.

A majority of the stockholders, but less than two-thirds decided to discontinue the business and liquidate the affairs of the corporation, and some of their number organized a new corporation for the purpose of continuing the business of the old corporation. The court found that the discontinuance of the business of the old corporation was made in bad faith, and that defendants conspired to turn over the business and good will to the new corporation for the purpose of excluding without compensation the plaintiff and other stockholders from further participating in such business, and that such purpose was accomplished, that directors may not thus as against dissenting stockholders in effect terminate the existence of a corporation; that while defendants might organize another corporation and engage in a competing business, neither they nor the new corporation have the right to conspire with the directors of the old corporation to acquire the latter's business and good will without paying therefor, and that a payment to an officer thereof for services in thus liquidating its affairs was a fraud upon it and upon the dissenting stockholders. Godley v. Crandall & Godley Co., 212 N. Y. 121 (1914), modfg. 153 A. D. 697.

Where the majority stockholders of a corporation, who are also its officers and directors, organize another corporation and become the officers, directors and stockholders thereof, and then sell all the property of the first mentioned corporation to the new corporation at a grossly inadequate price, the transaction constitutes a fraud upon the vendor corporation which will entitle that a corporation or a minority stockholder thereof suing in its right to have the transaction set aside and the directors held responsible for the injury caused to such corporation by a violation of their duty. Hinds v. Fishkill & Mattewan Gas Co., 96 A. D. 14 (1904).

Sale of Corporate Property by Owner of All the Stock.

Where a person is appointed manager of a corporation with full power and control of its affairs and with the right to incur debts, pay out money and, if he deems it advisable, to sell the corporate assets, this does not make him sole owner of the corporation, although he has acquired all of the shares except one. Buf. Electro-Plating Co. v. Day, 151 A. D. 237 (1912).

Sale of Independent Branch of Business.

The sale of the calendar department, which was a large and independent branch of the business of a corporation formed to carry on the business of lithographing and printing, is a sale which can only be made pursuant to this section. It is not a sale in the line of its ordinary business, and a stockholder who objects and complies with the provisions of section 17 is

entitled to an order for the appointment of appraisers under that section. Matter of Timmis, 200 N. Y. 177 (1910).

Report of Appraisers.

No authority is found in the statute for action by the court on the report of the appraisers. Under the statute, section 16, the dissenting stockholders have their election either to submit to the action of the directors and stockholders, or demand an appraisal under section 17. In choosing the latter course it is equivalent to a submission of their rights to an award of arbitrators chosen by the court. There is no inherent power in the court over such award. Ennis, et al. v. Federal Brewing Co., Spec. Term, Blackmar, J., N. Y. Law Journal, May 2, 1914.

§ 17. Rights of non-consenting stockholders on voluntary sale of franchise and property. If any stockholder not voting in favor of such proposed sale or conveyance shall at such meeting, or within twenty days thereafter, object to such sale, and demand payment for his stock, he may, within sixty days after such meeting, apply to the supreme court at any special term thereof held in the district in which the principal place of business of such corporation is situated, upon eight days' notice to the corporation, for the appointment of three persons to appraise the value of such stock, and the court shall appoint three such appraisers, and designate the time and place of their proceedings as shall be deemed proper, and also direct the manner in which payment for such stock shall be made to such stockholders. The court may fill any vacancy in the board of appraisers occurring by refusal or neglect to serve or otherwise. The appraisers shall meet at the time and place designated, and they or any two of them, after being duly sworn honestly and faithfully to discharge their duties, shall estimate and certify the value of such stock at the time of such dissent, and deliver one copy to such corporation, and another to such stockholder, if demanded; the charges and expenses of the appraisers shall be paid by the corporation. When the corporation shall have paid the amount of such appraisal, as directed by the court, such stockholders shall cease to have any interest in such stock and in the corporate property of such corporation and such stock may be held or disposed of by such corporation.

Part of former § 33, added by L. 1893, ch. 638, as am'd by L. 1901, ch. 130.

[CONSOLIDATORS' NOTE.—This section is part of former § 33, made into a new section without change, except heading is added, as explained in last note.

For procedure by dissenting stockholder, see forms, post.

The requirement that an application for appraisal of stock must be made within sixty days after the stockholders' meeting only requires the notice of such application to be served within that time; the hearing itself may be held at any time thereafter. Ennis v. Federal Brewing Co., 123 A. D. 691 (1908), aff'd., 192 N. Y. 570.

§ 18. Alterations or extension of business. Any stock corporation heretofore or hereafter organized under any general or special law of this state may alter its certificate of incorporation so as to include therein any purposes, powers or provisions which at the time of such alteration may apply to corporations engaged in a business of the same general character, or which might be included in the certificate of incorporation of a corporation organized under any general law of this state for a business of the same general character, by filing in the manner provided for the original certificate of incorporation an amended certificate, executed by the president and secretary, stating the alteration proposed, and that the same has been duly authorized by a vote of a majority of the directors and also by vote of stockholders representing at least three-fifths of the capital stock, at a meeting of the stockholders called for the purpose in the manner provided in section sixty-three of this chapter, and a copy of the proceedings of such meeting, verified by the affidavit of one of the directors present thereat, shall be filed with such amended certificate.

Formerly § 32, added by L. 1892, ch. 688, as am'd by L. 1901, ch. 354; L. 1905, ch. 751.

For form of certificate, see post, Form No. 251.

CONSOLIDATORS' NOTE.— Former § 32 has been transferred to article 2, as above, because it is a general provision.

Prior to the amendment of the above section in 1901 it authorized a corporation only to "extend or alter its business and powers," although the Gen. Corp. L. provides for inserting in the certificate of incorporation various matters in addition to the specification of the business and powers of the corporation, and there are various provisions of law authorizing the filing of amended or supplemental certificates specifying other matters than those provided for by this section. Therefore, the section, as amended in 1901, now provides that a corporation, by filing an amended or supplemental certificate, may alter its certificate of incorporation so as to include therein any purposes, powers or provisions which at the time of such alteration may apply to corporations engaged in business of the same general character or which might be included in the certificate of incorporation of a corporation organized under any general law for a business of the same general character.

Under the above section any domestic stock corporation may alter its certificate of incorporation to include any purposes, powers or provisions which might properly be included in the certificate for the formation of a corporation of the same general character under any general law. People ex rel. Municipal Gas Co. v. Rice, 138 N. Y. 151 (1893). One of the additional powers which may be acquired under this section is the power to exchange its stock for that of another corporation, although this is in effect the merging of the business and franchises of the two corporations. Id.

The amendment of 1905 provided that the president or secretary should execute the certificate instead of a majority of the directors, and also

required the certificate to state that it had been duly authorized by a vote of a majority of the directors as well as by a vote of stockholders representing at least three-fifths of the capital stock.

An Amendment by Unanimous Consent of Stockholders is Insufficient.

This section permits an amendment of the certificate of incorporation so as to provide for classification of directors, as might have been provided originally in the certificate of incorporation, but requires that such amendment be authorized by the statutory procedure prescribed in such section and the filing of a certificate executed in accordance therewith. An amendment by the mere unanimous consent of the stockholders is insufficient. Bond v. Atlantic Terra Cotta Co., 137 A. D. 671, 676 (1910).

Amendment to Change or Redefine Voting Rights.

Where the purpose of an amendment is to change, alter or redefine voting rights, and it is shown that only the vote required by this section has been obtained the Secretary of State is not authorized to file the amended certificate; but where such an amendment has been adopted by the vote of all the stockholders the amendment is valid and is the same in effect as if the provision were contained in the original certificate of incorporation. Opinion of Atty. Genl. (1900), p. 414.

An amended certificate which proposes to change a limitation upon the number of shares of stock to be held by each stockholder is a violation of the rights of minority stockholders even though such amendment might place the voting power on a per capita basis. Opinion of Atty. Genl., June 12, 1913.

§ 19. Issuance of shares of stock without nominal or par value. Upon the formation or the reorganization of any stock corporation, other than a moneyed corporation, and other than a corporation under the jurisdiction of any public service commission, the certificate of incorporation may provide for the issuance of the shares of stock of such corporation, other than preferred stock having a preference as to principal, without any nominal or par value by stating in such certificate:

(1) The number of shares that may be issued by the corporation, and if any of such shares be preferred stock, the preferences thereof. If such preferred stock or any part thereof shall have a preference as to principal, the certificate shall state the amount of such preferred stock having such preference, the particular character of such preferences, and the amount of each share thereof, which shall be five dollars or some multiple of five dollars, but not more than one hundred dollars.

(2) The amount of capital with which the corporation will carry on business, which amount shall be not less than the amount of preferred stock (if any) authorized to be issued with a preference as to principal, and in addition thereto a sum equivalent to

five dollars or to some multiple of five dollars for every share authorized to be issued other than such preferred stock; but in no event shall the amount of such capital be less than five hundred dollars.

Such statements in the certificate shall be in lieu of any statements prescribed by the law under which the corporation shall have been formed or reorganized as to the amount or the maximum amount of its capital stock or the number of shares into which the same shall be divided, or of the amount or the par value of such shares.

Each share of such stock without nominal or par value shall be equal to every other share of such stock, subject to the preferences given to the preferred stock if any authorized to be issued. Every certificate for such shares without nominal or par value shall have plainly written or printed upon its face the number of such shares which it represents and the number of such shares which the corporation is authorized to issue, and no such certificate shall express any nominal or par value of such shares. The certificates for preferred shares having a preference as to principal shall state briefly the amount which the holders of each of such preferred shares shall be entitled to receive on account of principal from the surplus assets of the corporation in preference to the holders of other shares, and shall state briefly any other rights or preferences given to the holders of such shares.

Such corporation may issue and may sell its authorized shares, from time to time, for such consideration as may be prescribed in the certificate of incorporation, [or as from time to time may be fixed by the board of directors pursuant to authority conferred in such certificate, or if such certificate shall not so provide, then by the consent of] the holders of two-thirds of each class of shares then outstanding given at a meeting called for that purpose in such manner as shall be prescribed by the by-laws. Any and all shares issued as permitted by this section shall be deemed fully paid and non-assessable and the holder of such shares shall not be liable to the corporation or to its creditors in respect thereof.

L. of 1917, amending this P.

Sections 19 to 23, both inclusive, of this article are new, added by Laws of 1912, chapter 351, in effect April 15, 1912.

For form of certificate for formation of corporation with shares of stock without par value, see Form No. 7, post.

History and Purpose of Shares of Stock of Unspecified Value.

See the above heading under section 23 of this law, post.

§ 20. Commencement of business; authorized debts. No corporation formed pursuant to section nineteen hereof shall begin to carry on business or shall incur any debts until the amount of capital stated in its certificate of incorporation shall have been fully paid in money, or in property taken at its actual value. In case the amount of capital stated in its certificate of incorporation shall be increased as herein provided, such corporation shall not increase the amount of its indebtedness then existing until it shall have received in money or property the amount of such increase of its stated capital. The directors of the corporation assenting to the creation of any debt in violation of this section shall be liable jointly and severally for such debt; but no action shall be brought under the foregoing provision of this section unless within one year after the debt shall have been incurred the creditor shall have served upon the director written notice of intention to hold him personally liable for such debt. Any director who, because of any such liability under this section, shall pay any debt of the corporation, shall be subrogated to all rights of the creditor in respect thereof against the corporation and its property and also shall be entitled to contribution from all other directors of the corporation similarly liable for the same debt and the personal representative of any such director who shall have died before making such contribution.

No such corporation shall declare any dividend which shall reduce the amount of its capital below the amount stated in the certificate as the amount of capital with which the corporation will carry on business. In case any such dividend shall be declared, the directors in whose administration the same shall have been declared, except those who may have caused their dissent therefrom to be entered upon the minutes of such directors at the time or who were not present when such action was taken, shall be liable jointly and severally to such corporation and to the creditors thereof to the full amount of any loss sustained by such corporation or by its creditors respectively by reason of such dividend.

Added by L. 1912, ch. 351.

§ 21. Taxation. The organization tax payable under section one hundred and eighty of the tax law by any corporation issuing such shares without designated monetary value shall be at the

rate of five cents on each such share which the corporation is authorized to issue, and a like tax upon any subsequent increase thereof. The tax payable under section two hundred and seventy of the tax law in respect of any sale or agreement of sale or any memorandum of sale or delivery or transfers of shares or certificates of any share without designated monetary value hereafter issued by any such corporation issuing such shares shall be at the rate of two cents for each and every share of such stock so transferred. The franchise tax upon any corporation issuing such shares of stock payable under section one hundred and eighty-two of the tax law shall be determined by the amount of the gross assets of such corporation employed in any business within this state, less such proportion of its liabilities as shall represent the ratio of its gross assets employed in any business within this state to its entire gross assets wherever employed in business, and the rate of such franchise tax shall be fixed in the manner provided in said section one hundred and eighty-two of the tax law. For this purpose the rate of dividends shall be computed by dividing the total amount of dividends which have been paid during the year by the amount of assets of the corporation upon the first day of such year.

Added by L. 1912, ch. 351.

§ 22. **Increase or reduction of shares or capital.** Any corporation formed or reorganized pursuant to section nineteen may amend its certificate of incorporation so as to increase or to reduce the number of shares which it may issue, or so as to increase or to reduce the amount of its stated capital, by filing, in the manner provided for the original certificate of incorporation, a certificate of amendment under seal executed by its president or a vice-president and by its secretary or its treasurer, stating the amendment proposed and that the same has been duly authorized by a vote of a majority of the directors and also by the vote of the holders of at least three-fifths of the outstanding shares of each class issued by the corporation, at a meeting of the stockholders called for the purpose in the manner provided in section sixty-three hereof, and by filing with such certificate of amendment a copy of the proceedings of such meeting, made, signed, verified and acknowledged by the president or a vice-president and by the secretary or the treasurer of the corporation; but an

amendment cannot be made under this section unless as so amended the certificate of incorporation could lawfully have been filed under section nineteen of this chapter. In case of a reduction of the amount of capital of a corporation, a certificate setting forth the whole amount of the ascertained debts and liabilities of the corporation shall be made, signed, verified and acknowledged by the president or a vice-president and by the secretary or the treasurer of the corporation and shall be filed with the certificate of amendment; and such certificate of amendment shall have endorsed thereon the approval of the comptroller to the effect that as so stated the reduced amount of capital is sufficient for the proper purposes of the corporation and is in excess of its ascertained debts and liabilities.

Added by L. 1912, ch. 351.

§ 23. Amount of capital stock and of shares within meaning of other laws. For the purpose of any rule of law or of any statutory provision (other than the foregoing sections nineteen, twenty, twenty-one and twenty-two) relating to the amount of the capital stock of a corporation or the amount or par value of its shares, the aggregate amount of the capital stock of any such corporation formed pursuant to section nineteen hereof shall be deemed to be the aggregate amount specified in the certificate or amended certificate of incorporation or of reorganization as the amount of capital with which the corporation will carry on business; the amount or the par value of each share of preferred stock having a preference as to principal shall be deemed to be the amount thereof so specified in such certificate or such amended certificate; and the amount or the par value of each other share shall be deemed to be an aliquot part of the aggregate capital so specified in such certificate or in such amended certificate in excess of the specified amount (if any) of the preferred stock therein authorized to be issued with a preference as to principal.

Added by L. 1912, ch. 351.

History and Purpose of Shares of Stock of Unspecified Value.

The enactment of chapter 351, Laws of 1912, whereby sections 19–23 were added to the Stock Corporation Law permitting the formation of corporations having capital stock divided into shares without the assignment to such shares of any nominal or par value in money and the issuance of stock certificates representing merely proportionate interests in the entire capital stock, while creating a radical innovation, is in accord with the views advo-

cated by profound thinkers respecting a remedy arising from the evil of over-capitalization. The harmful results flowing from excessive issues of capital stock bearing the dollar mark and thereby importing to the ordinary lay mind that the equivalent in actual property is thus represented has been at all times apparent to persons familiar with the methods adopted for the flotation of capital stock issues by promoters, unscrupulous directors and stock market manipulators. The minds of investors have been diverted from the actual fact that an ordinary share of stock of a corporation is neither more nor less than a certain proportionate part, according to the number of shares, of the holder's interest in the corporate property over and above all claims of creditors and of holders of preferred stock.

According to the best information obtainable the sanction of shares of undetermined value was first embodied in the corporation laws of Germany.

The movement in this State in behalf of the removal of the dollar mark from shares of stock began as early as 1892 when a proposition looking to that end was favorably reported to the New York State Bar Association, but without resulting in any definite action. At a hearing before the United States Industrial Commission in 1899, Francis Lynde Stetson, Esq., gave interesting testimony upon the subject. In 1896, in an address before the New Hampshire Bar Association, the late Mr. Edward M. Shepard forcibly elucidated the advantages embodied in the principle. For several years this method of issuing shares of stock has been in practical use by one of the voluntary joint stock associations organized in the State of New York. In 1907 another practical example of the working of the plan was given in the "ore certificates," issued by the trustees of the Great Northern Iron Ore Properties, which are now listed and dealt in on the New York Stock Exchange. In 1909, Messrs. Francis Lynde Stetson, Edward M. Shepard and Victor Morawetz, constituting a special committee appointed by the New York State Bar Association for that purpose, drafted a bill to amend the corporation statutes so as to permit the organization of corporations having capital stock divided into shares without par value. The bill passed both branches of the legislature but was vetoed because of some objections to the method of assessing the tax upon such corporations. Subsequently reawakened interest throughout the country was attracted to the proposition by the advocacy of the plan by Messrs. Hadley, Judson, Strauss, Fisher and Meyer of the Railroad Securities Commission, in their report transmitted to Congress in December, 1911. Thereafter the Stetson committee renewed its activities under authority of the State Bar Association, Mr. Louis Marshall taking the place of the late Mr. Shepard. In 1912 the amendment was re-drafted so as to obviate the objections previously made and the bill, in its amended form, became a law on April 15 of that year.

These provisions have attracted such wide consideration and general interest that it seems desirable to publish herewith the interesting comments respecting shares of stock of unspecified value, contained in an opinion rendered by the Public Service Commission in the second district, through its chairman, Mr. Stevens, July 21, 1908, in the matter of the N. Y. Central & Hudson River R. R. Company, as follows:

> "The harmfulness of excessive issues of capital stock of corporations serving the public arises from the fact that stock of a given face value has not behind it property equal in actual value to the face value of the stock. The result is that the owners of the stock naturally assume the value of the corporate assets to be at least equal to the face value of the stock, demand an adequate return upon the same, and in the effort to

secure such return both demand excessive prices for services rendered and unduly impair and cheapen the service.

"The stock in the natural course of business, falls into the hands of *bona fide* purchasers, who buy the same upon the assumption that it is issued dollar for dollar of value. Any effort to reduce prices for services rendered after stocks have fallen into the hands of such holders is fought, as tending to impair the value of existing securities and unsettling the basis of all corporate transactions. This last trouble arises from regarding the share of stock as representing value to an amount equal to its face value. Were all stock issued for full value, this might be true, for a brief interval, but in the practical course of business such equality rarely exists. In a successful business the value of the stock enhances; in an unsuccessful business it depreciates. It cannot well happen that the value of property invested in a going enterprise will remain of the same value permanently, or even for any considerable period.

"The fact is, a share of stock represents only a given fractional part of the assets of the corporation. If the entire capital stock is one hundred thousand dollars, divided into shares of one hundred dollars each, one share is in fact no more than the evidence of ownership of a one-thousandth part of the corporate assets upon final dissolution and division, and of a right to a one-thousandth part of any dividend which may be declared. It has not any direct proper value beyond these two rights. If no dividend can properly be declared, the stock has no value as evidence of a dividend right. This dividend right is simply an ownership of a given part of the net earning power of the business. To say that stock is entitled to any given rate of dividend is a logical absurdity — a confusion in language — since it is only evidence of a right to another and vastly different thing, namely, the right to a proportional part of the net earnings of the business. If once the public mind could be brought to regard shares of stock not as property in themselves, but as evidence of a right in property, we might hope to be rid of the deceptive notion that the par value of a share of stock is the slightest evidence of its real value, or is any evidence of the dividend returns to which the owner is entitled.

"It may well be considered a matter worthy of grave reflection whether in the case of at least all corporations hereafter organized a certificate of stock should have no par value, but should state only that the owner is entitled to a named proportional interest in the corporation. Every prospective purchaser would then be required to get a notion of the value of the property from a source other than the sums named on the certificate. The owner could not expect or demand returns upon a fictitious basis. The real would supersede the unreal in most investigations as to corporate values."

ARTICLE 3

Directors and Officers

SECTION 25. Directors.
26. Change of number of directors.
27. When acts of directors void.
28. Liability of directors for making unauthorized dividends.
29. Liability of directors for loans to stockholders.
30. Officers.
31. Inspectors and their oath.
32. Books to be kept.
33. Stock books of foreign corporations.
34. Annual report to secretary of state.
35. Liability of officers for false certificates, reports or public notices

§ 25. Directors. The directors of every stock corporation shall be chosen at the time and place fixed by the by-laws of the corporation by a plurality of the votes at such election. Each director shall be a stockholder unless otherwise provided in the certificate, or in a by-law adopted by a stockholders' meeting. Vacancies in the board of directors shall be filled in the manner prescribed in the by-laws. Notice of the time and place of holding any election of directors shall be given by publication thereof, at least once in each week for two successive weeks immediately preceding such election, in a newspaper published in the county where such election is to be held, and in such other manner as may be prescribed in the by-laws. Policyholders of an insurance corporation shall be eligible to election as directors, whether or not they be stockholders. At least one-fourth in number of the directors of every stock corporation shall be elected annually.

Formerly L. 1890, ch. 564, § 20, as am'd by L. 1892, ch. 688; L. 1901, ch. 354; L. 1906, ch. 238.

For adjudicated cases as to powers, duties and liabilities of directors see Gen. Corp. Law, § 34.

The amendment of 1901 omitted the provisions that directors shall be chosen from the stockholders, and that if a director shall cease to be a stockholder his office shall become vacant. Persons who are not stockholders may now be directors if the certificate of incorporation or a by-law adopted by a stockholders' meeting so provides.

For form of minutes of annual meeting of stockholders, see post, Form No. 220.

For form of notice of annual meeting, see post, Form No. 221.

For form of stockholder's waiver of notice of annual meeting, see post, Form No. 222.

For form of oath of inspectors of election and certificate of result, see post, Forms Nos. 223, 224.

For forms of proxy from a stockholder, see post, Forms Nos. 225–228.

For forms of ballot at election of directors, see post, Forms Nos. 231, 232.

For form of minutes of annual meeting of directors, see post, Form No. 233.

For form of waiver of notice of directors annual meeting, see post, Form No. 234.

For forms of classification of directors, see Forms Nos. 287–289.

Cross References.

The term directors, includes trustees. Gen. Corp. Law, § 3, ante.

At least one director must be a resident of this State. Gen. Corp. Law, § 34, ante.

No liability for dissolution arises from failure to elect directors on the day fixed in the by-laws. Gen. Corp. Law, § 28, ante. But see the Stock Corp. Law, § 27, as to neglect or refusal of directors to adopt by-laws for holding annual election.

Unless others are appointed by the court the directors shall be trustees of creditors, etc., in case of dissolution. Gen. Corp. Law, § 35, ante.

The number of directors may be changed. See next succeeding section.

By-laws adopted at a meeting of members of the corporation control action of directors. Gen. Corp. Law, § 11, subd. 5, ante. Any by-law adopted by directors, regulating election of directors or officers, must be published. Id.

The directors may appoint officers of the corporation. See § 30 of this law.

The directors shall manage the affairs of every corporation and a majority of the board of directors constitutes a quorum. Gen. Corp. Law, § 34, ante. And the act of a majority at a meeting having a quorum is the act of the board. Gen. Corp. Law, §§ 34 and 43.

At elections of directors each stockholder has one vote for every share of stock held by him, unless otherwise provided in the certificate of incorporation. Gen. Corp. Law, § 23, ante.

For liability of directors for unauthorized dividends, loans to stockholders, etc., see §§ 28 and 29 of this law, post.

Whenever, under the provisions of any of the corporate laws, a corporation is authorized to take any action by the agreement or action of its directors, managers or trustees, such agreement or action may be taken by such directors, regularly convened as a board, and acting by a majority of a quorum, except when otherwise expressly required by law or the by-laws of the corporation. Gen. Corp. Law, § 43.

For other decisions applicable to the provisions of the foregoing section, see the cases cited under § 23, Gen. Corp. Law.

For penal provisions relative to misconduct of directors, see Penal Law provisions, post.

A special meeting for electing directors may be called. Gen. Corp. Law, §§ 29, 30, 31, ante. In certain cases any member of the corporation may call such meeting. Id.

As to proceedings to compel directors to account for their official conduct; to transfer to the corporation property belonging to the same, etc., or for the removal of such director, see Gen. Corp. Law, §§ 90–92, and §§ 307, 308, ante.

As to inspectors of election and their election, see § 31 of this law, post.

Election of Directors.

See, also, sections 23 and 32 of the General Corporation Law, and numerous authorities cited under each section.

The fact that only a minority of the stock of the corporation was voted on at an election of directors does not make the election illegal. The stockholders attending the meeting or represented make a quorum. Ashcroft v. Hammond, 132 A. D. 3, 7 (1909), citing matter of Rapid Transit Ferry Co., 15 A. D. 530.

The continuous neglect of a corporation for a number of years to hold any election of officers affords a proper case for the issue of a mandamus. Peo. ex rel. Walker v. Albany Hospital, 11 Abb. Pr. (N. S.) 4 (1871). See, also, Peo. v. Twaddell, 18 Hun 427 (1879); In re Vandenburgh v. Broadway Underground Connecting Ry. Co., 29 Hun 348 (1883). See, also, 38 A. D. 159.

Waiver of Notice of Election.

See the provisions of section 42 of the General Corporation Law, ante.

Where the provisions of section 25 of the Stock Corporation Law, requiring publication of notice, was disregarded in an election of directors, but said notice was served on all stockholders, either personally or by mail, and the meeting was in all other respects legal, a waiver signed by each stockholder approving the vote taken pursuant to this section renders such election valid. Opinion of Atty. Genl., Feb. 2, 1910.

At any meeting at which every member of the board of directors shall be present, though held without notice, any business may be transacted which might have been transacted if the meeting had been duly called. Gen. Corp. Law, § 43, ante.

Powers, Duties and Liabilities of Directors.

For collection of authorities relative to the powers, duties and liabilities of directors, see the General Corporation Law, section 34, ante, under the various topical headings.

The notice prescribed in the by-laws must be given, in addition to that required by statute. Matter of Keller, 116 A. D. 58 (1906).

At a meeting for the election of directors, any number of stockholders, however small their holding, provided they hold a plurality of the stock voted, may elect directors, notwithstanding a by-law to the contrary. Matter of Rapid Transit Ferry Co., 15 A. D. 530, revsg. in part, 19 Misc. 409 (1897).

The cost of publishing notices of the stockholders' meetings is a corporate charge. Lawyer's Advertising Co. v. Consolidated Ry. Lighting Co., 187 N. Y. 395, modifying 110 A. D. 892 (1907).

Where a candidate at a corporate election receives a majority of the legal votes cast, the receipt of illegal votes will not defeat his election. Argus Co. v. Manning, 138 N. Y. 557 (1893).

Neither stockholders nor directors can do a corporate act, out of the jurisdiction creating the corporation, which can bind those who do not participate in it. Ormsby v. V. C. M. Co., 56 N. Y. 623 (1874). But meetings of directors of corporations organized under or subject to the provisions of the Business Corporations Law may be held outside the State unless otherwise expressly provided in the certificate of incorporation or in the by-laws. B. C. L., § 2, added by L. 1904, ch. 446.

The mere election of a person as a director of a corporation, where he neither accepts the position nor acts, is insufficient to establish that he is a director. United Growers Co. v. Eisner, 22 A. D. 1 (1897).

A trustee who, in spite of the protests of his co-trustee, votes upon the estate stock in favor of himself as director, is guilty of a breach of trust, and will not be permitted to derive personal profit therefrom. Matter of Elias, 17 Misc. 718 (1896).

Qualification of Voters.

For cases bearing upon this subject see Gen. Corp. Law, § 23.

Right to Deny or Limit Voting Privileges.

Discussion of Non-Voting Clauses in Certificate of Incorporation and Effect Thereof.

Vote by Administrators and Executors.

Vote by One Executor Against Wishes of Co-Executor Not Permissible.

Partners or Co-Owners of Stock Cannot Vote if They Disagree as to Such Vote.

See the foregoing topics under section 23 of the General Corporation Law, ante.

Agreement for Cumulative Voting Prior to Incorporation.

See the above topic under section 24 of the General Corporation Law, ante.

Defective Ballot.

A ballot, which contains the printed name of one candidate for office and the written name thereunder of another candidate for the same office, is defective and should be rejected. Peo. ex rel. Thorn v. Pangburn, 3 A. D. 456 (1896), revsg. 14 Misc. 195.

At an election of directors the failure of a stockholder to write the christian name of his candidates on the ballot does not invalidate his vote, and directors holding over on the claim of the invalidity of such ballot may be proceeded against under the Code, section 1948; but the petitioners may not avail themselves of the provisions of section 32 of the General Corporation Law. Opinion of Atty. Genl., Mar. 21, 1913.

Election of Director; Acceptance of Office Necessary.

The mere election of a person as a director by the stockholders does not make him such. There must be in addition an acceptance on his part of the office either express or implied from the circumstances of the case. Cameron v. Seaman, 69 N. Y. 396 (1877); United Growers Co. v. Eisner, 22 A. D. 1, 6 (1897). Circumstances under which acceptance may be presumed. Halpin v. Mutual Brewing Co., 20 A. D. 583 (1897).

Classification of Directors.

Section 18 of this law, supra, permits an amendment of the certificate of incorporation so as to provide for classification of directors, as might have been provided originally in the certificate of incorporation, but such amendment must be authorized by following the statutory procedure prescribed in such section and by filing a certificate executed in accordance therewith. An amendment under said section by the mere unanimous consent of the stockholders is unauthorized. Bond v. Atlantic Terra Cotta Co., 137 A. D. 671, 676 (1910).

Meeting of Board May Be Adjourned by Less Than a Quorum.

Where the by-laws of a corporation having nine directors provided that whenever, at a regular meeting of the board, there should attend less than a quorum, three or more directors present should have power to adjourn to such time and place as they should deem proper, not passing over the next regular meeting, and pursuant to such by-law, at a regular meeting at which only three directors were present, on motion they adjourned to a future day, when there were five directors present, and at that meeting a resolution was adopted authorizing the issue of a bond, such a by-law is reasonable and valid and the resolution adopted thereat was binding upon the corporation. Smith v. Law, 21 N. Y. 296 (1860).

Directors De Jure and De Facto.

Persons elected as directors by other directors, themselves merely de facto and not qualified to act as such, acquire no right or title to the office as against the corporation or its stockholders. Matter of Ringler & Co., 204 N. Y. 30 (1912), revsg. 145 A. D. 361. When persons become officers de facto they are such only as to the public and third persons dealing with the corporation, and are removable in a direct proceeding brought for that purpose. Id.

Where the by-laws require a director to be the holder or owner of at least one share of stock and the stock had been transferred prior to an election for the sole purpose of qualifying the transferees as directors and such shares had been immediately assigned back to the true owner in blank, their election as directors is invalid. Matter of Ringler & Co., 204 N. Y. 30 (1912), revsg. 145 A. D. 361.

When a transfer of stock is made in good faith for the purpose of qualifying a person as director and after his election such person actually holds the stock during his incumbency of office, such transferee is a stockholder and is a director de jure. Matter of Ringler & Co., 204 N. Y. 30 (1912), revsg. 145 A. D. 361.

At common law a director holding over after the end of his term became a director de facto, but under the existing statute (Now Gen. Corp. L., § 28) directors holding over and acting continue to be de jure directors until their successors are chosen. Van Amburgh v. Baker, 81 N. Y. 46, 48 (1880); Beardsley v. Johnson, 121 N. Y. 224, 228 (1890); Phila. & Reading C. & I. Co. v. Hotchkiss, 82 N. Y. 471, 474 (1880); St. George Vineyard Co. v. Fritz, 48 A. D. 233 (1900). In the latter case directors held over for five years. See, also, Sanborn v. Lefferts, 58 N. Y. 179, 183 (1874).

Provisions in statutes and by-laws that the election of directors is to be on a specified day are directory, and it may be held on a later day, and directors then chosen will be directors de jure. Beardsley v. Johnson, 121 N. Y. 224, 228 (1890); St. George Vineyard Co. v. Fritz, 48 A. D. 233 (1900).

If the eligibility of directors is based upon ownership of stock in the corporation and a director disposes of his stock, he ceases to be a director de jure, but if he continues to perform acts as a director and is permitted to do so, he is to be treated as a director de facto. Beardsley v. Johnson, 121 N. Y. 224, 228 (1890); St. George Vineyard Co. v. Fritz, 48 A. D. 233, 236 (1900); Donnelly v. Pancoast, 15 A. D. 323, 325 (1897); Union Natl. Bk. v. Scott, 53 A. D. 65, 72 (1900). See also, Vandenburgh v. B. R. Co., 29 Hun 348.

At an annual meeting of the stockholders of a corporation a resolution was passed increasing the number of directors from five to seven, and at the same meeting seven directors were elected by the stockholders for the ensuing year; held, that this resolution was valid, but that such increase did not become effectual until a certificate showing the increase was filed in the office

of the Secretary of State and in the office of the county clerk. Lewis v. Matthews, 161 A. D. 107 (1914). After filing the certificate as required by statute, such persons, in assuming to act, become de facto directors and their acts became binding on the corporation. Id.

The rule of law is that he who enters upon an office and exercises its functions is responsible for his acts therein to the same extent as though he of right occupied the position. Donnelly v. Pancoast, 15 A. D. 323, 325 (1897).

The Supreme Court has no power in a suit in equity brought by a stockholder in his own behalf and that of all other stockholders to try the respective claims to the office of director as between rival claimants not parties to the action. Nor can it enjoin a de facto director, holding under color of an election, from performing the duties of the office. Moir v. Provident Savings Life Assur. Soc., 127 A. D. 591, 603 (1908); Washington Lighting Co. v. Dimmick, 41 A. D. 596 (1899). In the latter case the court said, quoting from Ciancimino v. Man (1 Misc. 122): "A court of equity has no inherent power to try the disputed title to corporate office and to enjoin one in possession from the exercise of its functions at the suit of a rival claimant. * * * Such may be done and judgment of ouster rendered only in an action in the nature of a quo warranto instituted by the attorney-general on behalf of and in the name of the people." See, also, the general index, under the title "Quo Warranto."

Where a person has been elected a director, has accepted the position and took part in the business and affairs of the corporation, he becomes a director de facto and cannot claim that he was not eligible as a director. This does not result from an estoppel, but as a consequence of the rule of law that he who enters upon an office and exercises its functions is responsible for his acts therein to the same extent as though he of right occupied the position. St. George Vineyard Co. v. Fritz, 48 A. D. 233, 236 (1900); Donnelly v. Pancoast, 15 A. D. 323 (1897).

Where a person acquires stock by a transfer, regular upon its face, although alleged to have been induced by fraud, and such person is elected a director, he becomes an apparent and a de facto director, and may join other directors in a petition for voluntary dissolution, thus conferring jurisdiction on the court to entertain the proceedings. MacMahon v. Stepney Spare Wheel Agency, 140 A. D. 554 (1910), citing Matter of Manoca Temple Assn., 128 A. D. 756.

Since a person not a stockholder may be a director if the certificate of incorporation or by-laws so provide, a person elected director and president, unless he has resigned or his successor has been elected, cannot be presumed to have forfeited his office as director, even assuming that he has parted with all his stock, when nothing further is shown; and, in such a case, he may institute an action on behalf of the corporation pursuant to a resolution of the directors. Buffalo Electro-Plating Co. v. Day, 151 A. D. 237 (1912).

Recognition of a person as a director by the other directors, under a mistaken supposition that he was duly elected, is not, as between the person and the corporation, and where the public or third persons are not concerned, equivalent to, nor can it be made available as an election. People ex rel. Nicholl v. N. Y. Infant Asylum, 122 N. Y. 190 (1890).

Where neither the certificate of incorporation nor the by-laws provide that a director need not be a stockholder, the title to the office of director cannot be predicated upon an alleged purchase of stock by another person in the interest of or as the representative of the claimant to office. Matter of Hassam Paving Co., 152 A. D. 610 (1912), citing Matter of Ringler & Co., 204 N. Y. 30.

Married Women May be Directors.

Women, either married or single, if not full legal age, may become directors, People v. Webster, 10 Wendell 554 (1833). However, another ruling in this case to the effect that when a married woman sues, or is sued, her husband must be joined with her, has been superseded by the enactment of ch. 381, Laws of 1884 (now Domestic Relations Law, § 51). For the full text of said section, see Gen. Corp. Law, § 4.

Since the enactment of ch. 381, Laws of 1884 (now Domestic Relations Law, § 51) all disabilities of a married woman to make valid contracts are removed, and she may now make contracts and bind herself in the same way as a femme sole. Where such a contract is made she is no longer to be considered as acting as the agent of her husband. O'Connell v. Shera, 66 A. D. 467 (1901).

Infants May not be Directors.

Infants are ineligible to election as directors, as the statutes clearly contemplate that the persons entrusted with the management of the affairs of a corporation must be sui juris. In re Globe Mut. Benefit Assn., 135 N. Y. 280 (1892), and s. c., 63 Hun 263.

Cases Superseded by Amendment of 1901.

Prior to the last amendment to the foregoing section the following cases applied thereto: As soon as a director parts with all beneficial interest in and control over his stock and causes the corporate officers to have knowledge of the fact, he ceases to be a director. Chem. Nat. Bk. v. Colwell, 132 N. Y. 250 (1892); Beardsley v. Johnson, 121 N. Y. 224 (1890). The election of a disqualified person does not make him even a de facto director. In re Newcomb, 42 St. Rep. 442 (1891). One who holds the legal title to stock, but has no beneficial interest therein, is ineligible as a director. Matter of Elias, 17 Misc. 718 (1896). The provision, that "if a director shall cease to be a stockholder his office shall become vacant," is self-executing. Sinclair v. Fuller, 158 N. Y. 607 (1899), affg. 9 A. D. 297. But these decisions have been superseded by the amendment of 1901, which struck out the clause vacating a directorship in case a director ceased to be a stockholder, and which provides that directors need not be stockholders if the certificate of incorporation or a by-law made by stockholders so states.

Quorum of Directors and Powers of Majority.

For the above topic and numerous authorities relating thereto see Gen. Corp. Law, § 34.

§ 26. Change of number of directors. The number of directors of any stock corporation may be increased or reduced, but not below the minimum number prescribed by law, when the stockholders owning a majority of the stock of the corporation shall so determine, at a meeting to be held on two weeks' notice in writing to each stockholder of record. Such notice shall be served personally or by mail, directed to each stockholder at his last known

post-office address. Proof of the service of such notice shall be filed in the office of the corporation at or before the time of such meeting. The proceedings of such meeting shall be entered in the minutes of the corporation and a transcript thereof verified by the president and secretary of the meeting shall be filed in the offices where the original certificates of incorporation were filed. Such increase or reduction may also be effected by unanimous consent without a meeting, in which case there shall be filed in the offices herein specified the unanimous consent of the stockholders in writing, signed by them, or their duly authorized proxies, but no such consent shall be valid unless there is annexed thereto an affidavit of the custodian of the stock book of such corporation stating that the persons who have signed such consent, either in person or by proxy, are the holders of record of the entire capital stock of said corporation issued and outstanding. If a corporation formed under or subject to the banking law, the consent of the superintendent of banks, and if an insurance corporation, the consent of the superintendent of insurance, shall be first obtained to such increase or reduction of the number of directors. This section shall apply to any stock corporation whether organized under a general or special law, and the number of directors may be increased as hereby provided notwithstanding the maximum number of directors now prescribed by law. If the number of directors be increased, the additional directors authorized by such increase shall be elected by the votes of a majority of the directors in office at the time of the increase. If the original or an amended certificate of incorporation of the corporation shall provide that the directors shall be divided into two or more classes, whose terms of office shall respectively expire at different times, the additional directors shall be divided among such classes as nearly as practicable in proportion to the respective numbers of directors constituting each class prior to such increase.

Formerly L. 1890, ch. 564, § 21, as am'd by L. 1892, ch. 688; L. 1903, ch. 320; L. 1904, ch. 307; L. 1905, ch. 750; L. 1909, ch. 421.

For certificates of change of number of directors, see Forms Nos. 282, 283.

For forms of classification of directors, see Forms Nos. 287–289.

Amendatory Changes.

The provisions authorizing a change of the number of directors by unanimous consent without a meeting were inserted by L. 1904, ch. 307.

The last two sentences were added by L. 1905, ch. 750.

By L. 1909, ch. 421, amending L. 1909, ch. 61 (The Consolidated Act), a provision requiring the meeting of stockholders to be held at the usual place of meeting of the directors was stricken out.

This section omits to provide how the reduction of the number of directors is to be effected after it has been voted. It would be impossible to say that some of the directors have been ipso facto deprived of office while others remained as directors of the corporation. Unless, therefore, vacancies exist in the board, or the number can be reduced by the voluntary act of the directors themselves, it would seem that the provision can only become effective when the terms of office of a sufficient number of directors expire. In re Manoca Temple Assn., 128 A. D. 796 (1908).

Validity of Provision of Certificate of Incorporation Restricting Changes in the Number of Directors.

A provision in the certificate of incorporation that the number of directors shall not be changed, except by the unanimous consent of all the stockholders of the corporation, is a valid and binding limitation on the power of the corporation and its members, authorized by section 10 of the General Corporation Law; notwithstanding the fact that such limitation necessarily increases the powers of a minority to obstruct, because the privilege granted by said section 10 is intended to accomplish an increase of the rights of the minority. Where the majority of the stockholders of such corporation, in disregard of the aforesaid limitation contained in the certificate of incorporation, adopted, against the protest of the minority, a resolution increasing the number of the directors of the corporation, such action was invalid, as prohibited by the certificate of incorporation, and an injunction, asked by the minority stockholders, was properly granted to restrain such increase in the number of directors. Ripin v. U. S. Woven Label Co., 205 N. Y. 442 (1912, affg. 145 A. D. 916, and distg. Peo. ex rel. Barney v. Whalen, 119 A. D. 749, affd., 189 N. Y. 560. Unless such limitation tended to exempt the corporation or its directors or stockholders from the performance of any obligation or the performance of any duty imposed upon it by law, or was inconsistent with public policy, it was expressly authorized by the General Corporation Law, section 10. There is no duty or obligation imposed upon a corporation or its members to increase the number of directors. The provision under consideration is in conflict with the statute regulating an increase or reduction of directors, but unless it was intended by said section 10 to permit the incorporators at the time of the organization of a corporation to prescribe regulations for the conduct of its affairs and limitations on the power of the corporation and its stockholders different from those prescribed by the statute, the privilege granted to the incorporators would be of little or no efficacy. The privilege must be exercised only in one direction. It must limit, not increase, the powers of the corporation or those of its directors or stockholders. Ripin v. U. S. Woven Label Co., 205 N. Y. 442 (1912).

When it is intended to place a restriction upon the power of the stockholders to increase or reduce the number of directors, a provision to that effect should be inserted in the certificate of incorporation. Bond v. Atlantic Terra Cotta Co., 137 A. D. 671, 681 (1910), followed, 151 A. D. 938 (1912). Such a restriction is not binding upon subsequent owners of stock when made by agreement of stockholders outside the certificate of incorporation. Id.

The power to increase or reduce the number of directors is vested exclusively in the stockholders, and, while it may be competent in some cases for stockholders to bind themselves, by an agreement outside the certificate of incorporation, not to exercise such power, it would seem that such restriction would not be binding on subsequent owners of the stock who purchased it in good faith and without notice thereof. Bond v. Atlantic Terra Cotta Co., 137 A. D. 671 (1910), citing Munson v. Syracuse, Geneva, etc., R. R. Co., 103 N. Y. 58 (1886); Kent v. Quicksilver Mining Co., 78 N. Y. 159, 184 (1879); Driscoll v. West Bradley & C. M. Co., 59 N. Y. 96 (1874); Leith v. Wells, 48 N. Y. 585 (1872); Lyman v. State Bk. of Randolph, 81 A. D. 367 (1903); Am. Press Assn. v. Brantingham, 75 A. D. 435 (1902).

A stockholder's vested property rights, of which he cannot be deprived under the reserved power to amend the statute, certificate of incorporation, or by-laws, are not, in contemplation of law, affected by a change in the number of directors to manage the property and affairs of the corporation, as the matter of administration is vested exclusively in the stockholders to be exercised as authorized by law. Bond v. Atlantic Terra Cotta Co., 137 A. D. 671, 681 (1910), citing Looker v. Maynard, 179 U. S. 46 (1900); Miller v. State, 15 Wallace, 478, 498 (1872).

Filing of Transcript.

The verified transcript above provided for must be filed and recorded in the office of the Secretary of State and a duplicate original must also be filed and recorded in the county clerk's office in which the certificate of incorporation was filed. Gen. Corp. Law, § 5.

To effect a legal change in the number of directors, it is essential that a transcript of the minutes of the meeting at which the change was determined upon shall have been filed as required by the statute. In re Dolgeville Elec. Lt. & Power Co., 160 N. Y. 500 (1899), revsg. 41 A. D. 624.

A resolution reducing the number of directors is not effective until the transcript of the proceedings is filed, nor does a subsequent filing relate back so as to give effect to a resolution not operative in itself. Matter of Westchester Trust Co., 186 N. Y. 215 (1906), revsg. 114 A. D. 856.

A reduction in the number of directors cannot be assailed collaterally in an action by a creditor to enforce a corporate debt, although no certificate of such reduction was filed. Wallace & Sons v. Walsh, 125 N. Y. 26 (1890).

Effect of Omission to File Certificate.

At an annual meeting of the stockholders of a corporation a resolution was passed increasing the number of directors from five to seven, and at the same meeting seven directors were elected by the stockholders for the ensuing year; held, that this resolution was valid, but that such increase did not become effectual until a certificate showing the increase was filed in the office of the Secretary of State and in the office of the county clerk. Lewis v. Matthews, 161 A. D. 107 (1914). After filing the certificate as required by statute, such persons, in assuming to act, become de facto directors and their acts became binding on the corporation. Id.

Invalidity of By-Law Respecting Change of Number of Directors.

A by-law which provides that an increase or reduction of the number of directors shall not be made except by a vote of stockholders representing

90 per cent. of the stock is inconsistent with this section and is, therefore, invalid. Katz v. H. & H. Mfg. Co., 109 A. D. 49 (1905), affd. 183 N. Y. 578. The power to enact by-laws is limited by the General Corporation Law, section 11, to such as are "not inconsistent with any existing law," and such a by-law does conflict with the foregoing section. The distinction between authority to make a by-law and that to embody the agreement of the incorporators in the certificate of incorporation is marked. To uphold a by-law inconsistent with the statutory provision regulating the affairs of a corporation would allow a majority to invade the rights of a minority and to impose limitations on a stockholder to which he never gave assent, but to uphold a provision in the certificate of incorporation that the number of directors named therein shall not be changed except by unanimous consent is merely to compel a party to live up to his agreement and to sustain a valid limitation upon the powers of stockholders authorized by section 10 of the General Corporation Law. Ripin v. U. S. Woven Label Co., 205 N. Y. 442 (1912).

§ 27. When acts of directors void. When the directors of any corporation for the first year of its corporate existence shall hold over and continue to be directors after the first year, because of their neglect or refusal to adopt the by-laws required to enable the stockholders to hold the annual election for directors, all their acts and proceedings while so holding over, done for and in the name of the corporation, designed to charge upon it any liability or obligation for the services of any such director, or any officer, or attorney or counsel appointed by them, and every such liability or obligation shall be held to be fraudulent and void.

Formerly L. 1890, ch. 564, § 22, re-enacted without change by L. 1892, ch. 688.

No liability for a dissolution arises from failure to elect directors on the day fixed in the by-laws. Gen. Corp. Law, § 28.

In certain cases any member of the corporation may call a meeting to elect directors. Gen. Corp. Law, § 29.

§ 28. Liability of directors for making unauthorized dividends. The directors of a stock corporation shall not make dividends, except from the surplus profits arising from the business of such corporation, nor divide, withdraw or in any way pay to the stockholders or any of them, any part of the capital of such corporation, or reduce its capital stock, except as authorized by law. In case of any violation of the provisions of this section, the directors under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large upon the minutes of such directors at the time, or were not present when the same happened, shall jointly

and severally be liable to such corporation and to the creditors thereof to the full amount of any loss sustained by such corporation or its creditors respectively by reason of such withdrawal, division or reduction. But this section shall not prevent a division and distribution of the assets of any such corporation remaining after the payment of all its debts and liabilities upon the dissolution of such corporation or the expiration of its charter; nor shall it prevent a corporation from accepting shares of its capital stock in complete or partial settlement of a debt owing to the corporation, which by the board of directors shall be deemed to be bad or doubtful.

Formerly L. 1890, ch. 564, § 23, as am'd by L. 1892, ch. 688; L. 1901, ch. 354.

Prior to the amendment of 1901 directors violating this section were liable to the corporation and its creditors for the full amount of the unauthorized dividend, but by the terms of the amendment the penalty has been mitigated. The last clause of the section is new.

This section applies to foreign as well as domestic corporations. See § 70 of this law.

As to other actions against directors or trustees for misconduct, see Gen. Corp. Law, §§ 90–93 and 307–8, post, and for penal provisions relative thereto, see Penal Law, §§ 664–667 and 890, post.

Directors are liable for loans to stockholders, see § 29 of this law.

For form of clause in certificate of incorporation for creation of surplus fund and purchase by the corporation of its own stock, see Form No. 24.

For form of clause in certificate of incorporation for setting aside working capital, see Form No. 25.

For method of voting stock in other corporations, see Form No. 281.

For forms of resolutions declaring dividends, see Forms Nos. 252 and 253.

For resolution declaring a stock dividend, see Form No. 254.

For notice of a dividend declared, see Form No. 253.

For certificates of scrip dividends, see Forms Nos. 255–257a.

Liability of Directors.

The liability imposed by this section upon directors who declare a dividend except from surplus profits, is to be treated as a provision for indemnity against the loss which the corporation or its creditors may sustain from the payment of an illegal or unauthorized dividend. Dykman v. Keeney, 16 A. D. 131 (1897), affd., 160 N. Y. 677.

Directors are not personally liable to stockholders for a declared dividend until it has been set aside from the assets so as to become a trust fund in their hands. Searles v. Gebbie, 115 A. D. 778 (1907); affd., 190 N. Y. 533.

A stockholder of a New Jersey corporation, which transacts business in this State (having obtained a certificate of authority so to do), may maintain an action here on behalf of himself and others similarly situated, to compel a director who participated in declaring dividends, in violation of section 30 of the General Corporation Law of New Jersey, which is similar to the fore-

going section, to restore to the corporation the amount of dividends unlawfully declared and paid, when the corporation has refused to bring the action. Hutchinson v. Stadler, 85 A. D. 424 (1903).

A director who is not present when an unlawful dividend is declared, is not liable, even though he is present at a subsequent meeting when the minutes of a former meeting are ratified. Hutchinson v. Curtiss, 45 Misc. 484 (1904).

Duty to Declare Dividend.

Where the surplus property applicable to a dividend is ample and the directors in bad faith, and without reasonable cause, refuse to declare one, the court will direct the declaration of a reasonable dividend. Hiscock v Lacy, 9 Misc. 578 (1894).

When a corporation has a surplus, it rests in the fair and honest discretion of the directors, uncontrollable by the courts whether a dividend shall be declared. Williams v. W. U. Telegraph Co., 93 N. Y. 162, 192 (1883); Burden v. Burden, 159 N. Y. 287 (1899).

A stockholder cannot maintain a suit to compel the declaration of a dividend where it is not shown that he has made application therefor to the directors, or that such application would not be given proper consideration. Maeder v. Buffalo Bill's Wild West Co., 132 Fed. 280 (1904).

The accumulation of a surplus by the directors of a corporation cannot be enjoined by a stockholder so long as the directors are acting honestly and within their discretionary powers. Burden v. Burden, 159 N. Y. 287 (1899), affg. 8 A. D. 160.

Directors of a corporation have no right to pay dividends unless they leave the capital stock unimpaired. Berwind-White Coal Mining Co. v. Ewart, 11 Misc. 490, affd., 90 Hun 60 (1895).

Amount of Dividend.

The rate of dividend and the amount of surplus rest in the fair and honest discretion of the directors. McNab v. McNab & H. Mfg. Co., 62 Hun 18, affd., 133 N. Y. 687 (1891); Beveridge v. N. Y. El. R. R. Co., 112 N. Y. 1 (1889); Williams v. W. U. Tel. Co., 93 N. Y. 187 (1883); Reynolds v. Bk. of Mt. Vernon, 6 A. D. 62 (1896).

The term capital as used in this section means the property of the corporation contributed by its stockholders or otherwise obtained by it, to the extent required by its charter. When the property exceeds that limit the excess is surplus and may be divided in money or property or by a scrip dividend. Williams v. W. U. T. Co., 93 N. Y. 188 (1883); Burrall v. Bushwick R. R. Co., 75 N. Y. 211 (1878).

This section is intended to prevent the division, distribution, withdrawal and reduction of the property of a corporation below the sum limited in its charter. Williams v. W. U. T. Co., 93 N. Y. 187 (1883); Rorke v. Thomas, 56 N. Y. 559 (1874).

Under Laws of 1848, chapter 40 (now repealed), it was held that if the trustees choose to bear the responsibility, they had power to declare dividends though no surplus existed, at least until the courts intervened to prevent it. Edison Gen. Electric Co. v. Barker, 141 N. Y. 251 (1894).

The net income applicable to dividends can be determined only after all taxes, depreciation, maintenance charges and other necessary expenditures have been deducted. People ex rel. Jamaica Water Supply Co. v. State Bd. of Tax Comrs., 128 A. D. 13 (1908).

Guaranty of Dividends.

An individual guaranty that "dividends" should be paid by a corporation necessarily implies the continued existence of the corporation. Where, therefore, the corporation is dissolved, the guaranty terminates. Columbia Trust Co. v. Moshier, 51 Misc. 270 (1906).

It would seem that a corporation having power to purchase and sell the stock of other corporations has power, when selling such stock, to guarantee the payment of dividends thereon, and that, if it makes such a guaranty, it is estopped from denying its power to do so when the guaranty is sought to be enforced. Mason v. Standard Distilling & D. Co., 85 A. D. 520 (1903).

Whether or not a foreign corporation was authorized to issue stock with a guaranty of dividends, is to be determined by the law of its domicile, and a purchaser in this State of such guaranteed stock is not chargeable with knowledge of that law. McVity v. E. D. Albro Co., 90 A. D. 109 (1904), affd., 180 N. Y. 554.

When an officer of a corporation has sold stock with a written guaranty of dividends, the corporation by payment of such dividends affirmed the contract. McVity v. E. D. Albro Co., 90 A. D. 109 (1904), affd., 180 N. Y. 554.

A corporation cannot repudiate its obligation of a guaranty of dividends on the ground that it was ultra vires and at the same time retain the benefit which it had received for entering into such obligation. McVity v. E. D. Albro Co., 90 A. D. 109 (1904), affd., 180 N. Y. 554.

A guarantee printed on a stock certificate reading "The undersigned hereby guarantees and agrees to pay to the holder of record of the within certificate, so long as said certificate shall be outstanding but not to exceed the present unexpired term of the period for which said . . . company is incorporated," a certain dividend is terminated by the voluntary dissolution of the company. Mason v. Standard Distilling Co., 85 A. D. 520 (1903).

Formal Declaration of a Dividend; When Unnecessary.

Where a mother and her son own all the stock and bonds of a corporation and constitute a majority of the board of directors, the remaining director being a mere employee, they may agree, either by conversation or otherwise, to appropriate a portion of the corporate funds to the payment of dividends to themselves, and such use of corporate funds will be upheld unless it impairs rights of third parties. M. Groh's Sons v. Groh, 80 A. D. 85 (1903), revsd. on other grounds, 177 N. Y. 8.

Books as Evidence of Financial Status of Corporation.

In an action by the trustee of a bankrupt corporation to recover unauthorized dividends from directors voting therefor, the ledger is admissible in evidence to show the financial status of the corporation at the date the dividends were declared. Wesp v. Muckle, 136 A. D. 241 (1910), affd. 201 N. Y. 527. In this case the court distinguished the numerous other cases, in which it has been held that where the corporation brings suit it cannot establish its debt by an entry in its own books unless the defendant assents to the entry, because, in the declaration of a dividend, it is the duty of a director to ascertain whether the earnings justified the payment of such dividend.

In an action to compel the payment of back dividends to holders of preferred stock, the resolutions of directors, the book of minutes, annual report and other proceedings are competent evidence. Boardman v. Lake Shore & Mich. Southern Ry. Co., 84 N. Y. 157 (1881).

Dividends; to Whom Payable.

Directors have a wide discretion in the management of the corporate affairs and their declaration of a dividend from surplus assets, when honestly exercised, will not be interfered with by the courts, but that does not mean that directors possess any power to discriminate in the division of the surplus profits in such a manner as to impair any rights established by the contract between the corporation and its stockholders as evidenced in the certificate of incorporation. Roberts v. Roberts-Wicks Co., 184 N. Y. 257 (1906).

A corporation declared a dividend on the 7th day of December, 1893, and made it payable on the 10th day of January, 1894. The 8th day of January, 1894, was the day appointed by the tax authorities as that upon which the taxable status of the corporation should be determined. Held, that the dividend was not a part of the "surplus profits or reserved funds" of the corporation and was not taxable as property of the corporation. Peo. ex rel. U. S. Trust Co. v. Barker, 86 Hun 131 (1895).

Dividends are payable to the person in whose name the stock stands on the books of the corporation or his legal representatives. Officers are not required to demand production of the stock certificate before paying dividends. Brisbane v. D., L. & W. R. R. Co., 94 N. Y. 204 (1883); Jermain v. L. S. & M. S. Ry. Co., 91 N. Y. 483 (1883); Boardman v. Same, 84 N. Y. 157 (1881).

After a dividend is declared, it is, in legal contemplation, severed from the assets of the corporation and is thereafter held in trust for the person who was the stockholder at the time when the dividend was declared. McGill v. Holmes, Booth & Haydens, 23 Misc. 524 (1898).

Declared dividends payable at a future time, are no longer part of the corporate assets, but become at once the property of the shareholders, and are held by the corporation simply as a trustee for the shareholder. Matter of Kernochan, 104 N. Y. 618, 624 (1887); Hopper v. Sage, 112 N. Y. 530; Jermain v. L. S. & M. S. Ry. Co., 91 N. Y. 488, 492 (1883); People ex rel. U. S. Trust Co. v. Barker, 86 Hun 131 (1895).

Surplus arising from the reduction of capital stock should not be applied in paying arrears of dividends due upon preferred stock. If it is to be distributed at all it must be to all the stockholders. Roberts v. Roberts-Wicks Co., 184 N. Y. 257 (1906), revsg. 102 A. D. 118.

When a dividend is made payable at a time subsequent to the date of its declaration it belongs to the stockholder who owns the shares on the day the dividend is declared and not to the owner at the date when it is payable. Tepfer v. Ideal Gas & Elec. Fixtures Co., 58 Misc. 396 (1908).

Right to a Dividend Passes with Transfer of Stock.

The surplus of a corporation remains its property until a division is made or a dividend is deeclared. Until such corporate action, what contractual right to a dividend the stockholder possesses passes with an assignment or transfer of the stock as an incident thereto. Robertson v. De Brulatour, 188 N. Y. 301, 315 (1907).

Registered Shareholder to be Regarded as Actual Owner of Shares; Exceptions.

For the above topical heading, and authorities thereunder, see section 32 of the Stock Corporation Law, post.

Corporate Books as Evidence.

See the above topic under section 32 of the Stock Corporation Law, post, and authorities there cited.

Payment of Dividends; Rights of Different Classes of Stockholders.

When not governed by statute the relation of common and preferred stockholders to each other and to the corporation is entirely contractual; therefore, when the certificate of incorporation provides that the preferred stock shall be entitled to non-cumulative dividends at a rate not exceeding 4 per cent. per annum and to no other or further share of the profits and such dividends have been paid, all other gains and profits may be distributed among the holders of the common stock and the gains and profits made by fortunate investments in the stocks and bonds of other corporations are distributable as dividends to such common stockholders precisely in the same manner as net profits made in the corporate operations. Equitable Life Assur. Soc. v. Union Pacific R. R. Co., 212 N. Y. 360 (1914), affg. 162 A. D. 81.

A provision in the certificate of incorporation and in the certificates of preferred stock that such stock shall receive dividends at a specified rate before any dividends shall be paid on the common stock, that such dividends shall be cumulative, and in case of non-payment shall bear interest at a fixed rate from the date when payable, constitutes a valid contract which is binding upon all the stockholders. Roberts v. Roberts-Wicks Co., 184 N. Y. 257 (1906).

When the dividends upon the preferred stock are cumulative, and in case of non-payment are to bear interest at a fixed rate while such dividends are in arrears, it is the duty of the directors thereafter in dividing the surplus profits to apply them first to the satisfaction of the arrearages due to the preferred stockholders before declaring any dividend on common stock. Roberts v. Roberts-Wicks Co., 184 N. Y. 257 (1906).

Remedy of Stockholder When Denied Participation in a Dividend.

An action by a stockholder against a corporation to recover a dividend is not maintainable until one has been declared. If a dividend has been declared but withheld from a stockholder, the remedy is against the corporation to compel it to set off and pay him his share of the dividends. Godley v. Crandall & Godley Co., 212 N. Y. 121 (1914).

A stockholder who alleges that his right to participate in a dividend declared by the corporation has been wrongfully denied by it cannot maintain an action in the first instance for money had and received against another stockholder who has participated in such dividend. His remedy, if he was wrongfully excluded, from the rights of a stockholder, was in the first instance against the corporation, and he was not entitled to follow the corporate assets into the hands of parties to whom it had made payments, and to recover his dividends from them, until at least he had established his right as a creditor of the corporation and exhausted his legal remedies against it. Peckham v. Van Wagenen, 83 N. Y. 40 (1880).

Payment of Dividends with Borrowed Money.

Where a corporation, instead of disposing of the property in which its profits have been invested and then paying dividends from proceeds, prefers to retain such property and postpone payment of dividends, it is reserving the property from which it is fair to assume it earns a return sufficient to

discharge in whole or in part the interest upon its dividend obligation, and, furthermore, it has the right to borrow the money with which to pay dividends when it has invested the profits in improvements at least equal in value to the dividends declared. Bankers Trust Co. v. Dietz Co., 157 A. D. 594 (1913). Such a corporation may issue in lieu of a cash dividend interest-bearing debentures as a scrip dividend, and in a representative action by a stockholder against the directors, the complaint is defective which fails to allege that the corporation had not earned profits sufficient to justify the payment of said dividend. Id.

A corporation which has earned profits is not precluded from distributing them as dividends because part of its assets are in such form that it must borrow money for its business. Holmes v. St. Joseph Lead Co., 84 Misc. 278 (1914).

Unlawful Dividends.

Capital stock is a fund for the benefit of future as well as present creditors; therefore, it is no defense to an action brought by a trustee in bankruptcy to recover unlawful dividends that when such dividends were declared the assets were equal to the existing liabilities. Cottrell v. Albany Card & Paper Mfg. Co., 142 A. D. 148 (1911).

Unlawful dividends may be recovered by the creditors or by the trustee in bankruptcy who represents them. Cottrell v. Albany Card & Paper Mfg. Co., 142 A. D. 148 (1911).

Where unlawful dividends are paid to a holding corporation whose officers are also officers in the company declaring the dividend, this fact is sufficient to charge the holding company with notice of the unlawful dividends. Cottrell v. Albany Card & Paper Mfg. Co., 142 A. D. 148 (1911).

A director who votes to declare a dividend when there are no net earnings to justify the same, cannot escape liability upon the ground that he was ignorant of the financial status of the corporation; if a director present at a meeting at which such dividend is voted dissented therefrom and desires to be relieved from liability, he should cause his dissent to be entered at large upon the minutes of the directors at the time. Wesp v. Muckle, 136 A. D. 241 (1910), affd. 201 N. Y. 527.

In an action by a judgment creditor of a corporation brought against stockholders to recover sums alleged to have been fraudulently paid as dividends and profits, the corporation must be joined as a party defendant. Lathrop, Shea & Henwood Co. v. Byrne, 115 A. D. 846 (1906).

A corporation has no authority to make a scrip dividend in one year, and in the next to issue bonds to pay it. Merz v. Interior Conduit & Insulation Co., 87 Hun 430 (1895).

The general rule that in a creditor's action to recover property fraudulently transferred by the debtor, the latter is a necessary party defendant, also applies in an action by a judgment creditor of a corporation brought against stockholders to recover sums alleged to have been fraudulently paid as dividends and profits and if the plaintiff fail to join the corporation as a party defendant the complaint is subject to demurrer. Lathrop, Shea & Henwood Co. v. Byrne, 115 A. D. 846 (1906).

The issue of debenture bonds to be subscribed for by stockholders and paid for in part by the surrender of stock is invalid as not complying with this section and section 55 of the Stock Corporation Law, which requires the issue of bonds for money, labor or property. Merz v. Interior Conduit & Insulation Co., 20 Misc. 378 (1897).

Although it is the duty of the State to provide for the collection of debts from foreign corporations, due to its citizens, and to protect them from fraud, by all means in its power, whether against domestic or foreign wrongdoers, this does not authorize the courts to regulate the internal affairs of foreign corporations. The court will not enjoin directors of a foreign corporation from paying a dividend, where no debt is due to the plaintiff, and he has no claim for redress for any wrong, and his only ground for the injunction is a supposed error of directors in making the dividend. For such redress he must apply to the courts of the State where the company was incorporated. Howell v. Chicago & No. Western Ry. Co., 51 Barb. 378 (1868).

Stock, Scrip and Property Dividends.

Scrip dividends, when declared, become an indebtedness of the corporation, and where it is provided in such scrip that the dividend is payable at the pleasure of the company, notwithstanding such provision payment must be made within a reasonable time. Billingham v. Gleason Mfg. Co., 101 A. D. 476 (1905), affd. 185 N. Y. 571.

The distribution of the stock of other corporations is not a stock dividend as the term is usually employed, i. e., an increase of the nominal capital stock held by the shareholders. It is the same as a dividend of cash, because the corporation might have sold the stock and divided the money among its shareholders. In a stock dividend no money or property is withdrawn from the ownership and control of the corporation. If, however, the dividend be in cash, or in stock of other corporations, in either case just so much property is taken from the corporation and the title to it vested in the stockholders individually. Matter of Rogers, 22 A. D. 428, 432 (1897).

If corporate surplus consists of property so situated that a division among stockholders is practical a property dividend may be declared. Williams v. Western Union Tel. Co., 93 N. Y. 162, 189 (1883).

Surplus may be applied to the full payment of unissued corporate stock and this may be distributed as a dividend. Merz v. Interior Conduit Co., 87 Hun 430 (1895).

Where a corporation issues a scrip dividend "payable at the pleasure of the company" the obligation becomes absolute to pay within a reasonable time. If any of the scrip is redeemed all becomes immediately payable. Billingham v. Gleason Mfg. Co., 185 N. Y. 571 (1906), affg. 101 A. D. 476.

However objectionable the issue of stock dividends may appear to be, as bearing upon the value of stock, such considerations should be addressed to the directors rather than to the court, on a motion to continue an injunction. Howell v. Chicago & No. Western Ry. Co., 51 Barb. 378 (1868).

Under ordinary circumstances, where a corporation has earned a dividend, and it desires to retain the moneys so earned, for corporate purposes, either in making improvements on its property or for the payment of debts, it would be no violation of law to retain such moneys and in lieu thereof to issue to the stockholders a corresponding amount of stock. Howell v. Chicago & No. Western Ry. Co., 51 Barb. 378 (1868). The election to do either rests with the directors, and if the corporation has the power to increase the capital stock, for any purpose, either mode of making such increase is not a violation of law, and affords no grounds for an injunction to restrain them. Id.

Fraudulent Reduction of Dividends to Induce Sale of Stock.

Directors having the power to so manage the affairs of the corporation as to affect the value of its shares, owe a duty to stockholders to refrain from

intentionally abusing that power actually or apparently to depress the value of its shares for the purpose of acquiring them at an undervaluation; therefore, when directors owning a large portion of the stock, which had previously paid dividends from nine to fourteen per cent., declared only a three per cent. dividend and represented to the plaintiff, a stockholder, that the company had suffered reverses, and at the same time increased their own salaries, but the day after purchasing plaintiff's stock, and less than a month from the time they declared such reduced dividend, declared a special dividend of ten per cent., and at the next regular meeting reduced the salaries of officers, a case of fraud and deceit is established. Von Au v. Magenheimer, 126 A. D. 257 (1908), affd. 196 N. Y. 510.

Unearned Dividends Declared to Induce Purchases of Stock.

A complaint which alleges that the board of directors of a New Jersey corporation declared and paid a dividend which was not earned; that at the time the statute prohibited payment of dividends except from profits, and that it made the directors liable to the corporation and its creditors for the amount of such unlawful dividend in case of insolvency; that the directors intended that such dividend should be regarded by the public as a representation that it had been earned; that at the time the directors knew that such representations were false and made with intent to deceive the public and to induce it to purchase stock, is sufficient in an action for deceit against a director who knew such dividend was paid from capital and yet remained silent while plaintiff purchased the stock in the belief that the dividend was a distribution of net earnings. Ottinger v. Bennett, 203 N. Y. 554 (1911), revsg. 144 A. D. 525, upon dissentg. op. of Justice Miller.

The declaration of a dividend by a going concern implies earnings from which to pay it, and a publication of the fact of such declaration is calculated to induce the public to believe that the dividend has been earned, and the very act of declaring it, constitutes a representation to the public that it has been earned. Ottinger v. Bennett, 203 N. Y. 554 (1911), revsg. 144 A. D. 525, upon dissentg. op. of Judge Miller; Keeler v. Seaman, 47 Misc. 292 (1905).

Unlawful Dividends; Knowledge Imputable to Treasurer.

Where a person is the treasurer but not a director, he is nevertheless chargeable with any representations to be inferred from the declaration of a dividend. The very nature of his office imputes to him knowledge of the financial condition of the corporation. Keeler v. Seaman, 47 Misc. 292, 296 (1905).

Rights of Life Beneficiaries and Remaindermen in Stock Dividends.

Whether a stock dividend declared by a corporation and allotted to the shares of its original capital stock belonging to a testamentary trust estate, constitutes a distribution of principal or income is a question which must be determined according to the nature and substance of the thing which the corporation has assumed to transfer. If the dividend is a distribution of accumulated earnings or profits it represents income and belongs to the life beneficiary. The statement of the directors in taking the corporate action is not necessarily conclusive. McLouth v. Hunt, 154 N. Y. 179 (1897); Lowry v. Farmers' Loan & Trust Co., 172 N. Y. 137 (1902); Robertson v. DeBrulatour, 188 N. Y. 301 (1907); Chester v. Buffalo Car Mfg. Co., 70 A. D. 443 (1902); s. c., 94 A. D. 612, modified, 183 N. Y. 425 (1906).

The earnings of the corporation remain its property until the dividend is declared and until that time whatever interest a stockholder has passes with his transfer. A dividend thereafter declared upon such stock which has become a part of the corpus of the trust is income and belongs to the life beneficiary. Robertson v. DeBrulatour, 188 N. Y. 301 (1907).

The right to subscribe on an increase of the capitalization of the company belongs to the remainderman as an incident to the ownership of the stock. Richmond v. Richmond, 123 A. D. 117 (1908).

Unless a testator, creating a trust, otherwise provides, the principal of a trust invested in corporate stock should not be impaired by the division of accumulated surplus among life beneficiaries. The capital of a corporation cannot be divided among the beneficiaries of a life estate, and the capital of the trust fund should also be preserved, whether invested by the trustees in stocks of corporations at a premium, or acquired from the testator or maker of the trust. The surplus of the corporation existing at the formation of the trust or when the stock is purchased represents a part of the capital of the estate as fully as does the capital of the corporation. Matter of Osborne, 209 N. Y. 450 (1913), and cases cited.

Where there is nothing to indicate the source of surplus assets, represented by a stock dividend, and nothing to rebut the presumption that such surplus represent accumulated earnings or profits, a stock dividend prima facie belongs to the life interests, and the burden is upon the trustees to prove the contrary before they can include such shares as capital. Matter of Leask, 159 A. D. 102 (1913).

If bonds and scrip are distributed representing in part earnings and in part an increase in value of the corporate investment the life tenant is entitled only to such portion as represents earnings, the balance is a distribution of capital and belongs to the remainderman. Thayer v. Burr, 201 N. Y. 155 (1911).

Whether extraordinary dividends belong to life tenants, the trust estate, or to remaindermen, under a testamentary trust, is a question of the Intention of the testator as derived from the will. Under such a state of facts, the court determines the intention of the testator by the application of equitable canons of interpretation laid down in adjudged cases of authority. Matter of Todd, 85 Misc. 298 (1914).

Distribution of Surplus Created by Reduction of Capital Stock.

Surplus created by a reduction of capital stock cannot be applied in payment of arrears of dividends due to preferred stockholders, as a surplus thus created is not to be regarded as surplus profits arising from the business of the corporation. Its distribution, when made, can only be legally effected by dividing it among all the stockholders ratably and without preference. Roberts v. Roberts-Wicks Co., 184 N. Y. 257 (1906).

In case of a reduction of capital stock the excess of funds or property on hand, over and above the sum which the corporation is required to keep as capital is converted into a surplus fund which it is permitted to divide among its stockholders. Its right to make this distribution depends upon general principles and not upon any statutory provision. Strong v. Bklyn. Cross-Town R. R. Co., 93 N. Y. 426, 434 (1883).

Right of Action Against Directors of a Foreign Corporation Because of Unlawful Dividends; Conflict of Laws.

The only right intended to be given or liability to be imposed by sections 28 and 70 of this law upon the directors of a foreign corporation for making unauthorized dividends is the same liability or obligation as that imposed by

the statute of the State in which the corporation was created; hence, an action by a stockholder of a New Jersey corporation on behalf of himself and other stockholders similarly situated, to recover damages in the name of the corporation for the payment of unauthorized dividends, not being authorized by the statute of that State cannot be maintained in this State. De Raismes v. U. S. Lithograph Co., 161 A. D. 781 (1914). Judges Ingraham and Scott dissented on the ground that when the foreign corporation obtained permission to transact business in this State and established its executive offices here, it acquired the rights and benefits that accrue to a domestic corporation, and subjected itself to the provisions of the laws of this State in relation to the regulation of its corporate affairs and to the obligations imposed upon such a foreign corporation; that thereby the directors and officers subjected themselves to the liabilities imposed for a violation of the laws of this State. The liability for an unauthorized dividend depends upon the law of this State and not upon the law of the state of New Jersey. As to what is and is not an authorized dividend recourse must be had to the statutes of New Jersey. If the dividend declared by the directors of a New Jersey corporation doing business in this State is prohibited by the statute of that State, it is an unauthorized dividend and the law of this State says that, if the directors of this corporation have declared an unauthorized dividend, they shall be liable, not as provided by the laws of the state of New Jersey, but in the same manner and to the same extent as the officers and directors of a domestic corporation, and such liability may be enforced in this State in the same manner as a similar liability imposed upon the directors of a domestic corporation. It should be borne in mind that the statute of New Jersey, as amended in 1904, gives the right of action to the stockholders and not to the corporation, while the statute of New York State gives the right to the corporation and to its creditors, but not to the stockholders.

Transfer of Corporate Assets for Inadequate Consideration.

Where a stockholder brings a representative action on behalf of the corporation against its directors and officers for having disposed of its property for an inadequate price, another stockholder is not entitled to be brought in on his own motion as a party defendant, because whatever money is recovered from the directors and officers will be received by the corporation to be applied to its corporate uses, and other stockholders are not necessary to a determination of a claim in favor of the corporation in such an action. Hay v. Brookfield, 160 A. D. 277 (1914).

Corporate assets constitute a trust fund for the payment of the corporate debts, and if two directors transfer all the corporate property to a third director for a nominal consideration, they commit a breach of duty toward creditors and become personally liable for existing claims. Cullen v. Friedland, 152 A. D. 124 (1912), on the authority of Darcy v. Bklyn. & N. Y. Ferry Co., 196 N. Y. 99. Such third director is also liable to a creditor, on the additional ground that he received, with notice and without consideration, corporate property which was impressed with a trust for the payment of corporate debts. Id.

Where the majority stockholders of a corporation, who are also its officers and directors, organize another corporation and become the officers, directors and stockholders thereof, and then sell all the property of the first mentioned corporation to the new corporation at a grossly inadequate price, the transaction constitutes a fraud upon the vendor corporation which will entitle that corporation or a minority stockholder thereof suing in its

right to have the transaction set aside and the directors held responsible for the injury caused to such corporation by a violation of their duty. Hinds v. Fishkill & Matteawan Gas Co., 96 A. D. 14 (1904).

Gift of Part of Capital to a Stockholder.

A corporation, while a going concern, incurring debts and liabilities, or after it has ceased to do business and has outstanding liabilities, cannot give to a stockholder and director thereof, for the benefit of another stockholder, a part of the capital. Such an act is a violation of the statute and the principles of the common law, and a corporate officer who participates in such an act and thereby bestows upon himself a substantial part of the capital is liable in an action at law by the trustee in bankruptcy for wasting the assets. Hazard v. Wight, 201 N. Y. 399 (1911), revsg. 138 A. D. 441.

Power to Purchase its own Stock.

If a stockholder sells his stock to the corporation which issued it, he sells at his peril and assumes the risk of consummation of the transaction without encroachment upon the funds which belong to the corporation in trust for the payment of its creditors. The right of creditors cannot be defeated by the fact that at the time of the transaction the seller of the stock and the corporate officers who purchased it were acting in good faith and supposed that the corporation was solvent. In re Fechheimer-Fishel Co., 212 Fed. 357 (1914).

A note given by a corporation in payment of its own stock, given in good faith and at a time when the corporation was solvent, cannot be enforced as against the corporation where the corporation was insolvent at maturity; the note being in effect a promise to pay out of surplus profits if payment could be made without prejudice to creditors. In re Fechheimer-Fishel Co., 212 Fed. 357 (1914).

An agreement by a corporation to take back its stock at cost at the expiration of two years if the purchaser so wished becomes invalid and unenforceable if the corporation becomes insolvent at or before the time for the purchaser to exercise his option. In re Fechheimer-Fishel Co., 212 Fed. 357, 365 (1914).

In an action upon a contract by the terms of which a corporation agreed to repurchase its own stock, and it defends upon the ground that said contract is not enforcible because in violation of section 664 of the Penal Law, making it a misdemeanor to apply corporate funds other than surplus to such purchase, the burden of showing that there are no surplus profits rests upon the corporation. Richards v. Wiener Co., 207 N. Y. 59 (1912), affg. 145 A. D. 353; Strodl v. Farrish-Stafford Co., 145 A. D. 406 (1911).

A contract whereby a foreign corporation, in consideration of an employee's subscription for stock, agreed that if such employee should leave its employ it would repurchase the stock at par, is not necessarily void as contravening public policy, nor is it void at common law. If there be any statute of the State in which defendant was incorporated rendering such contract ultra vires and void, or if it be unenforcible because the defendant has no surplus with which to repurchase the stock, such defenses must be pleaded and proved. Strodl v. Farish-Stafford Co., 145 A. D. 406 (1911). The court cannot take judicial notice of the statute of another State. Id.

A by-law which makes the capital stock of the corporation dependent upon whether or not a shareholder resigns from the company, and which authorizes

the repayment to the shareholder, upon his resignation, of the amount paid for his stock is unauthorized by the Stock Corporation Law and is invalid. Picalora v. Gulf Co-operative Co., 68 Misc. 331 (1910).

A contract for the sale of stock to be paid for on the installment plan with a condition that the plaintiff could have his money returned after making payments for a time specified is not an agreement by the defendant corporation to purchase its own stock. Hyman v. N. Y. Urban Real Est. Co., 79 Misc. 439 (1913), citing Richards v. Wiener Co., 207 N. Y. 59.

The provision that a corporation may accept its own stock in payment of debts deemed to be bad or doubtful does not inferentially prohibit a purchase by it of its own stock; there being no rule of public policy upon the subject, a corporation may purchase its own stock, hold it unextinguished and reissue the same. Moses v. Soule, 63 Misc. 203 (1909); In re Castle Braid Co., 145 Fed. 224 (1906). Notwithstanding these decisions respecting the purchase of its own stock by a corporation it must be borne in mind that such purchase can be made only from surplus profits. See Penal Law provision, infra. Ed.

Where defendant and three others, all stockholders and directors of the corporation, paid defendant $500 under a contract to purchase fifty-five shares of stock owned by him, and further agreed that he should hold the certificates of said stock as security for balance of the purchase price, and where no interests of creditors were affected by the transaction, such purchase was neither illegal nor void. Moses v. Soule, 63 Misc. 203 (1909).

There is no legal objection to the purchase of its own stock by a solvent corporation, especially when it is intended to immediately reissue the same. Joseph v. Raff, 82 A. D. 47, 54 (1903), affd., 176 N. Y. 611.

In the absence of prohibition by statute a corporation may purchase its own stock, hold it unextinguished and reissue the same. City Bank of Columbus v. Bruce, 17 N. Y. 507 (1858); Booth v. Dodge, 60 A. D. 23 (1901); Vail v. Hamilton, 85 N. Y. 453, 457 (1881).

A corporation may lawfully repurchase its own stock or take it in payment for debts due or otherwise acquired by it. Vail v. Hamilton, supra.

Stock issued by a corporation, repurchased and resold by it cannot be regarded as unissued stock. Hartley v. Pioneer Iron Works, 181 N. Y. 73 (1905), revsg. 87 A. D. 107.

In the absence of statutory prohibition, a corporation may buy its own stock, at least with its profits, but where stockholders, by a majority vote, authorize the directors to buy the stock of certain stockholders and pay therefor in property constituting nearly all the corporate assets in fraud of the rights of dissenting stockholders they should be enjoined. Lowe v. Pioneer Threshing Co., 70 Fed. 646 (1895).

It has a right to cancel or purchase its own stock when no creditor is affected and it is advantageous to remaining stockholders. Burnes v. Burnes, 132 Fed. 485, 497 (1904).

A corporation may acquire its own stock by gift or bequest. Lake Superior Iron Co. v. Drexel, 90 N. Y. 87 (1882).

Stock held by the corporation which issues it cannot be voted or receive dividends, and has none of the usual rights or powers. Ex parte Holmes, 5 Cow. 426 (1826).

A director who concurs in any vote or act by which it is intended to apply any portion of the funds of the corporation, except surplus profits, to the purchase of shares of its own stock is guilty of a misdemeanor. Penal Law, § 664.

Purchase of Stock by Director with Corporate Funds; Consent of Stockholders.

Where two of the three directors of a corporation assigned their stock to the other director for a consideration paid from the corporate funds but which left the capital stock unimpaired and the remaining assets were more than sufficient to pay all liabilities, the transaction was proper and legitimate, so long as all of the stockholders consented to it; and the transaction did not render such directors personally liable to a judgment creditor of the corporation although the corporation was subsequently dissolved. Cullen v. Friedland, 152 A. D. 124 (1912).

Unlawful Transfer of Property.

An agreement of a corporation to transfer to a holder of stock which was issued for patent rights a part of such rights in stipulated territory in return for which the stockholder agrees to return his stock and resign as an officer of the company constitutes a violation of this section. Stevens v. Olus Mfg. Co., 72 Misc. 508 (1911).

While a corporation is in active business seeking credit, or while, after it has ceased to do business, it has outstanding liabilities, its directors and stockholders cannot lawfully appropriate, squander or give away any part of its capital. An officer participating in such spoliation is personally liable for damages to the trustee in bankruptcy of the corporation. Hazard v. Wight, 201 N. Y. 399 (1911), revsg. 138 A. D. 441.

Contract to Repurchase Stock at Book Value; Good Will Account.

Where parties enter into a contract, relative to a corporation to be organized by them, for the repurchase of shares of stock at the book value as shown on the accounts of the corporation, and thereafter one of the parties causes the good will value to be reduced on the books to a mere nominal sum, a court of equity, in a suit against such party and the corporation, will not interfere with the management of the books, especially when no provision was made as to the method of keeping the books and the corporation was not a party to the agreement. Drucklieb v. Harris, 209 N. Y. 211 (1913), revsg. 155 A. D. 83.

§ 29. Liability of directors for loans to stockholders. No loan of moneys shall be made by any stock corporation, except a moneyed corporation, or by any officer thereof out of its funds to any stockholder therein, nor shall any such corporation or officer discount any note or other evidence of debt, or receive the same in payment of any instalment or any part thereof due or to become due on any stock in such corporation, or receive or discount any note, or other evidence of debt, to enable any stockholder to withdraw any part of the money paid in by him on his stock. In case of the violation of any provision of this section, the officers or directors making such loan, or assenting thereto, or receiving or discounting such notes or other evidences of debt, shall, jointly and severally, be personally liable to the extent of such loan and

interest, for all the debts of the corporation contracted before the repayment of the sum loaned, and to the full amount of the notes or other evidences of debt so received or discounted, with interest from the time such liability accrued.

Formerly L. 1890, ch. 564, § 25, as am'd by L. 1892, ch. 688.

For further penalty, see Penal Law, § 664, subd. 2, post.

To create the liability imposed by this section there must have been a loan in such form as to create an indebtedness and an absolute liability for its repayment by the borrower. Billings v. Trask, 30 Hun 314 (1883), explained in 62 Hun at page 71 (1891).

The officers making or assenting to any loan of its money to stockholders are personally liable for debts of the corporation contracted before payment of such loan. Boynton v. Hatch, 47 N. Y. 225 (1872).

The directors cannot ratify an act which they could not lawfully do in the first instance. A. C. Nellis Co. v. Nellis, 62 Hun 63, 67 (1891), citing Peterson v. Mayor, etc., 17 N. Y. 449 (1858); Brady v. Same, 20 N. Y. 312 (1859).

The principal object of this section is to prevent a reduction of capital under cover of loans to stockholders. It is intended for the protection of creditors. A. C. Nellis Co. v. Nellis, 62 Hun 63, 67, 41 St. Rep. 599 (1891).

§ 30. Officers. The directors of a stock corporation may appoint from their number a president, and may appoint a secretary, treasurer, and other officers, agents and employees, who shall respectively have such powers and perform such duties in the management of the property and affairs of the corporation, subject to the control of the directors, as may be prescribed by them or in the by-laws. The directors may require any such officer, agent or employee to give security for the faithful performance of his duties, and may remove him at pleasure. The policyholders of an insurance corporation shall be eligible to election or appointment as its officers.

Formerly L. 1890, ch. 564, § 27, as am'd by L. 1892, ch. 688.

This section is permissive, but the corporation must have a president and a secretary, or treasurer, as stock certificates must be signed by two officers. See § 50, post. It will probably be found convenient, to secure compliance with the law in the absence of an officer, to have a president, vice-president, a secretary and a treasurer. The two last named need not be directors, but the president must be chosen from among the directors, and the vice-president should be a director, if given authority in the by-laws to act as president in the latter's absence. One person may hold two offices. While the president must be a director, he need not be a stockholder if the certificate of incorporation, or a by-law adopted by the stockholders, provides that directors are not required to be stockholders. Stock Corp. Law, § 25.

Election.

An agreement by one owning a majority of the stock to secure a corporate office to a party contracting with him is void as against public policy, notwithstanding that such party was capable and qualified to manage the business, and that the majority stockholder believed it would be to his interest and to the interest of all the parties concerned that such services should be secured. Fennessy v. Ross, 5 A. D. 342 (1896).

One person may fill two different offices. Novelty Mfg. Co. v. Connell, 88 Hun 254 (1895); Manhattan Co. v. Kaldenberg, 165 N. Y. 1 (1900).

Recognition of one as manager by other managers, under a mistaken supposition that he was duly elected, is not, as between the person and the corporation and where the public or third persons are not concerned, equivalent to an election. People ex rel. Nicholl v. N. Y. Infant Asylum, 122 N. Y. 190 (1890).

Compensation of Officers.

As to compensation of directors see authorities cited under section 34 of the Gen. Corp. Law.

Where a business partnership is transferred into a close business corporation and thereafter the majority elect themselves directors and then officers and distribute amongst themselves a substantial part of the profits as excessive salaries and additional compensation, a minority stockholder may maintain an action in the right of the corporation to recover back the sums improperly taken. Carr v. Kimball, 153 A. D. 825 (1912); Godley v. Crandall & Godley Co., 212 N. Y. 121 (1914).

If officers who have fraudulently voted themselves excessive salaries and extra compensation are called to account in a court of equity, they may be allowed to retain a sum equal to the fair and reasonable value of their services. Carr v. Kimball, 153 A. D. 825 (1912) and cases cited; Godley v. Crandall & Godley Co., 212 N. Y. 121 (1914).

A provision in the by-laws of a corporation authorizing the board of directors to fix the compensation of officers, employees or agents does not deprive a court of equity of jurisdiction to determine the legality of salaries and compensation paid to directors. Carr v. Kimball, 153 A. D. 825 (1912); Godley v. Crandall & Godley Co., 212 N. Y. 121 (1914).

An agreement between the officers of a corporation, while they are acting as such, that each shall have a salary for a term of years, and that the profits shall be distributed in a manner irrespective of the amount of stock held by them, is void as against public policy, being an attempt by the officers to use the corporation for their own benefit and not for that of the stockholders. Abbott v. Harbeson Textile Co., 162 A. D. 405 (1914).

As to circumstances which entitle an officer to the same compensation paid to him in former years, although for the year in question no salary had been fixed, see Eicke v. Wittemann Co., 157 A. D. 412 (1913).

Judge Chase in Gaul v. Kiel & Arthe Co., 199 N. Y. 472, p. 476 (1910), said:

The rules of law relating to the liability of a corporation to pay its officers for services rendered by them as such, or otherwise, for its benefit, are clearly stated in the reported decisions in this State, and quotes as follows: A director of a corporation is not entitled to compensation

for services performed by him as such, without the aid of a pre-existing provision expressly giving the right to it. When a stockholder, not a director, assumes the duties of the office, and performs them without some agreement or provision for compensation, the presumption in view of his relation and interest may properly arise that he performs the official services gratuitously. (Mather v. Eureka Mower Co., 118 N. Y. 629.) A president or director of a corporation who renders services thereto outside of his official duties upon an employment by the directors and a promise of compensation, is entitled to receive the value of such services and the expenses incurred during their rendition, although he is not entitled by the by-laws to any salary for his official services, and there is no express resolution of the board of directors containing an agreement to employ and to compensate him. (Bagley v. Carthage, Watertown & Sacketts Harbor R. R. Co., 165 N. Y. 179; Jackson v. N. Y. C. R. R. Co., 2 T. & C. 653.) In an action between the officers of a corporation and the corporation the officers are bound to show that the directors had assented to their right to compensation or had authorized the payment in some form. (Farmers' Loan & Trust Co. v. Housatonic R. R. Co., 152 N. Y. 251.)

A stockholder may invoke the equity powers of the court to restrain officers from wasting the corporate funds by the payment of excessive salaries. Lawrence v. Weber, 65 Misc. 603 (1910).

Where directors who are also officers vote themselves excessive increase of salaries, restitution will be decreed to the corporation, at the suit of an aggrieved stockholder, not only of the excessive salaries voted but also of the amount of their salaries as originally fixed, notwithstanding that each increase was voted upon separately and no director voted for the resolution to increase his own salary as an officer, and the burden is upon the directors to prove that the salaries voted were not excessive. Davids v. Davids, 135 A. D. 206 (1909).

Excessive salaries voted to themselves by directors who are also officers will not be upheld merely because each director refrained from voting upon the resolution fixing his own salary. Davids v. Davids, 135 A. D. 206 (1909). A director's omission to so vote merely gives the semblance of legality to a wrongful act which would not prevent a court of equity from decreeing restitution. Id.

A director may not audit his own claim for extra compensation for his services as secretary and treasuerr, nor be one of a quorum necessary to allow it, and the directors may be sued by any stockholder for himself and the others to recover a payment so allowed. Butts v. Wood, 37 N. Y. 317 (1867).

Directors may appoint and fix the compensation of the ministerial officers of the corporation, but in the absence of some provision of the statute, the by-laws or charter, they have no authority to vote salaries to each other as mere incidents of their office, nor for services already performed under a stipulated salary. Salaries voted by the directors to themselves under such circumstances may be recovered in a representative action brought by a stockholder. Godley v. Crandall & Godley Co., 212 N. Y. 121 (1914).

A salesman entitled under a contract to a percentage on profits cannot have included in such profits salaries paid to officers for services outside their official duties without pre-existing agreement where there is no claim of bad faith and there is evidence that the salesman had knowledge of the custom of paying such salaries when his contract was made. Gaul v. Kiel & Arthe Co., 199 N. Y. 472 (1910), modfg. 133 A. D. 621.

An express contract is not necessary to entitle a person to compensation for acting as an officer of a corporation of which he is neither a director nor stockholder. Smith v. Long I. Ry., 102 N. Y. 190 (1886).

The president and director of a corporation who renders services beyond his official duties, upon employment by the directors with a promise of compensation, is entitled thereto, although no salary attaches to his official position and there is no express resolution of the directors to employ and compensate him. Bagley v. Carthage, W. & S. H. R. R. Co., 165 N. Y. 179 (1900), affg. 25 A. D. 475.

The fact that an officer voted in favor of a resolution giving him a salary does not render the contract void, but only voidable at the instance of the corporation. Kearns v. N. Y. & College Point Ferry Co., 19 Misc. 19, affg. 17 Misc. 272 (1896).

Directors who are also officers and own nearly all the stock, may increase their salaries where each refrains from voting to increase his own salary. McNab v. McNab & Harlin Co., 133 N. Y. 687 (1892), affg. 62 Hun 18.

Officers who are either stockholders or directors are not entitled to compensation unless the same has been provided for. Mather v. Eureka N. Co., 118 N. Y. 629 (1890).

An executrix of the deceased president of a corporation, holding the stock formerly owned by him, cannot complain of the election of a new president by the directors, or of the resolution fixing his salary, when it appears that the new president did not vote on these propositions but withdrew from the meeting. Alleged fraudulent representations by the new president in inducing such executrix to consent to his election are immaterial, as a stockholder's consent was not necessary to the election of officers by a board of directors lawfully holding office. Hirsch v. Jones, 115 A. D. 156 (1906), appeal dismissed, 191 N. Y. 195. When such new president was voted the same salary as the deceased president, and there is no finding that he neglected his duties, or that the salary was excessive, there is no basis for a finding that the receiving of such salary was a conversion of the corporate moneys. Id. Although the newly elected president, as an executor of the deceased president, holds the controlling interest in the corporation, he is not disqualified thereby from holding office, as between himself and the corporation, and the latter cannot recover the salary paid in the absence of proof of official misconduct. The question as to whether such executor must account for such salary or be removed as executor are questions which do not arise in a stockholder's action brought in behalf of the corporation. Id.

If the officer expects to have compensation, and the corporation intends to pay him for his official services, it may be easily provided for by resolution or agreement before he enters upon his services. This is at all events a salutary rule, as applied to an officer who is a stockholder of the corporation. Mather v. Eureka Mower Co., 118 N. Y. 629 (1890).

The rule has become quite well settled that an officer of a corporation is not entitled to receive compensation, in the absence of an agreement securing it, for his services performed in the legitimate discharge of the duties of his office. Barril v. Calendar Water-Proofing Co., 50 Hun 257 (1888).

It has been our settled policy not to create a liability as against a corporation in favor of an officer who renders services upon the theory of an implied contract; our view being that the services will be presumed to be rendered gratuitously, unless there is an express contract upon which the right to compensation is based. Stout v. Security Trust & Life Ins. Co., 82 A. D. 129 (1903).

A person who is both a stockholder and director cannot sustain a claim for salary as president unless founded on a contract. Starbuck v. Housatonic R. R. Co., 83 Hun 534 (1895).

Where a stockholder of a corporation becomes an officer thereof, assumes the duties of the office and performs them without any agreement or provision for compensation, the presumption, in view of his relation and interest, may properly arise that he intends to perform the services gratuitously. Mather v. Eureka Mower Co., 118 N. Y. 629 (1890).

A by-law, fixing the salary of the president, may be modified by an executed parol agreement, acquiesced in by all parties. Bowler v. American Box Strap Co., 22 Misc. 335 (1898).

Directors have no right to vote themselves salaries as mere incidents to office. They are not debarred from becoming employees of the corporation, and may receive compensation as such. Fitchett v. Murphy, 26 Misc. 544 (1899).

Where a corporation has agreed to pay an employee in addition to a salary, 3 per cent. upon such salary for every 1 per cent. in excess of 10 per cent. which shall be paid as dividends and the corporation doubles its stock and thereafter declares a 100 per cent. dividend and thereafter a 30 per cent. dividend, the matter presents a question for the jury, as to whether the employee's compensation was affected by such increase of capital. Bradburn v. Solvay Process Co., 18 A. D. 542 (1897).

A corporation has inherently no actual or implied license to use inventions of its president without compensation to him, even though the experimental work was done in the plant of the corporation by its employees, where the president paid for it out of his own funds. Burden v. Burden Iron Co., 39 Misc. 559 (1903).

Resignation.

When an officer has tendered his resignation, to take effect immediately, in a letter delivered to the president, the resignation is complete and is not dependent upon acceptance by the directors or upon the election of his successor. Manhattan Co. v. Kaldenberg, 165 N. Y. 1 (1900), revsg. 27 A. D. 31.

The acceptance of an officer's resignation is ordinarily not necessary to make it effective. Zeltner v. Zeltner Brewing Co., 174 N. Y. 247 (1903), affg. 79 A. D. 136; Yorkville Bk. v. Same, 80 A. D. 578 (1903), appeal dismissed 178 N. Y. 572; Noble v. Euler, 20 A. D. 548 (1897); Wilson v. Brentwood Hotel Co., 16 Misc. 48 (1896).

The officers and directors of a corporation cannot by resigning in a body deprive themselves of their authority over the corporate property nor free themselves from the obligation to care for such property until other officers are appointed in their stead. Such resignation does not create the condition contemplated by the Code of Civil Pro. § 1810, subdiv. 3, authorizing the bringing of an action "to preserve the assets of a corporation having no officers empowered to hold the same." Zeltner v. Zeltner Brewing Co., 174 N. Y. 247 (1903), affg. 79 A. D. 136; Yorkville Bk. v. Same, 80 A. D. 578 (1903), appeal dismissed, 178 N. Y. 572.

Although a resignation need not be in writing nor in any particular form it is essential that it express a definite and present intention to withdraw from office and must be addressed to the company or the board of directors, or to an officer, as such, with the explicit purpose of having it reach the company or board of directors through him. Chemical Nat. Bk. v. Colwell, 9 N. Y. Supp. 285 (1890); Kindberg v. Mudgett, 24 Wkly. Dig. 229 (1886).

Directors of a corporation, if not insolvent, have the power, when they deem it for the best interest of the company, to request and accept the resignation of its president, paying him for his stock, back salary, and a certain sum as liquidated damages, in consideration of his resignation. Joseph v. Raff, 82 A. D. 47 (1903), aff'd., 176 N. Y. 611. It and its subsequent creditors should be estopped to rescind the transaction after its insolvency, and its consequent inability to restore him to his former position. Id.

Resignation of Officers; Agreement Providing for.

Where a person acquires 80 per cent. of the stock of a foreign corporation under an agreement to furnish funds to redeem its property from a foreclosure sale, a provision, that after such redemption the secretary and treasurer would resign and the directors would fill the vacancies with nominees of such person, is not against public policy, especially respecting a corporation of another State, the statutes of which are not proven, and when such provision is merely incidental. San Remo Copper M. Co. v. Moneuse, 149 A. D. 26 (1912).

Removal or Suspension of Officers.

See also, "Removal or Suspension of a Director," under section 34 of the General Corporation Law, ante, and section 1948 of the Code, post.

Where a by-law provided that the president, vice-president, secretary and clerks shall respectively hold their offices during the pleasure of the board of directors, and until the appointment of a successor, either permanent or pro tem., and no officer or clerk shall be removed without a concurrence of a majority of the whole board of directors, such officers are chargeable with notice of the by-law and under its terms are removable at any time. Douglass v. Merchants' Ins. Co., 118 N. Y. 484 (1890).

Duty and Liability of Officers to Corporation.

Directors and officers are agents of the corporation and liable to it for unauthorized acts. Holmes, B. & H. v. Willard, 125 N. Y. 75 (1890). But the corporation may indorse unauthorized acts of directors and officers. Id. See, also, Martin v. N. F. P. Mfg. Co., 122 N. Y. 165 (1890).

Officers of a corporation cannot avail themselves of their position and opportunity to deplete the trust fund for their own benefit. Bulkley v. Whitcomb, 121 N. Y. 107 (1890). See, also, Johnson v. U. S. & S. Co., 37 St. Rep. 876.

Money received from an outsider by a director and president for procuring the outsider and his friends to be elected directors and given control of the corporation, together with its property, is money obtained by virtue of his office, for which he must account to the corporation. McClure v. Law, 161 N. Y. 78, revsg. 20 A. D. 459 (1899).

A director is not liable for damages for preventing the consummation by outside parties of a contract with a corporation to furnish inducements for the removal of its works, when it appears that such director, in advising such parties in regard to the concealment of the condition of the corporation, performed only an obvious duty as a matter of honest business dealing. Hale v. Mason, 160 N. Y. 561 (1899), affg. 22 A. D. 630.

While the law looks with disfavor upon contracts made between a director or officer and the corporation, because it cannot accurately measure the in-

fluence of a trustee with his associates, yet a pledge as collateral for a loan actually made by an officer or director to the corporation is not necessarily void. Kinsman v. Fisk, 83 Hun 494 (1895).

Where the corporation accepted goods on a contract made by the president, and has had the benefit and paid part of the purchase price, it cannot assert the officer's lack of authority. Doolittle v. Keuka College, 129 A. D. 829 (1909).

Individual Liability.

Officers are not individually liable if it appears on the face of the instrument that they contracted with reference to corporate business and had authority to make such contract. Whitford v. Laidler, 94 N. Y. 145 (1883).

Although the president of a corporation was acting for it when wrongfully refusing to give up property, he is personally liable for the tortious act. McCrea v. McClenahan, 131 A. D. 247 (1909).

In an action by a stockholder against the president of a corporation for alleged misapplication of corporate funds it is improper to join other stockholders when they are entitled to no relief nor subject to any liability. McCrea v. McClenahan, 114 A. D. 70 (1906).

Where the officers signed an agreement in their individual names, adding the title of the office held by each after his signature, and the character in which they assumed to act is known to the person dealing with them, the agreement is that of the corporation and not that of its officers. Groves v. Acker, 85 Hun 492 (1895); Bush v. Gilmore, 41 A. D. 89 (1899).

An officer of a corporation, who, in order to enable the corporation to raise funds, individually indorses the corporate note is liable thereon to a bona fide holder in due course, although subsequent to his indorsement the treasurer, instead of filling in the space left for his name in the stamp of the corporation, which was on the note when indorsed, has erased the stamp and signed the note individually before negotiating it. Nassau Trust Co. v. Matherson, 113 A. D. 693 (1906).

Where individuals sign a promissory note, and after their respective names write "Prest." and "Treas.," it is their individual obligation and not the obligation of the corporation, if there is nothing in the body of the note to indicate that it is a corporate obligation, even though the name of the corporation be printed on the margin. First Nat. Bk. of Bklyn. v. Wallis, 150 N. Y. 455 (1896), affg. 84 Hun 376.

As a stockholder and president of a corporation is not individually liable for its debts, by guaranteeing payment of the debts he only assumes a collateral liability as surety. Winne v. Mehrbach, 130 A. D. 329 (1909).

The fact that a person, who intended to bind herself individually, used the name of a corporation in executing a contract, will not avail one who has not been misled. Davis v. Smith, 42 A. D. 333 (1899); Goodsell v. W. U. Telegraph Co., 130 N. Y. 430 (1892).

An agreement by the president, upon receiving a release from a discharged employee, to settle the question of wages due him, is not a promise to pay such wages and does not render the former personally liable, especially as the writing failed to recite any consideration. Schisgal v. Wronkow, 18 Misc. 445 (1896).

President; Authority of.

The president or other general officer of a corporation, who has personal charge of the business, represents the corporation, and has power, prima facie, to do any act which the board of directors could authorize or ratify.

Oakes v. Cattaraugus Water Co., 143 N. Y. 430, 436 (1894); Hastings v. Bklyn. Life Ins. Co., 138 N. Y. 473, 479 (1893); Patterson v. Robinson, 116 N. Y. 193, 200 (1889); Davies v. Harvey Steel Co., 6 A. D. 166 (1896); Prindle v. Washington Life Ins. Co., 73 Hun 488 (1893), affd., 149 N. Y. 614.

The authority of the president to bind the corporation by acts within the scope of his apparent authority may be implied from the adoption or recognition of his acts by the corporation or its directors. Hall v. Oehs, 34 A. D. 103 (1898).

The president of a corporation when engaged in a transaction entirely outside of the scope and purposes of the corporation, cannot bind the corporation simply because he is its executive officer; his authority to act for the corporation is limited by the legitimate scope of its business as defined by its charter; it can never be presumed that the agent of a corporation has authority to transact business which the corporation itself is not authorized by its charter to transact. McCorry v. Wiarda & Co., 149 A. D. 863 (1912), citing Leary v. Albany Brewg. Co., 77 A. D. 6, 10 (1902); Lord v. U. S. Transp. Co., 143 A. D. 437, 451 (1911).

The president cannot supersede an express resolution of the board of directors, and one dealing with the corporation having notice of such resolution is bound by it. Tradesmen's Nat. Bk. v. Manhattan Lumber Co., 46 St. Rep. 487 (1892).

The president of a corporation, who is in charge of the management of its business, is presumably authorized to execute a contract negotiated by him, and the corporation is bound by his acts. Stannard v. Reid & Co., 118 A. D. 304 (1907), affd., 88 N. E. 1132.

When the scope of the president's authority does not appear in terms, it may be implied from the power he was accustomed to exercise. Chambers v. Lancaster, 160 N. Y. 342 (1899), affg. 3 A. D. 215.

The fact that the president has frequently executed notes in the corporate name, which have never been repudiated or questioned by the directors, is sufficient to sustain a finding that he was authorized to execute notes, although the by-laws provided that they should be signed by the treasurer and the president or secretary. Grant, as Receiver of St. Nicholas Bk. v. Geo. C. Treadwell Co., 82 Hun 591 (1894).

The president is impliedly vested with authority to transact ordinary business. Reedy Elevator Co. v. American Grocery Co., 23 Misc. 520, revsd. on other grounds, 24 Misc. 678 (1898); also, Powers v. Schliet Heat & Power Co., 23 A. D. 380 (1897), affd., 165 N. Y. 662.

The president of a corporation has apparent authority to make a contract, and its validity is not impaired by the fact that it was signed and sealed by the general manager. Standard Fashion Co. v. Siegel-Cooper Co., 44 A. D. 121 (1899).

The president or other executive head of a corporation has authority by virtue of his office to employ counsel to prosecute or defend ordinary actions on behalf of the corporation. American Ins. Co. v. Oakley, 9 Paige 496 (1842); Mumford v. Hawkins, 5 Denio 355 (1848); Beebe v. Beebe Co., 64 N. J. Law 497 (1900); Streeten v. Robinson, 102 Cal. 542 (1894); Western Bank of Mo. v. Gilstrap, 45 Mo. 419 (1870); Southgate v. Railroad Co., 61 Mo. 89 (1875); Colman v. Oil Co., 25 W. Va. 148 (1884), and cases cited.

Where a contract made by the president of a corporation is one which its directors had power to authorize him to make, or to ratify after it had been made, the presumption is that he had power to make the contract, and the burden is on the corporation to show that it had not been authorized.

Lyon v. West Side Transfer Co., 132 A. D. 777 (1909); Norman v. Loomis-Manning Filter Co., 123 A. D. 739 (1908); Paterson v. Robinson, 116 N. Y. 193 (1889); Davies v. Harvey Steel Co., 6 A. D. 166 (1896).

The president has authority to receive the payment of subscriptions for stock, although the corporation is a trust company which cannot transact business until all its capital stock is paid in. Higginbotham v. Internat'l Trust Co., 141 A. D. 535 (1910); Borough Bank v. Lamphear, 154 A. D. 177, 179 (1912).

Where the president of a corporation buys fittings for its place of business and they are placed therein and the premises are subsequently leased by the corporation to another, the president acted presumptively within his powers. Pearson v. Liberty Ave. Theater Co., 152 A. D. 771 (1912).

Where the affairs of a business corporation organized to finance other corporations is left in the control of the president, he may bind the corporation in the general and ordinary conduct of its business. McDuffie v. Financier Co., 135 A. D. 307 (1909).

Where a promisee sues upon a contract made in the name of a corporation by its president, and the contract is one which the corporation could authorize its president to make or which it could ratify, the burden rests upon the corporation to show that it was unauthorized. Patterson v. Ongley Electric Co., 87 Hun 462 (1895).

A contract executed in the name of the corporation by its president and secretary and sealed with its seal, is prima facie valid. Jourdan v. L. I. R. R. Co., 115 N. Y. 380, 385 (1889).

An assignment executed by the president in the presence of its secretary and attested by the seal, is sufficient to protect the debtor in paying the assignee. Purdy v. Nova Scotia M. Ry. & Iron Co., 8 Misc. 510 (1894), affd., 11 Misc. 406.

When an authorized transfer of corporate property is made by the president in payment of his individual indebtedness it will be upheld. Quee Drug Co. v. Plaut, 55 A. D. 87 (1900). See, also, Osborn v. Montelac Park, 89 Hun 167 (1895), affd., 153 N. Y. 672.

As to power of president to sell bonds in absence of specific resolution of directors, see Owego Gas Light Co. v. Boyer, 111 A. D. 140 (1906).

Where the by-laws of a railroad corporation provide that the president shall have general charge of the business of the company he has power to conduct negotiations for the purpose of a right of way without special authorization from the board of directors. Matter of N. Y., Westchester & Boston Ry. Co., 151 A. D. 50 (1912).

The title to corporate property is in the corporate entity. A personal bill of sale executed by the president does not transfer title, although he owns substantially all the stock. Palmer v. Ring, 113 A. D. 643 (1906); Saranac & Lake Placid R. R. Co. v. Arnold, 167 N. Y. 368 (1901); Buffalo Loan, Trust & Safe Deposit Co. v. Medina Gas Co., 162 N. Y. 67 (1900).

The president of a company, having general authority to contract for making and delivering its products, has like authority, until it is withdrawn, to terminate and release such contract. Indianapolis R. M. Co. v. St. L. R. R. Co., 120 U. S. 256 (1886).

When the president executed a contract which the corporation could authorize him to make, or could ratify, and acknowledged it, assuming to act for the corporation by authority of its directors, the contract is binding unless the corporation shows affirmatively the president's lack of authority. Hudson River & Washington Co. Midland R. R. Co. v. Hanfield, 36 A. D. 605 (1899).

It is within the scope of the president's implied authority to employ accountants. Teele v. Consolidated Amusement Co., 102 N. Y. Supp. 666 (1907).

The rule disqualifying an agent from representing his principal in any transaction in which his personal interests are opposed to the principal's applies to all cases where there is danger that the agent may be induced to use his powers for his own advantage; and it is immaterial what the character of the interest of the agent may be, provided it be a substantial one. McCloskey v. Goldman, 62 Misc. 462 (1909); Claflin v. Farmers' & Citizens' Bk., 25 N. Y. 293 (1862).

One who deals with an officer, to whose office no inherent executive authority attaches, is chargeable with notice of an apparent want of authority and deals with him at his peril. Parmelee v. Associated Physicians & Surgeons, 9 Misc. 458 (1894), and cases therein cited. But when directors permit the officers to hold themselves out as clothed with powers to manage its affairs, and thus lead innocent parties to contract with them, they cannot repudiate such contracts. Same v. Same, 11 Misc. 363 (1895).

In certain cases a corporation cannot repudiate acts of its financial manager. Case Mfg. Co. v. Soxman, 138 U. S. 431 (1890).

President; Misconduct of.

The president and chief stockholder of a corporation may lawfully withdraw its funds from the bank to secure them against its probable insolvency, and place them in a safe deposit box though taken in his name, with the knowledge and consent of all corporate officers, but when he later withdraws them to purchase stock for his own account he is guilty both of common law larceny and of statutory embezzlement or larceny, though he afterwards returns the money to his own custody for the benefit of the corporation, and though the corporation was indebted to him at time of larceny in an amount approximating the sum taken, it not appearing on corporate records that it was withdrawn in payment of his claim. People v. Barnes, 158 A. D. 712 (1913).

The fact that the president has been authorized by a resolution of a board of directors "to take charge of all the property and business of the company" and to make and sign "all checks, notes, contracts and other obligations of the corporation" does not warrant the inference on the part of those dealing with such president that he was authorized thereby to use corporate funds to pay his personal debts, as such resolution means that the president could do the acts mentioned only in transacting the corporate business. Ward v. City Trust Co., 192 N. Y. 61 (1908).

Where a president, who under the by-laws had general management but without power to draw or indorse checks, misappropriated a number of checks, drawn to the order of the corporation by indorsing them in blank with the corporate name by himself as president and deposited them to the credit of his individual account or that of his firm and drew against such deposits with his own checks and those of his firm, the bank is chargeable with constructive notice and is liable to the corporation for the loss. Niagara Woolen Co. v. Pacific Bank, 141 A. D. 265 (1910).

Where dividends are being paid both upon the preferred and common stock of a corporation, a receiver will not be appointed on the application of a minority stockholder who claims that the president is violating a contract made by it, especially where it appears that such minority stockholder had known of such violation for several years and did not begin his suit until the president had refused to purchase his stock or give him a position with the corporation. Metzger v. Knox, 77 Misc. 271 (1912).

If the president, authorized to make notes, makes a note regular in form, payable to the order of a nominal payee, and indorsed by him to a firm of which the president is a member, and the president thereafter wrongfully delivers the note, before maturity, to one having no knowledge of defect in title, as collateral security, the fact that the corporate note bears upon its face the signature, as president, of the party dealing with him is not sufficient to put the transferee upon inquiry, and deprive him of the character of a bona fide purchaser. Cheever v. Pittsburgh, Shenango & L. E. R. R. Co., 150 N. Y. 59, revsg. 72 Hun 380 (1896).

Vice-President; Authority of.

Assuming that a brewing corporation has power to guarantee a customer's lease, the landlord cannot recover upon such guarantee, executed by the vice-president alone, where there is no affirmative proof that the corporation had any knowledge of the existence of the guarantee, or knew that the vice-president had executed it in the corporate name. The form of lease and guaranty is sufficient to put the landlord upon inquiry as to the extent of the vice-president's powers. Aaronson v. David Mayer Brewing Co., 29 Misc. 289 (1899), revsg. 26 Misc. 655 and 867.

When a corporation is to be charged with liability upon an act of its general counsel and vice-president, slight evidence in support of authority is sufficient to require it to show the true relation which such officers bear to the corporation, their authority being peculiarly within its knowledge. Nutting v. Kings Co. El. Ry. Co., 21 A. D. 72 (1897).

Vice-President; Misconduct of.

A trust company is not liable for representations of its vice-president that a mortgage under which the company was trustee was a first mortgage when the mortgage was in fact subject to existing prior mortgages. Davidge v. Guardian Trust Co., 203 N. Y. 331 (1911).

Treasurer; Authority of.

The treasurer of a corporation has no power to make promissory notes in its name unless such power is given to such officer by the by-laws of the corporation or by resolution of its board of directors, or unless such authority may be presumed from custom and usage acquiesced in by the corporation. Jacobus v. Jamestown Mantel Co., 211 N. Y. 154 (1914), and cases cited.

To charge a corporation with liability upon a contract purporting to be signed in its name by an individual as its treasurer, it is necessary to prove that the individual signing the contract had authority, express or implied, to do so on behalf of the corporation. Coney Island A. R. Co. v. Boyton, 87 A. D. 251 (1903).

In an action against a corporation for breach of an oral contract of employment alleged to have been made on behalf of the corporation by its treasurer, the fact that the corporation accepted and paid for plaintiff's services for one week is sufficient prima facie evidence of the treasurer's authority, and in such case it is not necessary to determine whether the treasurer has power to enter into ordinary contracts affecting the usual corporate business, not necessarily pertaining to its finances. Latiner v. Wonderland Amusement Co., 161 A. D. 554 (1914).

Where the by-laws do not give the treasurer power to execute an instrument but he does so and the corporation has received the benefit thereof it is enforcible against the corporation. Dill & Collins Co. v. Morison, 159 A. D. 583 (1913).

The powers, functions and duties of the treasurer of a corporation are determined by its charter and by-laws, and where it does not appear that such an officer has been guilty of a breach of any duty imposed by the charter and by-laws, he must be held to the same measure of liability, and none other, as that imposed upon all classes of persons who are clothed with fiduciary relations toward property in which others are beneficially interested. N. Y., Providence & Boston R. R. Co. v. Dixon, 114 N. Y. 80, 85 (1889).

It is outside the scope of the treasurer's authority to sell and assign accounts due the corporation and unless the assignment purports to have been made by authority of the directors the assignee cannot recover. Maroney v. Cole, 52 Misc. 451 (1907).

The treasurer cannot bind the corporation for work, labor and services, as such contract is beyond scope of his duties. Connell v. Ernst-Max-Nathan Co., 35 Misc. 133 (1901); Parmelee v. Ass'd P. & S., 9 Misc. 458 (1894).

A sale of corporate property, made by the treasurer and sole manager of a corporation, where he was not authorized by the by-laws to make it, but was in the habit of doing such business with the knowledge and sanction of the corporation, is valid. Philips v. Campbell, 43 N. Y. 271 (1870).

Treasurer; Misconduct of.

The payee of corporate checks who receives them from the treasurer in payment of a debt not owned by the corporation, but in payment of one which he has treated as the treasurer's individual debt, where the latter has no actual or apparent authority to issue such checks either in payment of his own debt or that of a third person, is chargeable with notice of the treasurer's incapacity to issue them and is bound to inquire, and where he accepts and uses the checks without question, he is liable to the corporation for the amount paid. Roch. & Charlotte Turnpike Rd. Co. v. Paviour, 164 N. Y. 281 (1900).

In an action by stockholders to compel the treasurer to account for corporate assets which it was claimed that he had wrongfully converted to his own use, an order for the examination of the treasurer before trial was made containing a provision that he should produce upon such examination certain corporate books for the purpose of refreshing his recollection. The treasurer took no appeal from the order, but refused to produce the books on the ground that they would tend to incriminate him; held, that the treasurer was guilty of contempt of court; that having acquiesced by not appealing from the order directing him to produce the books, he could not thereafter defy the court by refusing to comply with the order; that the mere production of the books could not, in and of itself, tend to incriminate him. Pray v. Blanchard Co., 95 A. D. 423 (1904).

The deposit bank of a corporation, upon which its checks were drawn, was its agent to determine whether the checks were properly payable or not. When it decided that they were, and paid them to another bank, in which they had been deposited by the treasurer for his individual account, which latter bank received the proceeds in good faith, this was an acknowledgment that its treasurer in fact possessed authority to draw such checks, and the corporation has no right to recover the proceeds from the bank in which they were deposited. Havana Central R. R. Co. v. Knickerbocker Trust Co., 198 N. Y. 422, revsg. 135 A. D. 313.

Unlawful Dividends; Knowledge Imputable to Treasurer.

Where a person is the treasurer but not a director, he is nevertheless chargeable with any representations to be inferred from the declaration of a dividend. The very nature of his office imputes to him knowledge of the financial condition of the corporation. Keeler v. Seaman, 47 Misc. 292, 296 (1905).

Secretary; Authority of.

The secretary has been held to be one of the general managing officers of the corporation whose authority is presumed to be as broad as that of the president himself. Traitel Marble Co. v. Brown Bros., Inc., 159 A. D. 485, 487 (1913), citing Hastings v. Bklyn. Life Ins. Co., 138 N. Y. 473, 479 (1893).

The secretary of a corporation is not chargeable with constructive notice of entries made in its banks of account, and the entries themselves are no more competent against him than against a stranger to the corporation. Union Nat'l Bk. v. Dean, 154 A. D. 869, 874 (1913).

The secretary of a corporation is one of its general managing agents, and when in the discharge of the duties of his office represents the corporation. Hastings v. Brooklyn Life Ins. Co., 138 N. Y. 473, 479 (1893).

The secretary of a corporation, who has an office and possession of the corporate books within this State, may be required to answer a question as to the profits earned by the corporation. Matter of Dittman, 65 A. D. 343 (1901).

Where the secretary of a real estate investment company, having full charge of its affairs, received money for investment in real estate, with the approval and acquiescence of the president, the corporation is estopped from denying that it had received the money for that purpose. Ring v. Long Isl. Real Est. Exc., 93 A. D. 442 (1904), aff'd., 184 N. Y. 553.

The secretary of a corporation is not necessarily an officer thereof and has no implied authority to indorse promissory notes made payable to the corporation. Karsch v. Potter & Stymus Mfg. & Impt. Co., 82 A. D. 230 (1903).

A forfeiture of stock is not a ministerial act. It is a corporate act, involving the exercise of judgment and discretion, which cannot be performed by the secretary. In re N. Y. & Westchester Town Site Co., 145 A. D. 623 (1911).

The secretary, whose duty it is to keep the minutes of the meetings, is not required to enter those minutes in his own hand in the record book; it is sufficient if he causes them to be properly and correctly recorded, and, after that has been done, his signature in the proper place, thereby authenticating their correctness, is sufficient to entitle them to be read in evidence. United Growers Co. v. Eisner, 22 A. D. 1 (1897).

Manager, General Manager, and Managing Agent.

Where a person is appointed manager of a corporation with full power and control of its affairs and with the right to incur debts, pay out money and, if he deems it advisable, to sell the corporate assets, this does not make him sole owner of the corporation, although he has acquired all of the shares except one. Buffalo Electro-Plating Co. v. Day, 151 A. D. 237 (1912).

While one may assume that a general manager has authority to contract with respect to the regular business of the corporation, it cannot be that a general manager may be deemed to have power to dispose of property required for corporate functions and to terminate the business. Lord

v. U. S. Transp. Co., 143 A. D. 437 (1911); however, if the act of a general manager who leases the property is known to the corporation and it accepts the benefits thereof, it may be bound. Id.

There is no rule to determine the exact authority and powers of a "general manager," and in each particular case it may be shown what the person has done in the general course of the business of the corporation. The title would import that such person is a general executive officer for all the ordinary business of the corporation, and this would justify, in connection with proof of acts done, a conclusion that all ordinary contracts made by such an official are authorized by the corporation. Camacho v. Hamilton Bank Note & Eng. Co., 2 A. D. 369 (1896); Studebaker Bros. Co. v. Rose Co., 65 Misc. 322 (1909).

In the absence of proof as to the authority of the "general manager" of a corporation engaged in selling liquors he does not have power to purchase an automobile. Studebaker Bros. Co. v. Rose Co., 65 Misc. 322 (1909).

Where a domestic corporation, engaged in carrying on business in a foreign country, has constituted an agent there its general resident manager, third persons dealing with such agent have a right to assume, in the absence of notice, that such manager's authority extends to all dealings necessary to carry on the business, such as procuring necessary supplies or ordinary implements for the work of the corporation, and pledging the credit of the corporation for the payment of debts contracted for those purposes. Rathbun v. Snow, 123 N. Y. 343, 349 (1890).

A by-law, which provides that no contract shall be made "by any officer" unless authorized by the board of directors, does not limit the authority of a managing agent, intrusted with the sale of stock, to make a contract verbally authorized by the corporate officers. Sherman v. Dwight, 138 A. D. 595 (1910); 123 N. Y. Supp. 89.

The general manager of a savings and loan association has power to authorize a collecting agent of the company to employ a broker at the prevailing rate of commissions to effect an exchange of property owned by the corporation. Norton v. Genesee Nat. Svgs. Assn., 57 A. D. 520 (1901).

Corporate Officers Generally.

Broadly stated, the rule is that the general officers of a business corporation are impliedly held out to the public as having authority to act in accordance with the general usage and practice of such corporation and of the business in which the particular corporation is engaged, and that their acts within the scope of an authority to be presumed from such conditions will bind the corporation in favor of persons possessing no knowledge of a lesser authority, or who are not in possession of facts sufficient to put a prudent man upon inquiry. Traitel Marble Co. v. Brown Bros., Inc., 159 A. D. 485 (1913).

Persons dealing with the officers and agents of a corporation are bound to take notice that their powers are derived from statutes, by-laws or usages which more or less define the extent of their authority, and in doubtful cases one must at his peril acquaint himself with the exact extent of that authority. Traitel Marble Co. v. Brown Bros., Inc., 159 A. D. 485 (1913).

Acts of corporate officers, within the apparent scope of their authority, are presumed to be the acts of the corporation and binding upon it, and a person dealing with them under such circumstances need not prove specific authority from the directors, and is not affected by secret provisions of the by-laws not brought to his attention. Lyon v. West Side Transfer Co., 132 A. D. 777 (1909).

Whatever may be the extraordinary or incidental powers of a corporation under its charter, power to bind the corporation can only be presumed to

exist in its executive agents and officers within the scope of its ordinary business and their ordinary duties. First Nat. Bk. v. Ocean Nat. Bk., 60 N. Y. 278, 287 (1875).

One who deals with the officers or agents of a corporation is bound to know their power and the extent of their authority. Jacobus v. Jamestown Mantel Co., 211 N. Y. 154, 160 (1914).

Persons dealing with officers of a corporation, or with persons assuming to represent it, are chargeable with notice of the purpose of its creation and its powers and with the authority, actual or apparent, of its officers or agents with whom they deal. Thompson v. Marseillaise French Baking Co., 85 Misc. 392 (1914); Wilson v. Kings Co. El. R. R. Co., 114 N. Y. 487, 491 (1889).

Within the limits of the chartered authority granted to the corporation the officers have the fullest power to regulate its affairs according to their best judgment. Leslie v. Lorilard, 110 N. Y. 519, 537 (1888).

When an officer does an act which is within the general scope of his powers, although circumstances may exist which render the particular act a violation of his duty, the corporation is nevertheless bound by his act as to persons dealing in ignorance of those circumstances, and is responsible to innocent parties who have sustained damages by such acts. Booth v. Farmers' & Mechanics' Nat. Bk., 50 N. Y. 396, 400 (1872).

The liability of the corporation for acts of its officers done within the scope of their general powers, is not affected by the fact that the act which the officer has assumed to do is one which the corporation itself could not rightfully do. A corporation may do wrong through its agents as well as a private individual. Booth v. Farmers' & Mechanics' Nat. Bk., 50 N. Y. 396, 400 (1872).

If officers of a corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. Bank of the U. S. v. Danbridge, 12 Wheat. 64.

Officers are presumed to have authority to perform duties which such officers ordinarily perform in similar corporations. Mutual Life Ins. Co. v. 42d St. R. R. Co., 74 Hun 505 (1893).

An unconditional employment by corporate officers of a person for life is repugnant to the express authority of such officers to appoint, remove and fix the compensation of employees. Rollins v. Co-operative Bldg. Bk., 98 A. D. 606 (1904), affd., 184 N. Y. 525, and cases cited. See, also, Usher v. N. Y. C. & H. R. R. R. Co., 76 A. D. 422 (1902), affd., 179 N. Y. 544.

A person has a right to assume that officers possess the authority to act in those capacities in which the corporation holds them out to be its representatives or permits them to act. Railway Equipment & Pub. Co. v. Lincoln Nat. Bk., 82 Hun 8 (1894).

One dealing with an officer is put upon inquiry where the act would be illegal unless actually authorized as, e. g., where securities offered for sale or as security are apparently the property of the corporation. Knox v. Eden Musee Am. Co., Ltd., 74 Hun 483 (1893), revsd. on other grounds, 148 N. Y. 441.

Declarations of agent or officer of a corporation are not admissible in action against it, except when part of the res gestæ, or made in the performance of his duties. Cosgray v. New England Piano Co., 22 A. D. 455 (1897).

When by-laws authorize officers alone to make contracts, an agent has no power to bind the corporation. Miner v. Edison El. Illg. Co., 22 Misc. 543, affd., 26 Misc. 712 (1899).

Execution of a contract by the president and secretary of a corporation using the corporate seal is prima facie evidence of their authority to execute it. Quackenboss v. Globe & R. F. Gas Co., 177 N. Y. 71 (1903), revsg. 77 A. D. 168.

Where a confidential correspondence clerk of a corporation is held out as occupying a position to answer for the corporation, the latter will be bound by any action of his coming within the ordinary executive duties pertaining to the transaction of corporate business. Hall v. Herter Bros., 90 Hun 280 (1895), affd., 157 N. Y. 694.

Corporations whose business is necessarily conducted altogether by agents are required to see to it that their officers and agents not only know what their powers and duties are but that they do not habitually transcend those powers. Persons dealing with them have no access to the by-laws and resolutions of the board of directors, and no means of judging in each instance whether the officer is or is not within the prescribed limits. Conover v. Mutual Ins. Co. of Albany, 1 N. Y. 290, 292 (1848).

Corporate Officers; Misconduct of.

See "Corporate Books as Evidence" under section 32 of the Stock Corporation Law, post.

The president, directors and paid officers cannot, in performance of official duties which they owe exclusively to the corporation, dispose of its property and distribute the proceeds according to an agreement kept secret from the other directors and stockholders, and thus realize a profit to themselves. Billings v. Shaw, 209 N. Y. 265 (1913).

The general rule is that one who receives from an officer of a corporation its money, notes or securities in payment of or as security for a personal debt of such officer, does so at his peril, and if the person receiving the same knows or is chargeable with knowledge that such corporate officer was thereby misappropriating the corporate funds, he is liable to the corporation for the amount so received. Prima facie the act is unlawful, and unless actually authorized by the corporation, the purchaser will be deemed to have taken them with notice of the rights of the corporation. Rochester Charlotte Turnpike Road Co. v. Paviour, 164 N. Y. 281 (1900), and to the same effect, Lanning v. Trust Co. of America, 137 A. D. 722 (1910), citing Ward v. City Trust Co., 192 N. Y. 61 (1908); Wilson v. Met. Elev. Ry. Co., 120 N. Y. 145 (1890); Havana Central R. R. Co. v. Knickerbocker Trust Co., 198 N. Y. 422 (1910), revsg. 135 A. D. 313. The deposit bank of a corporation upon which its checks were drawn was its agent to determine whether the checks were properly payable or not. When it decided that they were, and paid them to another bank, in which they had been deposited by the treasurer for his individual account, which latter bank received the proceeds in good faith, this was an acknowledgment that its treasurer in fact possessed authority to draw such checks, and the corporation has no right to recover the proceeds from the bank in which they were deposited. Havana Central R. R. Co. v. Knickerbocker Trust Co., 198 N. Y. 422, supra.

A corporation, while a going concern, incurring debts and liabilities, or after it has ceased to do business and has outstanding liabilities, cannot give to a stockholder and director thereof, for the benefit of another stockholder, a part of the capital. Such an act is a violation of the statute and the principles of the common law, and a corporate officer who participates in such an act and thereby bestows upon himself a substantial part of the capital is liable in an action at law by the trustee in bankruptcy for wasting the assets. Hazard v. Wight, 201 N. Y. 399 (1911), revsg. 138 A. D. 441.

In a prosecution for criminal libel brought against the president, treasurer and secretary of a corporation it is not to be presumed, in the absence of evidence showing their connection with the publication, that a mere officer of the corporation or a director thereof is a manager within the provisions of section 246 of the Penal Law. Peo. ex rel. Carvalho v. Warden of City Prison, 144 A. D. 24 (1911).

Where an officer buys the silence of municipal authorities in order to permit the conduct of a business on Sunday, the money must be returned at the suit of a stockholder, and where the officer who expended the money controls a majority of the stock, equity will intervene in behalf of a minority stockholder. Roth v. Robertson, 64 Misc. 343 (1909).

Participation by an officer in a swindling scheme does not deprive the corporation of the right to attempt to recover by all legal means the moneys out of which it has been swindled. Farrow v. Holland Trust Co., 74 Hun 585 (1893).

A corporation will not be liable for slander by an officer thereof unless it can be proved that it expressly directed the officer to use the objectional words. Odgers on Libel & Slander, page 368; Eichner v. Bowery Bank, 24 A. D. 63 (1897); 5 Ann. Cases 106 (1897), revsg. 20 Misc. 90.

Where it appears that one writing a libelous letter in the name of a corporation had general management and exclusive control of the department of the corporate business in the management of which the letter was written the corporation is liable for damages. Rose v. Imperial Engine Co., 127 A. D. 885, aff'd., 195 N. Y. 515 (1909).

Ratification of Unauthorized Acts of Officers.

See, also, authorities cited under section 34 of the General Corporation Law.

The general rule is that acts done in the interest of the corporation, which are voidable only and not fraudulent or ultra vires, may be ratified by a majority of the shareholders, and that those who object must correct them within the corporation. But even majority stockholders may not for selfish purpose act in hostility to the interest of the corporation with the intention of defrauding the non-assenting stockholders. Godley v. Crandall & Godley Co., 212 N. Y. 121 (1914).

The direct or indirect misappropriation of corporate assets to his own use and benefit by an officer is incapable of being authorized or ratified by a vote or any act or omission of a majority of the stockholders. Pollitz v. Wabash R. R. Co., 207 N. Y. 113, 127 (1912).

Where an agent of a corporation, engaged in selling its stock, induced a sale by a written guaranty to resell the stock at the purchase price if the investment was not approved by a third party, and the corporation accepted the purchaser's check in payment and issued the stock with knowledge of the guaranty, it amounts to a ratification of the agent's guaranty. Malcomson v. Monaton Realty Inv. Corp., 154 A. D. 694 (1913); motion to dismiss appeal denied, 211 N. Y. 529 (1914).

Although the president owning half the stock and having sole management had no right to rent his property to the corporation and reimburse himself out of its assets, there was ratification of the act where at a meeting all the stockholders on a disclosure of the facts passed a resolution permitting the owner of the other half of the capital stock to withdraw a similar amount from the corporate funds. C. S. Goss & Co. v. Goss, 147 A. D. 698 (1911), aff'd., 207 N. Y. 742.

Where the authority of an agent to make a contract in behalf of the corporation is not shown, ratification by the corporation of the agent's acts with knowledge of the same must be shown to bind the corporation. Camacho v. Hamilton Bank Note & Eng. Co., 2 A. D. 369 (1896).

Where the treasurer has not wasted or mixed corporate moneys with his own, but has properly discharged his trust by depositing them with the banking firm recognized by the corporation as its financial agent and place of deposit for several years, and further evidenced its acquiescence by keeping the account on the corporate books in the name of such banking firm and by reporting to its stockholders that its funds were with such banking firm, such conduct of the corporation constitutes a complete ratification of the act of the treasurer in selecting the place of deposit and absolves him from liability in that regard upon the insolvency of the banking farm. N. Y., Providence & Boston R. R. Co. v. Dixon, 114 N. Y. 80, 87 (1889).

If a corporate officer performs an act without authority, his act, standing alone and unsupported by any sanction, is void; just as the unauthorized act of any other agent is void as against his principal. But a corporation, like other principals, may, nevertheless, act and be bound in any of the modes not opposed to the general rules of law applicable to such bodies. It may previously resolve; it may subsequently acquiesce; it may expressly ratify; it may intentionally receive and appropriate the proceeds of the unauthorized transaction, and so put it out of its power to dispute the validity of the act. Curtis, Graham & Blatchford v. Leavitt, 15 N. Y. 9, 49 (1857).

Where the president had no actual knowledge of a general manager's unauthorized act, the corporation cannot be held on the theory of ratification for having accepted the fruits of his services. Lord v. U. S. Transp. Co., 143 A. D. 437 (1911).

The officers of a corporation who are sued by stockholders for damages arising from the transaction of business not authorized by its charter may defend by showing the stockholders' acquiescence in or assent to the business, express or implied. Wormser v. Met. St. Ry. Co., 184 N. Y. 83, 88 (1906); Holmes, Booth & Haydens v. Willard, 125 N. Y. 75, 82 (1890).

If an officer makes a contract in excess of his authority, and the corporation accepts the avails, it is estopped from repudiating it. White v. Sheppard, 41 A. D. 113 (1899).

The general rule is that an agreement made by an officer or agent of a corporation who assumes to act in its behalf can be enforced where it has received the benefit of the agreement. Davies v. Harvey Steel Co., 6 A. D. 166 (1896); Patterson, as Receiver, v. Robinson, 116 N. Y. 193 (1889); Cunningham v. M. S. & F. C. R. R. Co., 63 Hun 439, affd., 138 N. Y. 614 (1893).

Stockholders may ratify and validate unauthorized transactions of corporate officers. First Nat'l Bk. v. Com'l Travelers' Home Assn., 108 A. D. 78 (1905), affd., 185 N. Y. 575.

The corporate consent will be presumed in the case of an executed contract made by its agent, but without express authority, for, in such case, receipt and appropriation of the fruits of the transaction furnish the best evidence of approval. Davies v. Harvey Steel Co., 6 A. D. 166 (1896).

Where the manager of a corporation, having general control of its business, verbally hires premises, and the corporation occupies them, such occupation is a ratification. William Wicke Co. v. Kaldenberg Mfg. Co., 21 Misc. 79 (1897).

When officers or agents employ a person, and service is performed with the knowledge of the directors and principal officers, and the corporation

without objection receives the benefit it is liable under an implied assumpsit. Prindle v. Washington Life Ins. Co., 73 Hun 448, affd., 149 N. Y. 614 (1896).

A contract executed by the president, although unauthorized, will be presumed to have been ratified unless it dissents within a reasonable time, provided the contract is within the corporate powers. Indianapolis R. M. Co. v. St. L., etc., R. R. Co., 120 U. S. 256 (1886); Pittsburg R. R. Co. v. Keokuk Bridge Co., 131 U. S. 371.

A recovery cannot be had against a corporation on commercial paper unless the paper was issued by the officers as authorized by the by-laws, or by resolution of the directors, or by a course of dealing by which the corporation held them out as authorized to issue it and would be estopped from questioning their authority or of ratification by acceptance and retention of some benefit from the unauthorized act or otherwise. Miners & Merch. Bk. v. Ardsley Hall Co., 113 A. D. 194 (1906), and cases cited.

Repudiation of Unauthorized Acts of Officers.

Where a director of a gas and electric company holding but one share of stock, being chairman of its executive committee, participated in the negotiations whereby such corporation made contracts to furnish power and light practically free of cost, to a manufacturing corporation, of which such director was president and the largest stockholder, and the terms of such contracts are grossly inequitable, burdensome and unconscionable, they may be repudiated by the former corporation. Globe Woolen Co. v. Utica Gas & Elec. Co., 151 A. D. 184 (1912).

Contract of Employment for Life, When Unreasonable.

A contract, by the terms of which a person was employed for life, made by the executive officers of a corporation assuming to act under a by-law, previously adopted by the board of directors, empowering them "to appoint, remove and fix the compensation of each and every person except agents employed by the company," is unreasonable and not contemplated by such by-law, because, the term of office of directors being limited by statute, it must be assumed that they would not adopt a by-law authorizing the imposition of unreasonable contracts upon their successors in office. In construing the action of the board in adopting the by-laws in question courts must assume that they had in mind the provisions of the statute fixing their terms of office and that, at the expiration of that period, other persons may be chosen in their places, upon whom would rest the responsibility of the conduct and management of the business of the corporation, and that they had no right to interfere with the powers of future boards of directors by imposing upon them unreasonable contracts. Carney v. N. Y. Life Ins. Co., 162 N. Y. 453 (1900).

Frauds of Officers in Inducing Purchases of Stock.

See, also, "Frauds of Directors in Inducing Purchases or Sales of Stock," under section 34 of the General Corporation Law, ante.

Corporate officers who, knowing that circulars offering stock for sale contain false statements as to the condition of the corporation, and reap the benefits of a sale so induced, are liable for fraud. Spotten v. De Freest, 140 A. D. 792 (1910). The measure of damages for fraud in the sale of stock is the difference between the actual value of the stock sold and the value it would have had if the stock had been as represented. Id.; Vail v. Reynolds, 118 N. Y. 297, 301 (1890); Hubbell v. Meigs, 50 N. Y. 480, 491 (1872); Krumm v. Beach, 96 N. Y. 398, 407 (1884); Whitney v. Allaire, 1 N. Y. 305, 312 (1848).

An individual stockholder who has been induced to sell stock to the managing officers of a corporation for an inadequate consideration by means of false representations as to the condition of the corporation and the amount of dividends it could pay, is entitled to recover damages, even though the fraud may have wronged the corporation and would support an action on its behalf by the stockholder. Von Au v. Magenheimer, 126 A. D. 257 (1908), affd., 196 N. Y. 510.

Corporate Officers, Statements of, When Inadmissible Against Corporation.

Statements by an officer or agent are inadmissible against the corporation, unless in respect to a transaction in which he is authorized to appear for the corporation, or in the performance of his official duties, and he has no authority to bind the corporation by statements as to bygone transactions, unless expressly authorized to make them. Merch. Nat. Bk. v. Clark, 139 N. Y. 314 (1893); id., 146; Donnelly v. Younglove, 140 A. D. 846 (1910); Wagner v. H. Clausen & Son Brewing Co., 146 A. D. 70 (1911); Nat'l Bk. of Rondout v. Byrnes, 84 A. D. 100 (1903); First Nat. Bk. v. Ocean Nat. Bk., 60 N. Y. 278, 297 (1875).

Knowledge of Corporate Officer, When Imputable to Corporation.

Notice coming to a corporate officer while acting in behalf of the corporation makes the latter chargeable with the knowledge of such officer, but when the officer was not acting for and on behalf of the corporation but is acting independently of it the corporation is not chargeable with his knowledge. Jacobus v. Jamestown Mantel Co., 211 N. Y. 154, 158 (1914).

Where a corporate officer deals with the property of the corporation for his own benefit or for the benefit of others, whose interests are opposed to it, the knowledge of such officer is not imputable to the corporation. Brooklyn Distilling Co. v. Standard Distilling & Distributing Co., 193 N. Y. 551 (1908), affg. 120 A. D. 237.

Examination of Corporate Officers Before Trial.

See the Code of Civil Procedure, sections 870–876.

Exceeding Authority, Effect of.

Where an officer, by means of forged documents, causes registered bonds belonging to the corporation to be sold and converts the proceeds, the corporation can recover the bonds unless he acted within the scope of his authority. Clarkson Home v. Missouri, K. & T. R. Co., 182 N. Y. 47 (1905), affg. 92 A. D. 617.

Where the secretary, treasurer and general manager of a corporation, who had charge of its business, executed a contract for the sale of its products the vendee is entitled to recover damages for breach, although a by-law was not complied with which provided that the president should sign contracts involving over $200. Cone v. Empire Plaid Mills, 12 A. D. 314 (1896).

An officer cannot as such bind his corporation by his act or admissions, unless the acts or admissions are within the scope of his agency. McCloskey v. Goldman, 62 Misc. 466 (1909).

Although a certificate of incorporation provides that no debt exceeding $100 shall be incurred except in writing and under the corporate seal, yet, where a contract involving a larger sum has been discussed by all the direc-

tors and the matter has been left in the hands of the president, the vendor is entitled to recover the amount. N. Y. & N. J. Globe Gas Light Co. v. Metropolitan Investment Co., 10 A. D. 342 (1896).

Every one dealing with an officer of a corporation, who assumes to act for it in matters in which the interests of the corporation and officer are adverse, is put upon inquiry as to the authority and good faith of the officer. McCloskey v. Goldman, supra; Moores v. Citizens' Nat. Bk., 111 U. S. 156 (1883).

In an action on a note by a bona fide holder, the fact that it was made by the president and was not signed by the treasurer, as required by the by-laws, is not a defense if there was no diversion of the note, or its proceeds, from its original purpose. Nat. Spraker Bk. v. Geo. C. Treadwell Co., 80 Hun 363 (1894); Grant, as Rec. v. Geo. C. Treadwell Co., 1 App. Div. 367 (1896).

A corporation is not bound by a contract of employment, made by the treasurer in disregard of a by-law prohibiting the execution of such a contract by him alone. Parmelee v. Associated Physicians & Surgeons, 9 Misc. 458 (1894).

The corporation is under an implied obligation to make indemnity for a loss sustained by the negligent or wrongful exercise by its officers of the general powers conferred upon them. Mutual Life Ins. Co. v. Forty-second St., etc., R. R. Co., 74 Hun 505 (1893).

§ 31. Inspectors and their oath. The inspectors of election of every stock corporation shall be appointed in the manner prescribed in the by-laws, but the inspectors of the first election of directors and of all previous meetings of the stockholders shall be appointed by the board of directors named in the certificate of incorporation. No director or officer of a moneyed corporation shall be eligible to election or appointment as inspector. Each inspector shall be entitled to a reasonable compensation for his services, to be paid by the corporation, and if any inspector shall refuse to serve, or neglect to attend at the election, or his office become vacant, the meeting may appoint an inspector in his place unless the by-laws otherwise provide. The inspectors appointed to act at any meeting of the stockholders shall, before entering upon the discharge of their duties, be sworn to faithfully execute the duties of inspector at such meeting with strict impartiality, and according to the best of their ability, and the oath so taken shall be subscribed by them, and immediately filed in the office of the clerk of the county in which such election or meeting shall be held, with a certificate of the result of the vote taken thereat.

Formerly L. 1890, ch. 564, § 28, as am'd by L. 1892, ch. 688.

For form of certificate and oath of inspectors, see post, Forms Nos. 223, 224.

This section provides no penalty for failure to comply therewith and in practice is frequently disregarded.

Violation of oath or dishonest or corrupt conduct by an inspector constitute a misdemeanor. Penal Law, § 668, post.

For other provisions relative to corporate elections, see Stock Corp. L. § 25, and Gen. Corp. L. §§ 23–31, and notes under said sections.

Unless the by-laws of the company provide that the inspectors shall be stockholders, other persons may be chosen.

The use of the word "inspectors" requires that there shall be at least two. In re Lighthall Mfg. Co., 47 Hun 258 (1888). An election under the appointment and authority of one inspector is void. Id. See, also, Matter Chenango Co. Mut. Ins. Co., 19 Wend. 635 (1839).

An election will not be set aside on the ground that inspectors were not sworn in the form prescribed by statute; and it seems that if no objection was interposed at the time of the election, it will stand, although no oath whatever was administered. In re Mohawk & H. R. R. Co., 19 Wend. 135 (1838); Merritt v. Village of Portchester, 71 N. Y. 309 (1877), revsg. 8 Hun 40.

Inspectors may be candidates. Ex parte Willcocks, 7 Cow. 402 (1827).

The requirement that the oath of inspectors be filed with the county clerk is directory only, and failure to comply does not invalidate the election. Union Nat'l Bk. v. Scott, 53 A. D. 65 (1900).

§ 32. Books to be kept. Every stock corporation shall keep at its office correct books of account of all its business and transactions, and a book to be known as the stock book, containing the names, alphabetically arranged, of all persons who are stockholders of the corporation, showing their places of residence, the number of shares of stock held by them respectively, the time when they respectively became the owners thereof, and the amount paid thereon. The stock book of every such corporation shall be open daily, during at least three business hours, for the inspection of its stockholders and judgment creditors, who may make extracts therefrom. No transfer of stock shall be valid as against the corporation, its stockholders and creditors for any purpose except to render the transferee liable for the debts of the corporation to the extent provided for in this chapter, until it shall have been entered in such book as required by this section, by an entry showing from and to whom transferred. The stock book of every such corporation and the books of account of every bank shall be presumptive evidence of the facts therein so stated in favor of the plaintiff in any action or proceeding against such corporation or any of its officers, directors or stockholders. Every corporation that shall neglect or refuse to keep or cause to be kept such books, or to keep any book open for inspection as herein required, shall forfeit to the people the sum of fifty dollars for every day it shall so neglect or refuse. If any officer or agent of any such corporation shall wilfully neglect or refuse to make any proper entry

in such book or books, or shall neglect or refuse to exhibit the same, or to allow them to be inspected and extracts taken therefrom as provided in this section, the corporation and such officer or agent shall each forfeit and pay to the party injured a penalty of fifty dollars for every such neglect or refusal, and all damages resulting to him therefrom.

Formerly L. 1890, ch. 564, § 29, as am'd by L. 1892, ch. 688; L. 1900, ch. 128; L. 1901, ch. 354.

By the amendment of 1901 the stock book is required to be open for inspection during only three hours each day, leaving the rest of the day free for the use of the books in the proper work of the corporation.

For form of stock book, see Form No. 259, post.

Form of clause in certificate of incorporation restricting inspection of books and accounts, see Forms Nos. 22 and 23, post.

Cross References.

The production, upon a trial, of a book or paper, belonging to or under the control of a corporation, may be compelled, in like manner as if it was in the hands, or under the control, of a natural person. For that purpose a subpœna duces tecum, or an order, made as prescribed in the last section, as the case requires, must be directed to the president, or other head of the corporation, or to the officer thereof, in whose custody the book or paper is. Code, § 868.

In a case specified in the last section, or where a subpœna duces tecum, or an order, made as prescribed in section 866 or section 867 of this act, requires a public officer to attend, and bring a book or paper under his control, the subpœna or order is deemed to be sufficiently obeyed, if the book or paper is produced by a subordinate officer or employee of the corporation, or in the public office, who possesses the requisite knowledge to identify it, and to testify respecting the purposes for which it is used. If the personal attendance of a particular officer of the corporation or public officer is required, a subpœna, without a duces tecum clause, must also be served upon him. Code, § 869.

For misdemeanors in relation to corporate books, see Penal Law, § 665, post.

Stock book is evidence of stockholders' right to vote at corporate meetings. See Gen. Corp. Law, § 23, and cases cited.

Although the stock book of a domestic corporation is to be kept open during only three hours each day, a different provision applies to foreign corporations, as the stock book of such corporations must be kept open daily during business hours. Stock Corp. Law, § 33.

Corporate books as evidence. Saranac & Lake Placid R. R. Co. v. Arnold, 167 N. Y. 368 (1901), revsg. 41 A. D. 482.

Application of Section.

A railroad corporation, formed by the consolidation of foreign and domestic companies, is a domestic, and not a foreign corporation, and, therefore, it is subject to the provisions of this section. Sage v. Lake Shore & Mich. S. Ry. Co., 70 N. Y. 220 (1877).

A building and loan association is a stock corporation and the foregoing section applies to it. Buker v. Steele, 43 N. Y. Supp. 346 (1896); Leighton v. Leighton Lea Assn., 62 Misc. 73 (1909).

This section applies to a national bank as it is to be deemed a citizen of the State in which it is located. Matter of Tuttle v. Iron Nat'l Bk., 170 N. Y. 9 (1902); Peo. ex rel. Lorge v. Cons. Nat'l Bk., 105 A. D. 409 (1905).

Stock Book.

A book containing the names of the owners of shares, the number of shares held by each, and the amount paid thereon, answers the requirements of the statute and is a stock book, although called by a different name. Buker v. Steele, 43 N. Y. Supp. 346 (1896).

If deprived of possession of the stock book the directors may open a new one, making it so far as possible a copy of the old book, and the inspectors of election may refer to the new book, but if the old book is produced, the record therein must govern as to transfers before the new book was opened. Matter of Schoharie Valley R. R. Co., 12 Abb. N. S. 394 (1872).

To same effect, Argus Co. v. Manning, 138 N. Y. 557 (1893); Socorro Mt. Mining Co. v. Preston, 17 Misc. 220 (1896).

The book containing the names of the stockholders which every corporation is obliged to keep, is presumptive evidence of the facts therein stated. This section, however, does not make such book the only or even the best evidence of the fact that a person was a stockholder. Herries v. Wesley, 13 Hun 492 (1878).

This section does not make the stock book the only competent evidence of facts therein stated or preclude the plaintiff, in an action against a director of a corporation which neglected to keep a stock book, from showing, by common-law evidence, that he was a stockholder and was qualified to act as a director. Union Nat'l Bk. v. Scott, 53 A. D. 65 (1900).

Where disputable stock has stood on the corporate books for a year, without protest, in the name of a director, the court will restrain other directors, seeking to gain control of the corporation, from declaring void, not only the disputable, but also the valid, stock of the director until he has explained what has become of certificates which are missing from the stock book, which has been in his custody. Hall v. Lay, 27 Misc. 602 (1899).

In an action to determine the ownership of shares of stock, it appeared that the company's stock transfer book had been lost and certain original certificates had been returned and pasted in the stock certificate book and on the back of each certificate was written a statement in the handwriting of the president of the company to the effect that the certificate was one of several assigned to him. Held, that such stock certificate book could not be regarded as a stock transfer book such as was required by statute. Geneva Mineral Spring Co. v. Steele, 97 N. Y. Supp. 996.

Mandamus to Compel Retiring Officers to Deliver Books.

It is the duty of corporate officers to have the books in their custody or to obtain them and deliver such books to new officers elected in their places. Mandamus is the remedy to compel outgoing officers to turn over books, but where much litigation, requiring the use of the books, is in progress, the court may direct that all books of the relator corporation be turned over to the county clerk, who can arrange for such inspection as may be necessary. Peo. ex rel. Keeseville, A. C. & L. C. R. R. Co. v. Powers, 145 A. D. 693 (1911).

Method of Keeping Books; When Court Will Not Interfere.

Where two persons enter into a contract, relative to a corporation to be organized by them, for the purchase and sale of shares of stock at the book value, as shown on the accounts of the corporation, and thereafter one of the

parties causes the good will value to be reduced on the books to a mere nominal sum, a court of equity, in a suit against such party and the corporation, will not interfere with the management of the books, especially when no provision was made as to the method of keeping the books and the corporation was not a party to the agreement. Drucklieb v. Harris, 209 N. Y. 211 (1913), revsg. 155 A. D. 83.

Registration and Transfer of Stock.

It is not necessary that an original subscriber have his holding entered in the stock book before acting as a stockholder. Hamilton Trust Co. v. Clemes, 17 A. D. 152, affd., 163 N. Y. 423 (1900).

A transfer of stock, valid as between the parties, but not entered on the stock book, does not relieve the transferrer of liability as a stockholder to creditors of the corporation. Shellington v. Howland, 53 N. Y. 371 (1873).

Delivery of the certificate, as between owner and assignee, with the assignment and power indorsed, passes the title in the stock, subject only to such liens or claims as the corporation may have upon it. Cushman v. Thayer Mfg. J. Co., 76 N. Y. 365; McNeil v. Tenth Nat. Bk., 46 N. Y. 331 (1871).

The provision that no transfer of stock shall be valid for any purpose except to render the transferee liable for debts until it shall have been entered in the stock book, is only for protection of the corporation, and does not prevent passing of the entire legal and equitable title, as between the parties, by the delivery of the certificate with agreement and power of transfer. Chem. Nat. Bk. v. Colwell, 132 N. Y. 250 (1892). See, also, Isham v. Buckingham, 49 N. Y. 216 (1872); Robinson v. Nat. Bk., etc., 95 N. Y. 637 (1884); Billings v. Robinson, 94 N. Y. 415 (1884); Rudd v. Robinson, 126 N. Y. 113 (1891).

This section does not affect the validity of a stock transfer actually made as between vendor and vendee, although a transfer has not been entered upon the corporation books. Johnson v. Underhill, 52 N. Y. 203 (1873).

A transfer of stock in good faith, when the corporation is solvent, and entered upon the corporate books relieves the transferrer of liability. Tucker v. Gillman, 121 N. Y. 189 (1890); Cutting v. Damerel, 88 N. Y. 410 (1882).

The corporation is liable for unauthorized refusal to transfer shares on its books. Dunn v. Star Fire Ins. Co., 19 W. Dig. 531 (1884); Cooley v. Curran, 54 Misc. 221 (1907); Id., 54 Misc. 572 (1907); Dunham v. City Trust Co., of N. Y., 115 A. D. 584, affd., 193 N. Y. 642 (1908).

To relieve a stockholder the transfer of stock on the corporate books must be under a bona fide sale, without any secret understanding or trust in favor of the vendor. Veiller v. Brown, 18 Hun 571 (1879).

An owner and transferee of stock in a foreign corporation may compel the corporation to recognize the transfer, record it and issue new stock in place of the old; and may, in the same action, enjoin the corporation from a proposed illegal issue of preferred stock. Ernst v. Elmira Municipal Imp. Co., 24 Misc. 583 (1898).

Registered Shareholder to be Regarded as Actual Owner of Shares; Exception.

The rule that a corporation, acting in good faith and without notice of the rights of others, may treat registered shareholders as the actual owners of the shares standing in their names, applies only to such transactions as are within the express or implied powers conferred upon the company or its shareholders collectively, and an assignee of shares having possession of a certificate, although holding under an unregistered transfer, is not bound by

a contract between the registered shareholder and the corporation, which is not within the express or implied powers of the corporation or its stockholders. Campbell v. Am. Zylonite Co., 122 N. Y. 455 (1890).

A person to whom stock is transferred on the corporate books and who appears upon such books to be the legal owner, is liable as a stockholder, though it was transferred to and held by him as security for a debt. Rosevelt v. Brown, 11 N. Y. 148 (1854); see, also, 133 N. Y. 18, 42.

Where the name of a person appears on the stock book of a corporation as a stockholder, it is presumptive evidence that he is so, and in an action against him as a stockholder, the burden of proving that he is not is thrown upon him. Hoagland v. Bell, 36 Barb. 57.

The transferee of stock is liable for calls made after his name has been registered on the stock book and, being thus liable, there is an implied promise that he will pay calls made upon such stock while he continues its owner. Webster v. Upton, 91 U. S. 65, 68 (1875).

Stock Book; Absolute Right to Ispect, and to Penalty in Case of Refusal; Mandamus Discretionary.

Respecting the right of a stockholder to inspect the stock book, in the case of Henry v. Babcock & Wilcox Co., 196 N. Y. 302 (1909), revsg. 125 A. D. 538, it was held that the statute recognizes an absolute right in a stockholder to inspect the stock book and imposes an absolute duty upon the corporation and the custodian of the stock book to permit such inspection, irrespective of the motive or purpose with which the inspection is sought. In a later case, to wit, Peo. ex rel. Britton v. American Press Assn., 148 A. D. 651 (1912), upon an application for a writ of mandamus to compel a corporation to permit a stockholder to inspect its stock book, it was held that although a stockholder has an absolute right to inspect the stock book, irrespective of motive, and permits the recovery of the penalty in case of refusal, still the granting of a mandamus to compel inspection is discretionary and will be denied if it appears that the stockholder's purpose is "sinister and inimical" to the corporation.

In Peo. ex rel. Britton v. Am. Press Assn., 148 A. D. 651, supra, Judge Scott, writing the prevailing opinion, said:

> "The case of Henry v. Babcock & Wilcox Co., 196 N. Y. 302, establishes the absolute right of the stockholder either to be allowed an inspection of the stock book, or, if that be denied him, to a recovery of the penalty prescribed by statute. The right to a mandamus to compel compliance with the statute is not, however, specifically given by the written law and there still remains open the question whether or not the court will aid a stockholder in pursuing his ulterior designs upon the corporation by issuing a writ of mandamus. It has repeatedly been held that it will not (People ex rel. Althause v. Giroux Consolidated Mining Co., 122 A. D. 617; and People ex rel. Hunter v. National Park Bank, 122 A. D. 635) and it would be unnecessary to further consider that question but for the fact that the court below was of the opinion and counsel for the respondent strenuously argues that in some way the decision in Henry v. Babcock & Wilcox Co., 196 N. Y. 302, has overruled the cases last above cited. In neither of those cases was any question made as to the mandatory nature of the statute relied upon. That was assumed and conceded. The only question considered and decided was as to the granting of peremptory writ to enforce an absolute right sought to be enforced for a sinister purpose. That is to say, the only question was as to granting

a particular and extraordinary remedy and this question is not touched upon by the court of appeals in the case of Henry v. Babcock & Wilcox Co., and so far as that court is concerned it remains an open question. It is true that a stockholder has a strict and absolute legal right to inspect the stock book but the mere existence of an undisputed right although necessary to the granting of a mandamus is not sufficient of itself to require the issuance of the writ for that still rests in the sound discretion of the court. This has been the rule from the earliest times. So well established is it in this state that the granting or refusing of a writ of mandamus rests in the sound discretion of the supreme court that the court of appeals has uniformly refused to entertain appeals in such cases unless it is made to appear that the discretion of the court has been abused."

The common-law right of a stockholder to inspect the books and papers of his corporation at a proper time and place, and for a proper purpose still exists in this State unimpaired by legislation, and the Supreme Court has power, as part of its general jurisdiction, to enforce the right, in its sound discretion upon good cause shown, with suitable safeguards to protect the interests of all concerned. Matter of Steinway, 159 N. Y. 250, 263 (1899); Matter of Hitchcock, 157 A. D. 328 (1913). Creditors have no such common-law right. People v. Eadie, 63 Hun 320, affd., 133 N. Y. 573 (1892). The rules of pleading and procedure applicable to the proceeding for a writ of mandamus are to be followed. 157 A. D. 328, supra.

In an application for a mandamus for an inspection of corporate books the small interest of the stockholder is no barrier to relief. The gratification of idle curiosity, and the facilitation of speculative schemes have been discouraged, and the manifestation of ulterior or sinister motives is fatal to the application. Matter of Hitchcock, 157 A. D. 328 (1913), and many cases there cited.

Mandamus to compel inspection of the books, papers, documents and records of a corporation and to take extracts therefrom will not be granted where the purpose is to furnish the information thereby obtained to a competing corporation. Peo. ex rel. Lehman v. Consolidated Fire Alarm Co., 145 A. D. 427 (1911); same v. same, 142 A. D. 753.

Mandamus to Compel Inspection; Failure to Make Demand.

A stockholder is not entitled to a peremptory writ of mandamus to compel the corporation to permit him to examine its books for the purpose of discovering the prices at which the corporation retired outstanding bonds which it purchased in the open market, if no preliminary demand for such information was made upon the corporation but merely a demand for a written statement of its affairs, pursuant to section 69 of the Stock Corporation Law, which latter request was complied with. Matter of Hitchcock, 149 A. D. 824 (1912); same v. same, 157 A. D. 328 (1913).

Right of Stockholder to Make Memoranda or List of Stockholders.

A stockholder has the right not only to inspect the stock book, but also to take memoranda or copies of the names of stockholders. The stockholder has the right to the information to be derived from these books to enable him to ascertain who are qualified voters, and to confer with all such in relation to the election of directors. Cotheal v. Brouwer, 5 N. Y. 562, 567 (1851). An officer refusing to permit a stockholder to make such memoranda is liable to the penalty. Id.

Although the statute does not expressly entitle a stockholder to copy the names and addresses of the other holders of stock, the right to inspect the book includes the right on the part of the stockholder to aid his memory by copying therefrom. Henry v. Babcock & Wilcox Co., 196 N. Y. 302 (1909), citing 5 N. Y. 562, supra.

The stockholder's right to inspect the stock book and to make memoranda therefrom is absolute. Henry v. Babcock & Wilcox Co., 196 N. Y. 302 (1909); Hollaman v. El Arco Mines Co., 137 A. D. 862 (1910).

Identification of Stockholder May be Required.

Although a stockholder has an absolute right to inspect the stock book at the office of the corporation at any time within business hours, the officers and agents of the corporation are not required to exhibit the book to persons who demand to see it, where such persons are unknown to them, without first exacting reasonable proof of the identity of the persons making the demand to determine whether they are in fact the persons who are the stockholders of the corporation. Theile v. Merlis, 85 Misc. 351 (1914). The mere production of the certificate of stock is no proof that the man who produced it was the person therein named, and an attempted identification by another man equally unknown is futile. Id.

Inspection When Stock Book is in Use.

If it appeared in good faith that the stock book, at the time of the demand for an inspection, was in actual use for other corporate purposes the stockholder may be required to wait a reasonable time until such use terminated. Henry v. Babcock & Wilcox Co., 196 N. Y. 302 (1909).

Dummy Director; Right to Inspect Books.

Two directors claiming to be the only persons interested in the corporation may not deny to the third director the right to examine the corporate books on the ground that he is a mere dummy, without interest in the corporation, selected by them because the law required three directors. Peo. ex rel. Stauffer v. Bonwit Bros., 69 Misc. 70 (1910)., An order to show cause why such third director should not be permitted to examine the corporate books, which stays defendant director from removing him pending the proceeding, is not an injunction within the meaning of section 305 of the General Corporation Law, nor does it suspend the ordinary business of the corporation but it is of doubtful efficacy. Id.

Inspection, Demand and Refusal.

A stockholder may enforce his right to an inspection of the stock book by mandamus, but the granting of the writ is in the discretion of the court, and may be denied when it is sought for an ulterior purpose. Peo. ex rel. Hunter v. Natl. Park Bk., 122 A. D. 635 (1907); Peo. ex rel. Lorge v. Cons. Natl. Bk., 105 A. D. 409 (1905). The inspection must be at a proper time and place and for a proper purpose. Matter of Steinway, 159 N. Y. 263 (1899); Matter of Coats, 73 A. D. 180 (1902).

If the inspection is sought for legitimate purposes and the application therefor is made during proper hours the right to the inspection is mandatory. Peo. ex. rel. Lorge v. Cons. Nat'l Bk., supra.

A stockholder of a national bank located in this State is entitled to inspect the stock book to ascertain the names of the other stockholders in order that he may negotiate with them for the purchase of their stock, and, as an incident to this right, may copy and take away a list of the stockholders. Peo. ex rel. Lorge v. Cons. Nat'l Bk., 105 A. D. 409 (1905).

Although a stockholder's right to inspect corporate books may be denied in the discretion of the court, the right of a director to such inspection is absolute, being necessary to enable him to perform the duties of his office. To obtain a writ of mandamus he need only show that he is a director and has demanded permission to examine and has been refused. It is no answer to allege his hostility to the corporation, as his motives are immaterial. Peo. ex rel. Leach v. Central Fish Co., 117 A. D. 77 (1907); Peo. ex rel. McInnes v. Columbia Bag Co., 103 A. D. 208 (1905); Peo. ex rel. Gunst v. Goldstein, 37 A. D. 550 (1899). An inspection by the president of the corporation is also a matter of right regardless of his motives. 37 A. D., supra. If the director's hostility is such as to justify his removal from office, this should be accomplished by the proper method. 117 A. D. 77, supra; 103 A. D. 208, supra.

Where a bank cashier refused to permit a director to inspect the discount book, and such refusal was approved by resolution of the board of directors, it was held that they had no authority to exclude a director from an inspection of its books, although they believed he was hostile to the interests of the institution. Peo. ex rel. Muir v. Throop, 12 Wend. 183 (1834); Raub v. Gerken, 127 A. D. 42 (1908).

The only demand upon which can be predicated an action for a penalty is one made at a reasonable time, during business hours, at the office of the corporation where the stock book is kept. Buker v. Steele, 43 N. Y. Supp. 346 (1896).

A demand for all the books of the corporation for inspection is not a sufficient demand to be allowed to inspect the stock book so as to render the officers liable for a refusal. Buker v. Steele, 43 N. Y. Supp. 346 (1896).

The refusal or neglect to exhibit a stock book cannot be predicated upon a statement, made by an employee of the corporation in charge of its office to a stockholder who applies at that office for such inspection, that he could examine the book at the office of the president, which was only a short distance from its office. Lozier v. Saratoga Gas, Electric Light & Power Co., 59 A. D. 390, 9 Ann. Cas. 485 (1901).

Upon a refusal to permit an inspection of books by a person entitled thereto, a mandamus is a matter of absolute right. Peo. ex rel. McDonald v. U. S. M. R. Co., 20 Abb. N. C. 192 (1888). A demand by his attorney-at-law is insufficient. Id. Notwithstanding the ruling in this case, it will be seen from later cases, cited under this and the next succeeding section, that the issuance of the writ rests in the sound discretion of the court. Ed.

When the by-laws require the books to be kept by the secretary it is no defense to an application where the treasurer's refusal to permit inspection is unqualified, and not put on the ground of inability. Matter of Martin, 42 St. Rep. 409 (1891).

The right to examine books and papers of a corporation is a purely personal right, depending upon ownership of capital stock of the corporation. A temporary administrator, holding stock pending the contest of a will upon the outcome of which the title of the stock depends, is not a member of the corporation so as to entitle him to an inspection of its books and papers. Matter of Hastings, 120 A. D. 756 (1907).

In an action under this section for a refusal to allow an inspection of a stock book, the plaintiff cannot recover the costs and counsel fees of mandamus proceedings by which he compelled the corporation and its officers to allow an inspection. Clason v. Nassau Ferry Co., 20 Misc. 315 (1897), affd., 27 A. D. 621 (1898), 4 Ann. Cas. 167.

As to denial of averments of ownership of shares contained in affidavits upon an application for a mandamus to compel an inspection, see Matter of Martin, 42 St. Rep. 409 (1891). See, also, Peo. v. Cromwell, 102 N. Y. 477 (1886); Peo. v. Board, etc., 46 Hun 296 (1887); Kelsey v. Pfaudler P. F. Co., 20 St. Rep. 533 (1889).

A stockholder is not bound to accept the offer of the vice-president to allow him to inspect the stock book at some place other than the office of the company, and cannot be required to go elsewhere for that purpose. Recknagel v. Empire Self-Lighting Oil Lamp Co., 24 Misc. 193 (1898).

A stockholder of a corporation has the right to inspect the stock book with a person having the requisite knowledge to obtain for him the information to which he was entitled. Peo. ex rel. Clason v. Nassau Ferry Co., 86 Hun 128 (1895).

A stockholder has the right to examine the stock book although he holds stock turned over to him for the express purpose of qualifying him. Lawshe v. Royal Baking Powder Co., 54 Misc. 220 (1907).

That the relator is engaged in manufacturing goods somewhat similar to those made by the corporation is no ground for refusing a mandamus permitting him to examine the corporate books except as to those parts showing the names of customers. Peo. ex rel. Ludwig v. Ludwig & Co., 126 A. D. 696 (1908).

Penalty for Refusal.

This section is highly penal; therefore, a complaint in an action to recover the penalty must state all the material facts. Gunst v. Goldstein, 30 Misc. 44 (1899), and cases cited.

As to evidence to support a recovery of a penalty, see Kelsey v. Pfaudler P. F. Co., 20 St. Rep. 533 (1889). Sufficiency of a complaint. Levy v. Cohn, 45 St. Rep. 278. Affidavits in a mandamus proceeding. Martin v. Wm. J. Johnston Co., Ltd., 133 N. Y. 692 (1892), affg. 62 Hun 557.

A party suing for penalties can recover for but one violation or one default prior to the commencement of the action. Cox v. Paul, 175 N. Y. 328 (1903); Harkower v. N. Y. City Ry., 121 A. D. 194 (1907); Walcott v. Little, 46 Misc. 96 (1904). Demands and refusals on three successive days render the officer liable for but one penalty. Cox v. Paul, supra.

The custodian of the books, who submits them for the inspection of a stockholder or creditor but refuses to permit extracts therefrom, subjects himself to the penalty prescribed. Cotheal v. Brouwer, 5 N. Y. 562 (1851). Such custodian is not constituted a judge of the motives of the inspection, or of the manner thereof, or of the purpose which the information is to serve. Id. Stockholders have a right to know who are qualified voters and the number of votes each is entitled to cast. Id.: People ex rel. Richmond v. Pacific M. S. Co., 50 Barb. 280 (1867). It will be noticed that the holding in this case as to the immateriality of a stockholder's motives in seeking inspection is overruled in the later cases cited under §§ 32 and 33. Ed.

Where the corporation has not kept a stock book an officer cannot be made liable for failure or refusal to exhibit it. Billingham v. E. P. Gleason Mfg. Co., 43 Misc. 681 (1904).

A stockholder cannot maintain an action for the penalty imposed by this section against the corporation for failure to keep a stock book or to exhibit the same. The right is given to the people alone. Billingham v. E. P. Gleason Mfg. Co., 43 Misc. 681 (1904).

Inspection of General Records and Accounts.

The Supreme Court has power by mandamus to compel a corporation to permit a stockholder to inspect the books, and papers of the corporation other than the transfer books. Matter of Steinway, 159 N. Y. 250, affg. 31 A. D. 70, 6 Ann. Cas. 352 (1899).

Facts held to justify mandamus to compel corporation to submit its books to inspection of a stockholder. Matter of O'Neill, 47 Misc. 495 (1905).

To permit every stockholder to examine the entire corporate books and records by accountants selected by him, when and as often as he pleases, would be to establish a rule highly prejudicial to the interests of all corporations and their stockholders. Peo. ex rel. Hatch v. L. S. & M. S. R. R. Co., 11 Hun 1, affd., 70 N. Y. 220 (1877).

The stockholder's right to examine books is not absolute, and where he has been defeated in a prior action upon his contention that contributors to an impairment of the capital had subsequently withdrawn their contributions, the court will not grant him a mandamus to examine and copy the by-laws and entire corporate books, as to allow such inquisitorial research by a hostile and defeated party will not be a proper exercise of judicial discretion. Peo. ex rel. Mackey v. Am. Union Life Ins. Co., 31 Misc. 617 (1900).

A peremptory writ of mandamus will not be issued to compel a corporation to exhibit to a stockholder its books of account and records to enable him to discover whether the corporation, which has reduced the price of its product, is selling the same at a loss, and whether it is paying its fixed charges out of capital, with a view, if such be found to be the case, of preventing such action on the part of the company by an application for a receiver, where it appears that such reduction in price of products was made to meet a reduction made by a rival company, and that the stockholder's contemplated action would be injurious rather than beneficial to the corporation and the other stockholders. In re Pierson, a stockholder of New Amsterdam Gas Co., 44 A. D. 215 (1899).

The common-law right of a stockholder to inspect the books of his corporation still exists in this State, unimpaired by legislation; and the Supreme Court has power to enforce the right, upon good cause shown. Matter of Steinway, 159 N. Y. 250 (1899), affg. 31 A. D. 70.

The statutory provision in relation to the transfer book of a corporation is not exclusive of other methods of obtaining information relating to the business and affairs of the corporation. Matter of Steinway, 159 N. Y. 250 (1899), affg. 31 A. D. 70.

A pledgee of stock still standing in the name of a deceased pledgor, is not a stockholder either under the foregoing section, or under the Gen. Corp. Law, § 23, and hence cannot be accorded the common-law right which a stockholder has of inspecting the corporate books. Matter of First Nat. Bk. of Brooklyn, 28 Misc. 662 (1899).

In contempt proceedings upon failure to produce books required to be kept, presumption is that such books have been kept. Fenlon v. Dempsey, 50 Hun 131 (1888).

One who became a stockholder in good faith and holds 43 per cent. of the capital stock may by mandamus secure an inspection of the books where the company is expending large sums in building a factory on land owned by the sister of its president. Peo. ex rel. Ludwig v. Ludwig & Co., 126 A. D. 696 (1908).

In one case it was held, respecting the general business books of a corporation, that the court will not order an inspection unless the stockholder

seeks to learn something which he has the right to know for his own protection, and his application must be in good faith and not for the purpose of injuring or annoying the corporation, but that the right to inspect the stock book is an absolute statutory right conferred by this section irrespective of the stockholder's motives in demanding an inspection. Peo. ex rel. Callanan v. Keeseville, A. C. & L. C. R. R. Co., 106 A. D. 349 (1905).

The right to inspect books and papers is not an absolute one, and before such inspection will be granted the stockholder must establish that the information desired has been refused by the corporation after a demand made therefor, and that it is necessary for him to have the information to protect his interest in the corporation. Matter of Latimer v. Herzog Teleseme Co., 75 A. D. 522 (1902).

A writ requiring a corporation to permit one of its stockholders to inspect all its books, papers and vouchers and make extracts therefrom should not be granted upon an affidavit made by a person who alleges that he has a power of attorney from a stockholder authorizing him to make the examination, where the power of attorney is not produced and no facts are stated showing that he has been authorized to institute the proceeding. Matter of Latimer v. Herzog Teleseme Co., 75 A. D. 522 (1902).

A mandamus requiring a corporation to allow executors of a deceased stockholder to examine its books ostensibly to enable county officials to fix a transfer tax should be denied where it appears that the real object is to obtain information that will aid the petitioners in injuring the business of the corporation for the benefit of a business rival. Matter of Kennedy, 75 A. D. 188 (1902).

A mandamus will not be granted to compel a corporation to exhibit its books and papers to ascertain whether facts exist which would authorize an application to the Attorney-General to dissolve the corporation or to appoint a receiver or to enable the relator to begin criminal proceedings against the officers of the corporation for a violation of their duties. Peo. ex rel. McElwee v. Produce Exc. Trust Co., 53 A. D. 93 (1900).

An order granting a director, his attorney, accountant and assistants, without limitation in number, to examine the books, and permits the examination to continue for three months, is too broad in its scope. Such order should be modified by allowing the inspection by the director and one accountant, and the period should be limited to four weeks with a provision for an extension of the time by the court in case of necessity. Peo. ex rel. Innes v. Columbia Bag Co., 103 A. D. 208 (1905).

A stockholder is entitled to mandamus to obtain an examination of the books only when necessary in aid of his stock interests. Where it is sought to secure information in aid of a stockholder's suit against directors personally for damages sustained by reason of a false report published by them whereby he was induced to become a stockholder, the writ will be refused. Matter of Taylor, 117 A. D. 348 (1907), followed, 122 A. D. 620, and 125 A. D. 540.

Corporate Books as Evidence.

Business transactions of a corporation with its members and directors are on the same footing as those with strangers, and business entries in its books are no more evidence against them than against strangers. Corporate books are received in evidence generally to prove acts of a corporation, such as its incorporation, its list of stockholders, its by-laws, the formal proceedings of its board of directors, its financial condition when its solvency comes in question, etc., but the books of account are not of themselves competent

evidence to establish an account or claim against a director or stockholder in an action brought in behalf of the corporation. Rudd v. Robinson, 126 N. Y. 113, 118 (1891); Sigua Iron Co. v. Brown, 171 N. Y. 488, 496 (1902).

The fact that a person is a director or stockholder of a corporation does not make him chargeable with actual knowledge of its business transactions or of entries made in its books. Rudd v. Robinson, 126 N. Y. 113 (1891); Peo. v. Burnham, 119 A. D. 302 (1907); Powell v. Conover, 75 Hun 11 (1894).

In an action to charge an individual liability against directors for the corporate debts the account books of the corporation, without proof of correctness, are not evidence against the directors of the existence of the indebtedness, in the absence of evidence that such directors had access to, or were familiar with, the contents of the books of account. Minor v. Crosby, 76 A. D. 561 (1902).

In an action by the trustee of a bankrupt corporation to recover unauthorized dividends from the directors who voted therefor, the ledger of the corporation is admissible as evidence to show the financial status of the corporation at the date the dividends were declared. Wesp v. Muckle, 136 A. D. 241 (1910), aff'd., 201 N. Y. 527, without opinion. In this case the court distinguished the numerous other cases, in which it has been held that where the corporation brings suit it cannot establish its debt by an entry in its own books unless the defendant assents to the entry, because, in the declaration of a dividend, it is the duty of a director to ascertain whether the earnings justified the payment of such dividend.

Where an officer was present during a meeting of the board of directors, at which authority was given for certain acts subsequently performed by him, the minutes of such meeting are competent evidence to show the good faith of the officer in obeying instructions. Peo. v. Burnham, 119 A. D. 302, 313 (1907).

In the absence of evidence that an officer had anything to do with the corporate books or any knowledge of their contents or any connection with the entries therein, such books are not evidence against him in a criminal prosecution. People v. Burnham, 119 A. D. 302, 313 (1907), citing Rudd v. Robinson, 126 N. Y. 113.

The books of a corporation, which is not a party to an action, will not be received in evidence to show knowledge of their condition on the part of defendant directors unless there is further evidence connecting the dirctors with the entries or showing knowledge thereof on their part. Thayer v. Schley, 137 A. D. 166, 172 (1910).

The books, wherein are recorded the transactions of a corporation at its meetings, the resolutions adopted or the election of officers, are evidence of the facts contained in them, whenever those facts are necessary to be proved, no matter whether they are offered in favor of the corporation or against it. Leonard v. Faber, 52 A. D. 495, 499 (1900).

While corporate books would not be competent evidence against a stranger or as against a director, in an action in which the corporation itself seeks to enforce a liability against him arising out of some dealing by him with it as an individual, yet they are competent to establish that a party was a director, and, if it were necessary, that he was a stockholder. St. George Vineyard Co. v. Fritz, 48 A. D. 233, 236 (1900).

As between stockholders the corporate books are competent evidence to show the acts of the corporation. Hubbell v. Meigs, 50 N. Y. 482, 492 (1872). Sworn copies of the books are also competent. Id.

The books of account of a corporation are mere declarations in its favor and would not be admissible as against the plaintiff in an action. Matter of Dittman, 65 A. D. 343 (1901).

The accounts and entries in corporate books are competent as evidence of the declarations and admissions upon the part of the corporation in a controversy between the corporation and a third party. Matter of Randall, 90 A. D. 192, 197 (1904).

Where the minute book purports to show that a meeting was that of the board of directors, the corporation is estopped from asserting that it was a meeting of the executive committee. In re N. Y. & Westchester Town Site Co., 145 A. D. 623 (1911).

The secretary and treasurer of a corporation presumptively possesses knowledge of the contents of the cash book, journal and ledger of the corporation, and it is not essential that it should appear that he made the entries in the books or directed them to be made, or that he had actual knowledge of the transactions which appear therein, or that the entries were made during his incumbency in the office of secretary and treasurer. Matter of Randall, 90 A. D. 192 (1904).

The secretary of a corporation, who has an office and possession of the corporate books within this State may be required to answer a question as to the profits earned by the corporation. Matter of Dittman, 65 A. D. 343 (1901).

The secretary of a corporation is not chargeable with constructive notice of entries made in its books of account, and the entries themselves are no more competent against him than against a stranger to the corporation. Union Nat'l Bk. v. Dean, 154 A. D. 869, 874 (1913).

The omission of the secretary of a corporation to sign the minutes taken by him at a particular meeting and entered in the original minute book, does not render such minutes incompetent upon the trial of an issue as to whether the corporation passed a certain resolution at that meeting. Woodhaven Bank v. Bklyn. Hills Imp. Co., 69 A. D. 489 (1902).

There is no statute requiring the keeping of minutes by a private corporation or that if such minutes are kept they should be signed or attested by any officer. Woodhaven Bank v. Bklyn. Hills Imp. Co., 69 A. D. 489 (1902).

Entries in the books of a corporation must be proved by the production of the books themselves unless a foundation is laid for secondary evidence. Union Nat'l Bk. v. Dean, 154 A. D. 869, 874 (1913).

Where the name of a person appears on the stock book of a corporation as a stockholder, it is presumptive evidence that he is so, and in an action against him as a stockholder, the burden of proving that he is not is thrown upon him. Hoagland v. Bell, 36 Barb. 57 (1861); Wakefield v. Fargo, 90 N. Y. 213 (1882).

A person to whom stock is transferred on the corporate books and who appears upon such books to be the legal owner, is liable as a stockholder, though it was transferred to and held by him as security for a debt. Rosevelt v. Brown, 11 N. Y. 148 (1854); see, also, 133 N. Y. 18, 42.

A resolution may be read in evidence where it appears that it was contained in the regular book of minutes kept by the secretary of the corporation, and its correctness was authenticated by the secretary, and his signature was proved. It is not necessary that the secretary, whose duty it is to keep the minutes of the meetings, should enter those minutes in his own hand in the record book, but it is sufficient if he causes them to be properly and correctly recorded; and, after that has been done, his signature in the proper place, thereby authenticating their correctness, is sufficient to entitle them to be read in evidence. United Growers Co. v. Eisner, 22 A. D. 1 (1897).

§ 33. Stock books of foreign corporations. Every foreign stock corporation having an office for the transaction of business in this state, except moneyed and railroad corporations, shall keep therein a book to be known as a stock book, containing the names, alphabetically arranged, of all persons who are stockholders of the corporation, showing their places of residence, the number of shares of stock held by them respectively, the time when they respectively became the owners thereof, and the amount paid thereon. Such stock book shall be open daily, during business hours, for the inspection of its stockholders and judgment creditors, and any officer of the state authorized by law to investigate the affairs of any such corporation. If any such foreign stock corporation has in this state a transfer agent, whether such agent shall be a corporation or a natural person, such stock book may be deposited in the office of such agent and shall be open to inspection at all times during the usual hours of transacting business, to any stockholder, judgment creditor or officer of the state authorized by law to investigate the affairs of such corporation. For any refusal to allow such book to be inspected, such corporation and the officer or agent so refusing shall each forfeit the sum of two hundred and fifty dollars to be recovered by the person to whom such refusal was made.

Formerly L. 1890, ch. 564, § 53, as am'd by L. 1892, ch. 688; L. 1897, ch. 384.

CONSOLIDATORS' NOTE.—Former § 53 is transferred to this article for the reason that it relates to books to be kept by foreign corporations and should follow section 32 (former section 29), which relates to books to be kept by domestic corporations.

For other provisions affecting foreign corporations, see the index.

Although the stock book of a foreign corporation is required to be kept open daily during business hours, a different provision governs domestic corporations whereby the stock book of such corporations is to be kept open during only three hours each day for inspection of stockholders and judgment creditors. Stock Corp. Law, § 32.

Application of Section.

A foreign corporation is not transacting business here and is not subject to the penalty prescribed by this section for a failure to keep a stock book at its office here, where such office was rented merely as headquarters for salesmen at which they might meet customers and conduct correspondence. Hovey v. De Long Hook & Eye Co., 211 N. Y. 420 (1914), revsg. 147 A. D. 811. In this case no bank account was kept within the State, no books of account or goods for sale were kept here and no collections for goods sold were made from such office within the State.

The maintenance of a transfer agent within the State for the convenience of stockholders and to facilitate sales of stock does not constitute the maintenance of an office for the "transaction of business." Therefore, the transfer agent of a foreign stock corporation, having no office for the transaction of business in this State, is not liable for the penalty for a refusal to permit an inspection of the stock book. Wadsworth v. Equitable Trust Co., 153 A. D. 737 (1912).

The words "if any such foreign stock corporation," with which the third sentence of the section begin, refer to the class defined in the first sentence, viz.: "foreign stock corporations having an office for the transaction of business in this state, except moneyed and railroad corporations." Wadsworth v. Equitable Trust Co., 153 A. D. 737, 739 (1912); Caesar v. Bernard, 156 A. D. 724, 734 (1913).

The word "agent," as used in this section, refers to the "transfer agent," and one who is merely a sales agent, having no power to procure the stock book or allow it to be inspected, is not liable for the penalty. Hovey v. Eiswald, 139 A. D. 433 (1910).

A foreign corporation which maintains a "sales office" in this State cannot escape the penalty prescribed for refusing to permit an inspection by failing to keep any stock book in the office. Hovey v. Proctor & Gamble Co., 139 A. D. 521 (1910).

Where a foreign corporation, having no office in this State, employed a trust company to deliver stock certificates, the actual transfer of the stock being made at the home office of such corporation, the office of its transfer agent is not its office for the transaction of business, and said agent is not liable for the penalty for a refusal to permit a stockholder to inspect a socalled stock book of said corporation. Althause v. Guaranty Trust Co., 78 Misc. 181 (1912), disregarding Peo. ex rel. Miles v. Montreal & Boston Copper Co., 40 Misc. 282, and following Union Trust Co. v. Sickles, 125 A. D. 105.

This section applies only to foreign stock corporations having an office for the transaction of business in this State. Fuller v. O'Connor, 61 Misc. 279 (1908); Peo. ex rel. Singer v. Knickerbocker Trust Co., 38 Misc. 446 (1902).

A stock transfer agency constitutes an office "for the transaction of business in this State." Peo. ex rel. Miles v. Montreal & Boston Copper Co., 40 Misc. 282 (1903).

A corporation must be deemed to have an office "for the transaction of business in this State" where it pays rent for an office, has a person permanently in charge of it, deposits money from it and pays dividends at it. 38 Misc. 446, supra.

In a proceeding under this section, it is immaterial whether the transfer of stock to the relator was merely colorable or whether any consideration was paid therefor. Peo. ex rel. Harriman v. Paton, 20 Abb. N. C. 172 (1887).

Where a stockholder in a foreign corporation, having its only office for the transaction of business within the State located in New York city, demands an inspection of its stock book, and the vice-president in charge states that the book is in the hands of an accountant in Brooklyn to be written up, offers to give the stockholder a letter to such accountant or to have the book at the main office of the company in Jersey City on the following Wednesday, the stockholder is entitled to recover the penalty imposed. Recknagel v. Empire Self-Lighting Oil Lamp Co., 24 Misc. 193 (1898).

Stock Book; Absolute Right to Inspect.

See also, under section 32, ante, the topical heading "Stock Book; Absolute Right to Inspect, and to Penalty in Case of Refusal; Mandamus Discretionary" and discussion of authorities thereunder.

This section recognizes an absolute right in the stockholder and imposes an absolute duty upon the corporation and the custodian of the stock book, irrespective of the motive or purpose with which the inspection is sought. The right to inspect includes the right to copy from the book. Henry v. Babcock & Wilcox Co., 196 N. Y. 302 (1909), revsg. 125 A. D. 538. If it appeared in good faith that the stock book, at the time of the demand, was in actual use for other corporate purposes the stockholder could be required to wait a reasonable time until such use terminated. Id.

Duty of Transfer Agent.

The duties imposed by this section are put specifically upon the transfer agents, and not upon the corporations or the officers of the corporations which they represent. Peo. ex rel. Hatch v. Lake Shore & M. S. Ry. Co., 11 Hun 1 (1877); Peo. ex rel. Field v. No. Pac. R. R. Co., 50 Super. Ct. 456 (1884).

It is the absolute duty of a transfer agent in this State to exhibit at all reasonable times during the usual business hours, to any stockholder, when required, the transfer book and a list of the stockholders, if in his power so to do. Kennedy v. Chicago, Rock Isl. & Pacific R. R. Co., 14 Abb. N. C. 326 (1884). But see later cases to the contrary, cited under this and the preceding section. A demand for the exhibition of the stock book is not sufficient as a demand for the transfer book. Id.

A mandamus to compel exhibition of transfer books should be directed to the transfer agents only. Peo. ex rel. Hatch v. L. S., etc., above.

When a foreign corporation has failed to keep in its office a stock book for the inspection of stockholders, a person in the office who is not shown to have been an officer of the corporation cannot be made liable for the statutory penalty imposed upon a refusal to show the stock book, by proof that he answered a demand for it by saying that the book was not in the office. Greene v. Shain, 22 Misc. 720 (1898).

Mandamus to Compel Inspection.

This section does not confer specifically the right to make extracts from the stock book, but even assuming that it does, a peremptory writ of mandamus to compel the corporation to grant that right will be denied when it affirmatively appears that the extracts are for an illegitimate or ulterior purpose and not connected with the stockholder's interest in the corporation or its management. Peo. ex rel. Althause v. Giroux Cons. Mines Co., 122 A. D. 617, modfg. 56 Misc. 508 (1907).

In 122 A. D. 617, supra, the court said "there is no express provision of law authorizing the issuance of a writ of mandamus to enforce the provisions of this section, and when application is made under the section whether such writ will issue rests in the sound discretion of the court to which the application is made." However, to a contrary effect, the doubtful doctrine was laid down in an earlier case that the State courts have no jurisdiction to grant the application of a stockholder of a foreign corporation for a writ of mandamus to compel an inspection by him of the books and records of such corporation. Matter of Rappleye, 43 A. D. 84, appeal dismissed on technical grounds, 161 N. Y. 615; Mitchell v. N. S. & T. Co., 44 Misc. 514 (1904); Matter of Crosby, 43 A. D. 618 (1899), revsg. 28 Misc. 300.

The granting or refusal of a writ of mandamus to compel an exhibition of corporate books not provided for in the statute is discretionary and is not reviewable by the Court of Appeals. Sage v. Lake Shore & Mich. S. Ry. Co., 70 N. Y. 220 (1877).

Where a foreign corporation keeps only an office of the stock transfer agents in the State, such office is, within the meaning of this section, one "for the transaction of business in this State," and there it must keep the stock book and may be compelled to do so by mandamus. Peo. ex rel. Miles v. Montreal & Boston Copper Co., 40 Misc. 282 (1903).

When, on an application for a mandamus to compel the alleged transfer agent of a foreign corporation to exhibit the transfer book and list of stockholders, a question of fact is raised as to whether the defendant is the transfer agent of the corporation, an alternative writ of mandamus should be granted for the purpose of determining such question of fact. Peo. ex rel. Daniels v. Crawford, 68 Hun 547 (1893); Peo. ex rel. Del Mar v. St. L. & S. F. Ry. Co., 44 Hun 552 (1887).

Upon an application for a mandamus held that a stockholder of a foreign stock corporation, which has an office for the transaction of business in the State but which does not keep therein the stock book required by law, is entitled to inspect books kept by its transfer agent and by its registrar of transfers of stock in their offices in the State containing some or all of the information required to be shown by a stock book when kept as these books may be deemed to have been prepared by the corporation. Peo. ex rel. Singer v. Knickerbocker Trust Co., 38 Misc. 446 (1902).

Mandatory Features of Statute.

The provisions of this section are mandatory and the law is not complied with by keeping a book which does not contain the street and number of stockholders living in cities in which the word "unknown" is inserted in the column provided for the amount paid on said stock. Fay v. Coughlin-Sandford Switch Co., 47 Misc. 687 (1905).

Whether the corporation has a transfer agent or not it is required in all cases where it has an office for the transaction of business within this State to keep and exhibit its stock book. Where it also has a transfer agent it may, in the alternative, permit the inspection there, but the mandatory provision of the statute as expressed in the word "shall" is directed primarily against the corporation itself. Peo. ex rel. Mills v. Mont. & Boston C. Co., 40 Misc. 282 (1902).

Actions for Penalties.

The provision in this section imposing the forfeiture of $250 for refusal to allow inspection of the stock book being a penal statute must be strictly construed, hence there can be no recovery in an action for the penalty based upon the refusal of a stockholder's demand to inspect the stock book and copy therefrom a list of the stockholders with the number of shares held by them when the demand to inspect could not be separated from the demand to copy. Henry v. Babcock & Wilcox Co., 125 A. D. 538 (1908).

The refusal of the secretary to permit a stockholder to examine the stock book, followed the next day by a similar demand and refusal, and the president's refusal of the same request the day following, constitute but one demand and one refusal and not three demands and refusals and render each officer and the corporation liable to but one penalty. Cox v. Paul, 175 N. Y. 328 (1903).

Where, after actions have been brought by a stockholder to recover penalties because of a refusal to permit the inspection of the stock book had been tried and were sub judice, the plaintiff is permitted to inspect and make extracts from the stock book, and the next day his demand for further inspection for the purpose of making a complete transcript is refused, unless he states the purpose, and he refuses to disclose his purpose, merely stating that he did not seek inspection for a hostile purpose; and, on the trial of the action to recover a penalty for the latter refusal, plaintiff testifies that the only reason he sought a complete list of stockholders was to facilitate him in circularizing to effect the sale of stocks in other companies in which he was interested, and that he had within four months brought fourteen suits of a similar character, a judgment in his favor should be reversed. Althause v. Giroux, 56 Misc. 511 (1907).

To recover the penalty plaintiff must prove by competent evidence that defendant is a stock corporation having an office for the transaction of business or a transfer agent in New York; that it is not a moneyed or railroad corporation, and that he is a stockholder therein. Hollister v. De Forest Wireless Telegraph Co., 47 Misc. 674 (1905).

In an action against a foreign corporation for the penalty the complaint must state that the corporation is a "stock corporation" and not a "moneyed or railroad" corporation. Seydel v. Corporation Liquidating Co., 46 Misc. 576 (1905).

Refusal, what Constitutes.

A "refusal" to permit a stockholder inspection is sufficiently made out where the transfer agents or those in charge of the office have for a month given only evasive answers to the stockholder's repeated demands for an inspection. Peo. ex rel. Miles v. Montreal & Boston Copper Co., 40 Misc. 282 (1903).

General Books of Account.

A foreign corporation by suing a citizen in this State subjects itself to the jurisdiction of the court and may be required to allow an inspection of its books and papers, although the same are in a foreign jurisdiction. When such books are in daily use in such jurisdiction, a verified copy of the required items should only be allowed, with permission for the defendant to inspect the books themselves in the foreign jurisdiction, if, after the service of the copy, he so desires. Nat'l Distilling Co. v. Van Enden, 120 A. D. 746 (1907).

Books of Foreign Corporation as Evidence.

See also, "Corporate Books as Evidence," under the preceding section.

Original books of a foreign corporation which have been in the custody of its proper officer are admissible to prove its corporate transactions in an action against a transferee of stock for unpaid calls, without first proving the correctness of each entry by the person making it, and are presumptive evidence for that purpose under section 929 of the Code. Sigua Iron Co. v. Brown, 171 N. Y. 488 (1902).

It is necessary to show the correctness of the entries in corporate books before they can be received in evidence where they are offered to prove an account of a corporation for the purpose of establishing a debt or liability against third persons in an action brought by or in behalf of the corporation. Sigua Iron Co. v. Brown, 171 N. Y. 488, 496 (1902).

§ 34. Annual report to secretary of state. Every domestic stock corporation and every foreign stock corporation doing business within this state, except moneyed and railroad corporations, shall annually, during the month of January, or, if doing business without the United States, before the first day of May, may make a report as of the first day of January, which will state:

1. The amount of its capital stock, and the proportion actually issued.

2. The amount of its debts or an amount which they do not exceed.

3. The amount of its assets or an amount which its assets at least equal.

4. The names and addresses of all the directors and officers of the company, and in the case of a foreign corporation, the name also of the person designated in the manner prescribed by the code of civil procedure, as a person upon whom process against the corporation may be served within this state.

Such report shall be made by the president or a vice-president or the treasurer or a secretary of the corporation and shall be filed in the office of the secretary of state. If such report be not so made and filed, any such officer who shall thereafter neglect or refuse to make and to file such report, within ten days after written request so to do shall have been made by a creditor or by a stockholder of the corporation, shall forfeit to the people the sum of fifty dollars for every day he shall so neglect or refuse.

Formerly L. 1890, ch. 564, § 30, as am'd by L. 1892, ch. 2, and ch. 688; L. 1897, ch. 384; L. 1901, ch. 354; L. 1905, ch. 415.

For form of report, see post, Form No. 332.

Subdivision 4 of this section was added by L. 1905, ch. 415.

In addition to the foregoing requirements the report should state the amount of stock, if any, issued for property, as required by section 55 of this law.

Former section 34 of the Stock Corp. Law, added thereto by L. 1899, ch. 354, was repealed by L. 1909, ch. 61, enacting the present Consolidated Stock Corporation Law. Said former section 34, among other things, provided a short statute of limitations respecting the liability of directors for the creation of an excessive indebtedness and for failure to file an annual report. Former section 24 of said law, which imposed the liability for creating an excessive indebtedness, was repealed by L. 1901, ch. 354. The statutory liability which former section 34 limited having been thus repealed, there was no further use for a short statute of limitations as to the liability for excessive indebtedness which no longer existed. The same is true as to the liability to creditors for failure to file an annual report. There is no longer any liability to creditors for failure to file an annual report, and there is consequently no need of a limitation of any such liability. The present section 34 (former § 30) provides only for a penalty to the people

and not to creditors and that only after notice to file a report has been served upon an officer of the corporation. Said former section 24 prohibited any stock corporation, except a moneyed corporation from creating any debt, if thereby its total indebtedness not secured by mortgage, exceeded the amount of its paid-up capital stock, and it provided further that the directors consenting to the creation of any such debt should be personally liable therefor to the creditors of the corporation. Since the repeal of said section a corporation is allowed to borrow as much as its credit and security will permit without reference to the amount of its capital stock.

The provisions of this section have been greatly modified by the amendments of 1901. The report is not required to be sworn to, nor to be filed with the county clerk, and the duty of making and filing it in the office of the Secretary of State has been transferred from directors to the executive officers of the corporation. The unreasonable penalties imposed upon directors for failure or neglect on their part to file the perfunctory annual report have been stricken from the statute. The old law has been the cause of much anxiety to innocent and well-meaning directors, and the necessity for this change had become imperative. A failure or neglect on the part of the officers of a company to perform this duty of filing a report no longer renders every director individually liable for the debts of the corporation, but in lieu thereof imposes the liability to a fine of $50 a day upon the officer who thus fails to file a report, but only after he has been requested in writing by a stockholder or a creditor to file it. This is modeled upon the requirement of the New Jersey statute.

This section applies to both foreign and domestic corporations. For other provisions affecting foreign corporations, see Index under "Foreign Corporations."

Penalty, Action to Recover.

The penalty prescribed in the foregoing section may be recovered in an action brought by the Attorney-General. Code, section 1962. A recovery in such an action bars a recovery in any other action, brought for the same cause. Id. Money collected in such an action must be paid into the State treasury. Code, § 1963.

Cases Superseded by Amendment of 1901.

The decisions construing former § 30 as it read prior to the modifications made by L. 1901, ch. 354, are not applicable to said section as above amended. For the decisions construing the former provisions of said section, see the cases cited in the fourth edition of "White on Corporations," pages 116–121, and, also, the following: Morgan v. Hedstrom, 164 N. Y. 224, affg. 25 A. D. 547; Manhattan Co. v. Kaldenberg, 165 N. Y. 1, revsg. 27 A. D. 31; Matty v. Sampson, 64 A. D. 1; Sinclair v. Fuller, 158 N. Y. 607, affg. 9 A. D. 297; Witherow v. Slayback, 158 N. Y. 649, revsg. 11 Misc. 526; Chapman v. Lynch, 156 N. Y. 551; Lillienthal v. Betz, 61 A. D. 601, affd., 172 N. Y. 643; Ginsburg v. Von Seggern, 59 A. D. 595; Wood & Sellick Co. v. Vandeveer, 55 A. D. 549; Union Natl. Bk. v. Scott, 53 A. D. 65; Leonard v. Faber, 52 A. D. 495; Union Natl. Bk. v. Keim, 52 A. D. 135; St. George Vineyard Co. v. Fritz, 48 A. D. 233; Uptegrove v. Schwarzwaelder, 46 A. D. 20, affd., 167 N. Y. 587; Tysen v. Fritz, 44 A. D. 562; Bank of Metropolis v. Faber, 38 A. D. 159; Lee v. Jacobs, 38 A. D. 531; Am. Grocery Co. v. Pratt, 36 A. D. 152; Gerdau v. Faber, 26 A. D. 606; Milson Rendering & Fertilizing Co. v. Baker, 16 A. D. 581; Seebeck v. King, 34 Misc. 483; Lilienthal v. Yuengling, 33 Misc. 619; Wood & Sellick Co. v. English, 31 Misc. 557; Stevenson v. Cowan, 84 A. D. 135 (1903).

§ 35. Liability of officers for false certificates, reports or public notices. If any certificate or report made or public notice given by the officers or directors of a stock corporation shall be false in any material representation, the officers and directors signing the same shall jointly and severally be personally liable to any person who has become a creditor or stockholder of the corporation upon the faith of any such certificate, report, notice or any material representation therein to the amount of the debt contracted upon the faith thereof if not paid when due, or the damage sustained by any purchaser of or subscriber to its stock upon the faith thereof. The liability imposed by this section shall exist in all cases where the contents of any such certificate, report or notice or of any material representation therein shall have been communicated either directly or indirectly to the person so becoming a creditor or stockholder and he became such creditor or stockholder upon the faith thereof. No action can be maintained for a cause of action created by this section unless brought within two years from the time the certificate, report or public notice shall have been made or given by the officers or directors of such corporation.

Formerly L. 1890, ch. 564, § 31, as am'd by L. 1892, ch. 688.

The term "directors," as used in this section, includes trustees or other persons by whatever name known, duly appointed to manage the affairs of the corporation. Gen. Corp. Law, § 3.

Under § 30 (now § 34) of the Stock Corp. Law as amended in 1901, directors were relieved from the duty of filing reports and their personal liability in connection therewith abolished, and in addition as former § 24 was repealed by L. 1901, ch. 354, so there can be no such thing as excessive indebtedness nor liability of directors for the creation thereof; and the foregoing section is no longer applicable, except as to matters arising prior to April 16, 1901, when chapter 354 took effect.

Measure of Damages.

A corporate officer making a false report becomes liable to the damages which naturally flow from or are caused by the falsehood. The legislature has not defined the precise damage which may be recovered, but has used a broad term which covers all damages which flow directly from the false statement. An action upon this statute is one in tort partaking largely of the character of an action for damages for fraudulent representations knowingly made upon the sale of property. At common law and independent of any statute, an action for damages based on fraud could be maintained, and it was not necessary that the representations should be made to the plaintiff directly. It was sufficient if they were made to a third person to be communicated to the plaintiff, or if made to the public generally with a view of its being acted upon. In such a case and in an action upon a waranty the measure of damages in the sale of personal property is determined by the difference in value between the article sold and what it should be according to the warranty or representation. Parsons v. Johnson, 28 A. D. 1 (1898).

Knowledge of Officer Making Statement.

The statute does not in terms require that the report should be false to the knowledge of the officer making it, but goes further than the common law in creating responsibility and makes the officer liable if the report be false in material respects. The legislature sought to protect persons dealing in the stock of the corporation by holding the officer to a strict account for his statement, if false, whether knowingly made or otherwise. Parsons v. Johnson, 28 A. D. 1 (1898); Hutchinson v. Young, 93 A. D. 407 (1904).

Statute Not Penal; Former Statutes Distinguished.

The foregoing section is not a penal statute, and an action brought thereunder is not governed by section 983 of the Code which provides that an action "to recover a penalty or forfeiture imposed by statute" must be tried in the county where the cause of action arose. Hutchinson v. Young, 80 A. D. 246 (1903).

Pleadings.

In an action for damages resulting from the purchase of stock upon the faith of a false report made and issued by the defendant, the treasurer of the corporation, a cause of action under this section and also one at common law, may be joined in the same complaint under the Code, section 484, subdivision 6, each being for an injury to personal property. Hutchinson v. Young, 93 A. D. 407 (1904).

Unverified Answer.

In an action brought under the Stock Corporation Law, section 35, by one who purchased stock upon the faith of false statements published by the defendants as to the financial condition of the corporation, defendant may serve an unverified answer although the complaint alleging the fraud was verified. Since the allegations of the complaint constitute a misdemeanor under the Penal Law, section 665 and since a verified pleading is an affidavit, and hence testimony, the defendants cannot under the Code, section 837, be compelled to verify an answer which tends to incriminate them. Thompson v. McLoughlin, 138 A. D. 711 (1910).

Debts Incurred Prior to Report.

The provisions of this section are not available to creditors whose debts were incurred before the making of the certificate or report, and who, consequently, did not rely upon the credit thereof. Bagley & Sewall Co. v. Lennig, 61 A. D. 26 (1901).

Miscellaneous Cases.

For cases construing the foregoing section, see Shepard v. Fulton, 55 A. D. 329, affd., 171 N. Y. 184 (1902); St. George Vineyard Co. v. Fritz, 48 A. D. 233 (1900); Staten Island Midland R. R. Co. v. Hinchcliffe, 34 Misc. 624, affd., 66 A. D. 614; modified, 170 N. Y. 473 (1902).

The burden is placed upon the plaintiff of establishing that the certificate filed was in point of fact false. Ferguson v. Gill, 74 Hun 566 (1893).

It is not necessary to show that the officers knew the certificate or report to be false. Huntington v. Attrill, 118 N. Y. 365 (1890); Torbett v. Eaton, 113 N. Y. 623 (1889), 49 Hun 209. But see, also, Bonnell v. Griswold, 89 N. Y. 122 (1882); Same v. Same, 89 N. Y. 128 (1880); Lake Sup. I. Co.

v. Drexel, 90 N. Y. 87 (1882); Pier v. Hanmore, 86 N. Y. 95 (1881); Butler v. Smalley, 101 N. Y. 71 (1885).

Untruthful representations which would have no effect upon the judgment or conduct of persons dealing with the corporation could not be held to be material. Walton v. Godwin, 33 St. Rep. 889; id., 58 Hun 87 (1890).

Officers signing a false report are liable only for debts contracted after the report was filed. Bagley & Sewall Co. v. Lennig, 61 A. D. 26 (1901); Torbett v. Godwin, 42 St. Rep. 323, 62 Hun 407 (1891).

Only those who make false report are liable. Bonnell v. Griswold, 68 N. Y. 294; Torbett v. Godwin, 62 Hun 407 (1891).

In an action against a director a judgment against the corporation is neither conclusive nor prima facie evidence of the debt. Torbett v. Godwin, 62 Hun 407 (1891); Brand v. Goodwin, 24 St. Rep. 305 (1889).

The penalty is recoverable by the assignee. Pier v. George, 86 N. Y. 613; Torbett v. Godwin, 62 Hun 407 (1891).

The action under this section abates upon the death of either party. Brackett v. Griswold, 103 N. Y. 425 (1886); Blake v. Same, 104 N. Y. 613 (1887); Whitaker v. Masterton, 104 N. Y. 280 (1887).

As to the measure of damages. Parsons v. Johnson, 28 A. D. 1 (1898).

Penal Statutes of Other States, Enforceability.

Whether a statute of one State is a penal law which cannot be enforced in another State, is to be determined by the court which is called upon to enforce it. Huntington v. Attrill, 146 U. S. 658 (1892).

If a judgment for a fixed sum of money, recovered in one State by a creditor of a corporation against one of its officers upon a liability for all its debts, imposed by a statute of that State for making and recording a false certificate of the amount of its capital stock, is sued on in a court of another State, and that court declines to enforce the judgment because of its opinion that the original liability was a penalty, the judgment is thereby denied the full faith, credit and effect to which it is entitled under the Constitution and laws of the United States. Huntington v. Attrill, 146 U. S. 658 (1892).

ARTICLE 4

Stock and Stockholders

SECTION 50. Issue and transfer of stock.
51. Transfers of stock by stockholder indebted to corporation.
52. Purchase of stock of other corporations.
53. Subscriptions to stock.
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60. Partly paid stock.
61. Preferred and common stock.
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SECTION 65. Change in par value of shares.
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67. Application to court to order issue of new in place of lost certificate of stock.
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69. Financial statement to stockholders.
70. Liabilities of officers, directors and stockholders of foreign corporations.

§ 50. Issue and transfers of stock. The stock of every stock corporation shall be represented by certificates prepared by the directors and signed by the president or vice-president and secretary or treasurer and sealed with the seal of the corporation, and shall be transferable in the manner prescribed in this chapter and in the by-laws. No share shall be transferable until all previous calls thereon shall have been fully paid in.

Part of former § 40, ch. 564, L. 1890, as am'd by L. 1892, ch. 688; L. 1902, ch. 601.

For forms of certificate of stock, see post, Forms Nos. 243–250.

For form of demand for transfer of certificate of stock, see Form No. 260.

This section contains the first two sentences of former § 40, which has been divided by the consolidated laws into three sections (§§ 8, 50 and 52). The places of the other sections have been rearranged so as to follow according to logical sequence and subject-matter. Former § 26 has been placed after § 50, with its number changed to 51. It has been so placed because it relates to the same subject-matter as § 50, which it follows, namely transfers of stock. The remaining portions of § 40 have been re-enacted as §§ 8 and 52.

Stock Transfer Act.

The provisions of the Personal Property Law, sections 162–185, both inclusive, added to said law by chapter 600 of the Laws of 1913. in effect May 17, 1913, are printed in this book under the title "Stock Transfer Act," post. Said provisions of the Personal Property Law are known as "The Uniform Stock Transfer Act," having been enacted, with some slight variations of language and section numbers, in New York, Ohio, Pennsylvania, Rhode Island, Wisconsin, Alaska, Louisiana, Maryland, Massachusetts and Michigan.

Tax on Transfers of Stock.

For the provisions of the Tax Law relative to the payment of a stamp tax on transfers of shares of stock, see the full text of the same, ante, pages 297–316.

Shares of Different Par Values; Right of Corporation to Issue.

Lawyers are occasionally confronted with the problem as to whether a corporation may issue common and preferred stock of different par values. None of the writers have attempted to deal with this subject. There is no provision in the corporation laws of this State prohibiting a variance in the par value of shares, and, so far as the author has been able to discover in his researches on this question. there is no decision of our courts bearing directly upon this point. The Business Corporations Law, section 2,

provides that the certificate of incorporation shall, among other things, state the number of shares of which the capital stock shall consist each of which shall not be less than five nor more than one hundred dollars. Neither this statute nor any other statute of this State authorizing the formation of corporations or providing for their regulation, contains any requirement that the shares shall be of equal par value. In the absence of any statute on the subject or of any question of public policy which such a practice might be deemed to contravene, the author is strongly of the opinion that where the certificate of incorporation provides for the classification of the capital stock into common and preferred shares it may at the same time regulate the parity of such issues by providing that the common and preferred shares shall be of a different par value so long as the shares in each particular class shall be of equal parity or face value. It might be urged that such a difference in the relative value of the shares would be invalid because it created between the two classes of stock a disparity in voting powers, but upon a consideration of the provisions of section 61 of the Stock Corporation Law and the determination of the court in the case of People ex rel. Browne v. Koenig, 133 A. D. 756, it is believed that this objection is without force. The section of the Stock Corporation Law referred to empowers domestic stock corporations to issue both preferred and common stock and different classes of preferred stock, if the certificate of incorporation so provides. In the case alluded to it was held that a provision withholding from preferred stockholders the right to vote was valid, that it was perfectly lawful for the different classes of stockholders to enter into an agreement of this character because it did not contravene public policy or affect the public. Hence, it logically follows, that if it is lawful to provide that one class of stockholders shall have no vote whatever it would be equally lawful to give one vote for each share of stock and create a disparity in voting privileges by regulating the voting power of the holders of different classes of stock by a variance in the par value of the shares issued to each class, so long as the shares of stock within each particular class are all of equal parity. It is well established that where the certificate of incorporation creates different classes of stock it may provide for different rates of dividends to be paid to the holders of preferred and common stock, respectively, and for different rights of the holders of the various classes of stock upon the distribution of assets of the corporation in case of liquidation; therefore, if a variance in the par value of shares to be issued to the holders of different classes of stock is deemed necessary or convenient by the incorporators in order to establish a different status for the several classes of stock in the distribution of dividends or of assets upon dissolution such differentiation is valid. The shares merely represent the proportionate interest of the stockholders in the entire corporate enterprise, in its property and in the division of its profits, if any, and, under the generous latitude and freedom of contract sanctioned by section 10 of the General Corporation Law, it is perfectly competent for the incorporators, in the certificate of incorporation, to determine into how many aliquot parts each class of stock shall be divided. Any arrangement so made constitutes a valid contract which is binding upon all the stockholders. As heretofore stated a provision of the character herein discussed is not in conflict with any statute of the State but even if it were the provision would be valid for the very purpose of section 10 of the General Corporation Law is to permit the incorporators at the time of the formation of the corporation to prescribe regulations for the conduct of its affairs and limitations upon the rights of stockholders inconsistent with the provisions of the statute. Such was the doctrine enunciated in

Ripin v. U. S. Woven Label Co., 205 N. Y. 442. At any angle from which this question may be viewed the right of the incorporators to provide in the certificate of incorporation for a difference in the par value of shares of the preferred and common stock appears to be sustained.

The incorporation of the Glove Ball Bearing Company, Inc., affords a precedent in this State for the formation of a corporation with authority to issue preferred and common stock consisting of shares of different par values. The certificate of incorporation of the above mentioned company was filed in the office of the Secretary of State, April 29, 1914.

A method of phrasing a clause in the certificate of incorporation for shares of stock of different par values is suggested in Form No. 274, post.

Distinctions Between Stock and Bonds.

The fact that an instrument is called a bond does not determine its character. The distinguishing feature of a bond is that it is an obligation to pay a fixed sum with stated interest. It may or may not be secured, but if it is, and the security proves to be insufficient, the indebtedness is not thereby wiped out. The distinguishing feature of stock is that it confers upon the holder a part ownership of the assets and right to participate according to the amount of his stock in the surplus profits of the corporation, and ultimately, on its dissolution, in the assets remaining after the payment of its debts. A stockholder, whether common or preferred, cannot have a lien on the property of the corporation even though the stock by its terms is accorded a lien; therefore, where an instrument denominated a bond contains a promise to pay a stated sum of money at a fixed time, and to pay meanwhile a stated rate of interest, but also provides that after certain fixed dividends have been paid on the common and preferred stock the holder of the bond is "entitled to a proportionate share in the surplus income, if any," it is a species of preferred stock. Cass v. Realty Securities Co., 148 A. D. 96 (1911), affd., 206 N. Y. 649.

So-called debenture bonds issued by a corporation which contain a clause providing that they should be subordinate to the claims of general business creditors, that upon liquidation or dissolution such creditors would be entitled to priority of payment over the holders of such bonds, that the bonds should bear cumulative interest payable out of the earnings before any dividends should be paid on the stock, and that upon liquidation or dissolution the bonds after the payment of corporate debts should be entitled to the whole residue of the corporate assets, are in effect preferred stock, since the distinguishing feature of a bond is an obligation to pay a fixed sum with stated interest, while the distinguishing feature of stock is a part ownership of the assets and a right to participate in the management and share in the surplus profits and in surplus assets upon dissolution. In re Fechheimer-Fishel Co., 212 Fed. 357 (1914).

Distinction Between Stockholders and Bondholders.

Where a trust agreement for an issue of corporate bonds provided that the holders of said bonds shall be entitled to receive the full payment of the principal thereon and interest, and also an equal share with the stockholders of the balance of assets, such distribution of corporate assets, after payment of the bonds, will be restrained at the suit of a minority stockholder, as inequitable and unjust and destructive of rights of stockholders in the surplus assets of the corporation. The distinction between stockholders and bondholders is that stockholders are partners in the enterprise, while bondholders are creditors. Smith v. Westchester Bronxville Realty Co., 78 Misc. 75 (1912), affd., 156 A. D. 920.

Stock Certificates.

Certificates of stock of a corporation issued in excess of the limit imposed by its charter are void, and the holder of them is not entitled to the rights, nor subject to the liabilities of a holder of authorized stock. Scoville v. Thayer, 105 U. S. 143 (1881).

An officer or director of a stock corporation who issues, participates in issuing, or concurs in a vote to issue any increase of its capital stock beyond the amount of the capital stock thereof, duly authorized by or in pursuance of law, is guilty of a misdemeanor. Penal Law, § 664, post.

The certificate of stock is the muniment of the shareholder's title, and evidence of his right. Kent v. Quicksilver M. Co., 78 N. Y. 180 (1877).

The certificates of stock are only evidence of the ownership of the shares, and the interest represented by the shares is held by the company for the benefit of the true owner. As the habitation or domicile of the company is and must be in the State that created it, the property represented by its certificates of stock may be deemed to be held by the company within the State whose creature it is, whenever it is sought by suit to determine who is its real owner. Jellenik v. Huron Copper Mining Co., 177 U. S. 1 (1899).

The capital stock is the money contributed to the capital, and is usually represented by shares issued to the subscribers to the stock on the initiation of the corporate enterprise. Christensen v. Eno, 106 N. Y. 97 (1887); Burrall v. Bushwick R. R. Co., 75 N. Y. 211 (1878).

Certificates of stock are simply muniments and evidence of the holder's title to a certain number of shares in the property and franchises of the corporation of which he is a member. Mechanics' Bk. v. N. Y. & New Haven R. R. Co., 3 Kern. 627; Angell & Ames on Corpns., § 560.

Where a corporation issues certificates of stock bearing on their face the words, "shares $100 each, full paid and non-assessable beyond $10 per annum," the corporation cannot subsequently assess the shares, and the acceptance of the shares, with this clause, does not amount to an assent upon the part of the owner to an assessment which is not authorized by law. Sullivan County Club v. Butler, 26 Misc. 306 (1899).

The relation of stockholder is established by the subscription and payment, and does not depend upon the issue of a certificate or other evidence of such right by the corporation. Rutter v. Kilpatrick, 63 N. Y. 604 (1875).

A subscriber for shares of the original stock becomes a member of the corporation by virtue of his subscription, and the delivery of a certificate for the stock is merely evidence of that relation. Kohlmetz v. Calkins, 16 A. D. 518 (1897).

A by-law imposing upon each share of stock dues to the extent of ten dollars per year, passed after the owner acquired his stock, affords no authority for an assessment thereof and is, as to the owner, ex post facto and unauthorized. Sullivan County Club v. Butler, 26 Misc. 306 (1899).

No presumption that a party is still a stockholder in a corporation arises by the production from the papers of the corporation of a canceled stock certificate, showing that the shares represented thereby had been issued to him, that he had signed a blank transfer on the back of the certificate, and that the certificate had come into the hands of the company and had been canceled, without any proof that such transfer was obtained from him without consideration or by false representations. Thompson v. Stanley, 73 Hun 248 (1893). The relation of stockholder is not established by the mere production of a certificate of stock with a transfer purporting to be signed by the administrator of the person named on the face of such certificate. Id.

When certificates of stock contain apparently all the essentials of genuineness, a bona fide holder thereof has a claim to recognition as a stockholder. Mut. Life Ins. Co. v. Forty-second St. R. R. Co., 74 Hun 505 (1893).

The capital stock of a corporation is personal property; it has not, nor has the certificate or other evidence of title or ownership, any of the qualities of commercial or negotiable paper. Weaver v. Barden, 49 N. Y. 286 (1872). While certificates of stock do not possess, in full, the qualities of commercial paper, yet when the transfer indorsed thereon is signed in blank by the shareholder named therein, they become, in effect, so far as the public is concerned, as if they had been issued to bearer. Fifth Ave. Bank v. Forty-second St. & Grand St. Ferry R. R. Co., 137 N. Y. 231 (1893).

While corporation stock certificates do not possess all the qualities of commercial paper, they do possess some of them, and innocent parties dealing in them will be protected upon analogous principles, and, in a proper case, will be entitled to compel recognition as stockholders, where power exists to issue new certificates, or to indemnity if there is not. Jarvis v. Manhattan Beach Co., 148 N. Y. 652 (1896), affg. 75 Hun 100.

Certificates of stock are not negotiable in form; they represent no debt and are not securities for money; but the courts of this country, in view of the extensive dealings in certificates of shares in corporate enterprises, and the interest both of the public and of the corporation which issues them in making them readily transferable and convertible, have given to them some of the elements of negotiability. Knox v. Eden Musee Co., 148 N. Y. 441 (1896), revsg. 74 Hun 483; Lyman v. State Bank of Randolph, 81 A. D. 367 (1903), affd., 179 N. Y. 577.

The relation of shareholder in a corporation is created by the subscription agreement, and it is not essential to such relation that a certificate of stock be actually issued. Beals v. Buffalo Expanded Metal Constn. Co., 49 A. D. 589 (1900). When such subscriber accepts an office in the corporation and does other acts which can only be done by a shareholder, he is estopped from denying the existence of that relation, notwithstanding the fact that no stock book was kept by the corporation, and that he never received a certificate of stock. Id.

Stolen Certificates of Stock.

See the above topic under section 67 of the Stock Corporation Law, post, and collection of authorities thereunder.

Right of Stockholder to Subscribe Pro Tanto for Future Issues of Authorized Stock.

For a discussion of the above topic, see section 62 of the Stock Corporation Law.

Right of Stockholder to Maintain Existing Relation Between His Stock and the Entire Capital Stock.

See section 62 of the Stock Corporation Law, under the above heading.

Transferee of Stock Acquires All Rights of Prior Owners.

An action may be maintained by a stockholder in the right of the corporation for his own benefit and that of other stockholders to set aside a fraudulent transaction notwithstanding that the transaction occurred before he acquired his stock. A stockholder has an indivisible interest in the

property and assets of a corporation subject to the discharge of its obligations. This indivisible interest is represented by certificates of stock and is transferred by their transfer, and a right of action by or in behalf of the corporation for fraud to set aside a conveyance of its assets, or to avoid obligations imposed upon it, is part of its rights, property and assets in which a stockholder has this indivisible interest which passes by the transfer of a certificate of its stock. Continental Securities Co. v. Belmont, 206 N. Y. 7 (1912), affg. 150 A. D. 298; Pollitz v. Gould, 202 N. Y. 11 (1911), affg. 142 A. D. 939, and distg. Hawes v. Oakland, 104 U. S. 450; see, also, Boardman v. Lake Shore & Mich. So. Ry. Co., 84 N. Y. 157, 178 (1881).

An assignee of stock takes it subject to all equities which existed in relation thereto in the hands of his assignor. Matter of Seneca Oil Co., 153 A. D. 594 (1912), affd., 208 N. Y. 545.

Wrongful Transfer of Stock on Corporate Books.

Shares of stock were transferred to the plaintiff by assignment on the back of the certificate, which assignment was witnessed by an officer of the corporation and subsequently the assignor of such stock assigned the same stock to such officer for a trifling consideration but without such certificate of stock and such assignee with knowledge of the plaintiff's claim, transferred the stock to himself on the corporate books. When the plaintiff produced the certificate of stock and power of attorney, demanding a transfer of the stock to himself, which was refused, he is entitled in a suit brought for that purpose to compel the transfer upon the books of the company and is not restricted to an action for damages. Cushman v. Thayer Mfg. Jewelry Co., 76 N. Y. 365 (1879).

Transfer of Stock by an Executor.

The legal title to stock held by an executor may be transferred by a written assignment thereof, signed by him with his individual name. Mahaney v. Walsh, 16 A. D. 601 (1897).

Stockholder; May Become Such Without Receiving Certificate of Stock.

A certificate of stock is not necessary to make a subscriber to the stock of a corporation a stockholder, whether he becomes a subscriber before or after its organization. The certificate is merely evidence of that relation. Burr v. Wilcox, 22 N. Y. 551 (1860); Wheeler v. Millar, 90 N. Y. 353 (1882); Kohlmetz v. Calkins, 16 A. D. 518 (1897).

As between vendor and vendee delivery of stock sold is not necessary in order to pass title. Mahaney v. Walsh, 16 A. D. 601 (1897).

The relation of shareholder in a corporation is created by the subscription agreement, and it is not essential to create such relation that a certificate of stock be actually issued. Beals v. Buf. Expanded Metal Const. Co., 49 A. D. 589 (1900).

Restrictions Upon Transfers of Stock.

See, also, under this section "Agreements Restraining Transfers."

Unless there is a provision in the certificate of incorporation or in the by-laws that stock is transferable only on the books of the company, such provision in the certificate of stock itself does not have the effect of limiting the unconditional right of transferring them. Union Bk. v. U. S. Exc. Bk., 143 A. D. 128 (1911).

At common law a corporation has no lien upon its stock, and this rule applies in this State, in the absence of any statute to the contrary. Under section 51 a corporation cannot refuse to consent to a transfer of the stock of a stockholder until his indebtedness to the corporation is paid unless the provisions of the section appear upon the certificates of stock. Union Bk. v. U. S. Exc. Bk., 143 A. D. 128 (1911).

An agreement between the incorporators limiting their right to sell their stock and bonds to a sale to the other members, and providing if the other members did not wish to purchase the corporation should be dissolved, did not destroy its character as a corporation or make it a partnership. In re Fechheimer-Fishel Co., 212 Fed. 357, 367 (1914).

Where, outside the certificate of incorporation a majority of the stockholders of a corporation entered into an agreement whereby the parties agreed that if any of them desired to sell their stock, preference must be given to the other parties to the agreement before selling to any other party the court in its dictum said that if the period of operation of such provision was unlimited, it would be void as against public policy as imposing a perpetual restraint on the power of alienation of the stock. Brown v. Britton, 41 A. D. 57 (1899).

Although the question of public policy was adverted to by the court in discussing the foregoing case, yet in another case where an attempt had been made in the by-laws to place a restraint upon the right to alienate shares of stock, Judge Denio, in considering the effect of such a provision in the by-laws upon the right of a stockholder to transfer his stock, seems not to have had in mind any question of public policy respecting a restraint on the power of alienation of the stock, but on the other hand seemed inclined to view with favor such a provision if contained in the certificate of incorporation instead of the by-laws by saying that "there is a marked difference between a restraint upon alienating the shares of stock of a corporation, contained in the certificate of incorporation which must receive the assent of all the primary shareholders and by which all persons holding derivative interests must be bound, and a like restraint imposed by the directors in the form of a by-law which may or may not come to the knowledge of the shareholders, and which, if known, may be disapproved of by them." Bank of Attica v. Manufacturers' & Traders' Bk., 20 N. Y. 501 (1859).

A provision in a certificate of incorporation that "shares of stock shall not be transferable without the consent in writing of a majority of the board of directors and the granting of such consent shall rest wholly within the personal discretion of said board of directors," is invalid and against public policy. Opinion of Atty. Genl. (1910), p. 404.

Holder of Certificate for Shares May Compel Reissue of Same in Separate Certificates.

The holder of a stock certificate covering a certain number of shares, on tendering the same to the corporation, is entitled to have it reissue to him other certificates, dividing the stock into several blocks as indicated by him, and he may enforce that right by action if his request be refused. Powers v. Universal Film Mfg. Co., 162 A. D. 806 (1914).

Where a director of a corporation, owning one-half of its capital stock, surrenders his certificate of stock to the other directors, who own the remaining half of the capital stock, in order to obtain new certificates of smaller denominations, and the other directors issue to him certificates for only a portion of his stock, claiming that he has directed the other shares

to be sold for the benefit of the corporation, the defrauded director is entitled, in an equitable action to the transfer to him of the shares wrongfully withheld, and to an injunction pendente lite, restraining the directors from transferring or issuing certificates for such shares to any other person. Bedford v. Am. Aluminum & Specialty Co., 51 A. D. 537 (1900).

Transfer of Stock.

A statement on the stock certificate that the shareholder is entitled to so many shares of stock which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise, is a notification that whoever in good faith buys the stock and produces the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred to him, and such notification also assures the holder that the corporation will not transfer the stock to any one not in possession of the certificates. Bank v. Lanier, 11 Wallace (U. S.) 369 (1870); Buffalo German Ins. Co. v. Third Nat. Bk., 162 N. Y. 163 (1900).

The statutory provision that stock "shall be transferable in the manner prescribed in this chapter and in the by-laws" has reference solely to the transfer of stock from one stockholder to another, and not to the original issue of stock to subscribers. The issue of the original certificates is in no sense a transfer of stock. Burr v. Wilcox, 22 N. Y. 551 (1860).

When the owner sought to redeem a certificate of stock pledged by him to secure an indebtedness, which certificate was stolen from the pledgee, and was eventually purchased by defendant, held, where an accounting is necessary to ascertain plaintiff's indebtedness for which the stock had been pledged and to determine the amount of dividends due him, that an equitable action is proper and plaintiff is not obliged to proceed at law. Treadwell v. Clark, 190 N. Y. 51 (1907), affg. 114 A. D. 493. The fact that the plaintiff, when he delivered the certificate to the pledgee, wrote his name on the back thereof, did not under the circumstances make it negotiable and confer a good title upon the defendant, where the blank power of attorney on the assignment attached to the certificate was not signed or witnessed. Id. Such an action is governed by the limitation applicable to equitable actions and is in time if brought within ten years after plaintiff discovered defendant's wrongful possession of the certificate and his determination to retain it. Id.

The non-production and surrender of the certificate of stock at the time of the transfer is not fatal to the title of the transferee. It is only essential to the safety of the corporation, and may be waived by it at its own peril. The company has the means of knowing whether a particular stock certificate is outstanding or not, and power to insist upon its return before any transfer is made, and a buyer where the transfer is permitted by the corporation to be made on its books, by one to whose credit the stock is standing, has a right to presume that no certificate has issued, or if one has, that his vendor has duly surrendered it for cancellation. N. Y. & N. H. R. R. Co. v. Schuyler, 34 N. Y. 30, 80 (1865).

The owner of shares of stock may transfer his title by delivery of the certificate with a blank power of attorney indorsed thereon, signed by the owner of the shares named in the certificate, and such a delivery transfers the legal title to the shares as between the parties to the transfer, and not a mere equitable right. Knox v. Eden Musee Co., 148 N. Y. 441 (1896), revsg. 74 Hun 483.

When a stock corporation issues stock certificates in which it affirms that a person named therein is entitled to a certain number of shares of stock, it thereby holds out to persons who may deal in good faith with the person

named in the certificate that he is an owner and has capacity to transfer the shares. This rests on the principle of estoppel. Holbrook v. N. J. Zinc Co., 57 N. Y. 616 (1874).

In the absence of a statutory provision or by-law to the contrary, an original subscriber to the stock of a corporation can transfer his stock to another, and, if made in good faith, his liability as a stockholder ceases and the transferee will be substituted in his place with the same rights and liabilities as the original holder. Rochester & Kettle Falls Land Co. v. Raymond, 158 N. Y. 576 (1899), aff'g. 4 A. D. 600.

A transfer of stock, valid as between the parties, but not entered upon the books of the corporation, does not exempt the transferrer from liability as a stockholder to the creditors of the corporation. Shellington v. Howland, 53 N. Y. 371 (1873).

The vendor of stock is the nominal owner thereof until a transfer is made on the books of the corporation. Both vendor and vendee are liable to creditors. Johnson v. Underhill, 52 N. Y. 203 (1873).

As between the vendor and vendee the delivery of the certificate of stock, with the assignment and power indorsed, passes the entire title, legal and equitable, in the shares, notwithstanding that by the terms of the charter or by-laws of the corporation, the stock is declared to be transferable only on its books; such provisions are solely for the protection of the corporation, and can be waived or asserted at its pleasure; no effect is given to them except for the protection of the corporation; they do not incapacitate the shareholder from parting with his interest, and his assignment, although not on the books, passes the entire legal title to the stock, subject only to such liens or claims as the corporation may have upon it, and excepting the right of voting at elections. McNeil v. Tenth Nat'l Bk., 46 N. Y. 325 (1871), modifg. 55 Barb. 59; N. Y. & N. H. R. R. Co. v. Schuyler, 34 N. Y. 30, 80 (1865). He also takes the risk of the collection of dividends by his assignor, or of any lien the corporation may have on the shares, but in other respects his title is complete. Id.

By omitting to register his transfer, the holder of the certificate fails to obtain the right to vote, and may lose his stock by fraudulent transfer on the books of the company, by the registered holder, to a bona fide purchaser. N. Y. & N. H. R. R. Co. v. Schuyler, 34 N. Y. 30, 80 (1865).

In case of a sale of stock, actual delivery thereof is not necessary to perfect the title to the transferee. Mahaney v. Walsh, 16 A. D. 601 (1897); Mitchell v. West, 55 N. Y. 107; Caywood v. Van Ness, 145 N. Y. 600 (1895), affg. 74 Hun 28; Schoonmaker v. Vervalen, 9 Hun 138 (1876); Beardsley v. Beardsley, 138 U. S. 262 (1890).

Questions of fraudulent representations in the sale of corporate stock considered. Townsend v. Felthousen, 156 N. Y. 618 (1898); Darling v. Klock, 33 A. D. 270, affd., 165 N. Y. 623 (1901).

The provision empowering a corporation to make by-laws regulating the transfer of its stock merely authorizes it to prescribe the officer by whom the stock shall be transferred and the mode of its transfer. It does not authorize the imposition upon the stock of a penalty limiting the unconditional right of transferring it. Kinnan v. Sullivan County Club, 26 A. D. 213 (1898).

Where the corporation canceled an entry of stock standing on its books and issued a new certificate without a surrender of the outstanding certificate, a bona fide holder of the latter may maintain an action for damages upon the company's refusal to transfer it. The certificate is a continuing affirmation of the ownership of the specified amount of stock by the person desig-

nated or his assignee and such ownership the corporation is estopped from denying. Holbrook v. N. J. Zinc Co., 57 N. Y. 616 (1874); the pendency of an action to determine the title of the original holder is not constructive notice to a purchaser in good faith. Id.

The transferee, in good faith and for value, holds his title free from latent equities between prior parties in the line of transmission. Under the doctrine of implied agency and the application of the principle of estoppel to the situation, the true owner is in many cases precluded from asserting his title. But the title of the true owner of a lost or stolen certificate may be asserted against any one subsequently obtaining its possession, although the holder may be a bona fide purchaser. Knox v. Eden Musee Co., 148 N. Y. 441 (1896), revsg. 74 Hun 483, distinguishing McNeil v. Tenth Nat. Bk., 46 N. Y. 325; N. Y. & N. H. R. R. Co. v. Schuyler, 34 N. Y. 30, and citing Anderson v. Nicholas, 28 N. Y. 600; Bangor Elec. Lt. Co. v. Robinson, 52 Fed. 520; Biddle v. Boyard, 13 Pa. St. 150; Barstow v. Savage M. Co., 64 Cal. 388; Shaw v. R. R. Co., 101 U. S. 557.

A transfer of stock upon the corporate books, standing alone, is not sufficient to constitute a valid gift of the stock, but in addition the transferee must be given a dominion over the stock. The possession of the certificate is not, however, essential to the validity of the gift. Richardson v. Emmett, 61 A. D. 205, revsd on other grounds, 170 N. Y. 412 (1902).

Where a valid sale of stock, pledged for a debt, has been made upon default in payment, and the pledgee has purchased the same, neither the pledgor nor his personal representatives, in case of his death, are necessary parties to an action to compel the corporation to transfer the stock. Buffalo German Ins. Co. v. Third Nat. Bk., 19 Misc. 564, affd., 29 A. D. 137, revsd. on other grounds, 162 N. Y. 163 (1900).

An executor has the right to sell and transfer stock and a purchaser in good faith takes good title and is not responsible for the application of the purchase money, nor is the title affected by knowledge of the existence of a claim against the estate generally. Leitch v. Wells, 48 N. Y. 585 (1872); Mahaney v. Walsh, 16 A. D. 601 (1897).

The legal title to stock held by an executor is transferable by a written assignment thereof, signed by him merely with his individual name, and such assignment carries with it a right of action for a conversion of the stock. Mahaney v. Walsh, 16 A. D. 601 (1897).

Where a director, owning one-half of the capital stock of a corporation, surrenders his certificate of stock to the other directors, who own the remaining half of the capital stock, in order to obtain new certificates of smaller denominations, and the other directors issued to him certificates for only a portion of his stock, he is entitled to maintain an action against such directors to compel a transfer to him of stock wrongfully withheld, and, under section 603 of Code of Civil Procedure, to an injunction pendente lite, restraining them from issuing such shares to any other person. Bedford v. Am. Aluminum & Specialty Co., 51 A. D. 537 (1900).

Where the holder of a certificate for 216 shares of stock, transfers seventy-five shares thereof, and thereafter, before the seventy-five shares thus transferred are entered upon the books of the corporation in the name of the transferee, transfers all of the 216 shares to another party, he, by such last-mentioned transfer, wrongfully exercises ownership over the seventy-five shares, which constitute a conversion thereof. Mahaney v. Walsh, 16 A. D. 601 (1897).

Transfer of Stock by Indorsement in Blank.

See, also, section 67 of the Stock Corporation Law under "Stolen Certificates of Stock."

It is well settled that a blank transfer of a certificate of stock with an irrevocable power of attorney to transfer, signed by the person who appears by the certificate to be the owner, confers upon the holder of the certificate apparent title to the stock and that the bona fide purchaser of such stock can hold the stock against the real owner who is estopped from asserting his title, except where the transferer obtained the certificate and assignment feloniously. Mitchell v. Boyer, 160 A. D. 565 (1914), and cases cited.

Although a certificate of stock is not a negotiable instrument, an assignment with a power of attorney indorsed upon the certificate in blank, except as to signature and witness, presents such indicia of title that an innocent holder obtains good title, and the true owner is precluded from disputing the existence of title or power, which through negligence or mistake he has allowed to appear to be vested in the person making the transfer. Talcott v. Standard Oil Co., 149 A. D. 694 (1912), following McNeil v. Tenth Nat. Bk., 46 N. Y. 325. If the assignment and power, though upon a separate paper, identify by description the stock intended to be assigned, the same rule applies. Id.; also Smith v. Savin, 141 N. Y. 315 (1894).

A bank which obtains from its cashier a certificate of stock, indorsed in blank by the owner and left by him with the cashier, as security for a loan made by it to the cashier without notice of any infirmity in his title to the certificate, obtains a good title thereto as against the person to whom the certificate was originally issued and who claimed to have lost the same. Knowledge upon the part of the cashier that he was without authority to pledge the stock is not chargeable to the bank, as in the matter of the loan he was acting in his own interest and adversely to the interest of the bank. Brady v. Mt. Morris Bk., 65 A. D. 212 (1901).

Good title to stock may be given by delivery of the certificate indorsed in blank. Peo. ex rel. Rottenberg v. Utah Gold & Copper M. Co., 135 A. D. 418 (1909).

The bare production of a certificate of stock which the holder claims to have acquired by gift and whose name was inserted in a blank indorsement, is insufficient to establish his title without proof of the authenticity of the assignment thereof, and this is true although the assignment purported to have been made over 30 years prior to the action. Longworth v. East River Nat'l Bk., 160 A. D. 737 (1914).

Conversion of Stock by Tenant in Common.

Where the owner of shares of stock for a valuable consideration assigned to the plaintiff his right, title and interest therein to the extent of three-eighths of such stock the relations of the parties with respect to the stock were those of tenants in common and when the defendant sold such stock the plaintiff became at once the owner of three-eighths of the purchase price and was entitled to immediate possession thereof upon demand. After such demand a refusal amounts to a conversion. Warner v. Cecil, 84 Misc. 21 (1914), and cases cited.

Where plaintiff gave to co-owner of corporate stock authority to convert his stock into that of other corporations and defendant confused it with stock of others so that stock ownership could not be traced, defendant was liable for average price at which stock sold, with interest on such value, and dividends earned prior to last sale of stock, less credits for stock returned to plaintiff. Saul v. Barse, 158 A. D. 560 (1913).

Corporate Liability for Fraud of Agent Having Authority to Sign or Issue Certificates.

The liability of the corporation where the agent had authority to sign or issue certificates, is determined by an application of the general rules of law that govern the relations of principal and agent as developed and applied to corporations acting solely through such agency. The principal is liable to a third person in a civil action for the fraud of his agent perpetrated by the latter in the course of his employment, although the principal did not authorize, justify or know of the misconduct. Jarvis v. Manhattan Beach Co., 148 N. Y. 652–657 (1896), affg. 75 Hun 100.

Where the by-laws of a corporation provided that stock should only be transferred on the corporate books on surrender of the issued certificates, and the transfer agent, who was authorized to sign and issue new certificates on transfer and surrender of the old and who was also authorized to issue certificates to original subscribers, fraudulently issued stock in excess of the charter limitation which purported to be both original and transferred stock, and an action was brought by the corporation against the holders of the stock to cancel the same and in which the defendants asked for damages, it was held that the stock must be canceled for it could not be deemed valid and thus become a part of the capital of the company. The defendants, however, were awarded damages because the issuing of the certificates was within the scope of the real or apparent authority of the transfer agent and upon the doctrine of agency that a principal is liable when he has clothed his agent with power to do an act depending upon the existence of some extrinsic fact necessarily and peculiarly within the agent's knowledge, and of the existence of which the executing power is a representation; and the third party dealing with the agent in good faith may rely upon the representation and the principal is estopped from denying liability. N. Y. & New Haven R. R. Co. v. Schuyler, 34 N. Y. 30 (1865).

The rule which imposes a liability upon the principal for the unauthorized acts of his agent applies to a spurious, but apparently genuine, certificate of stock, wrongfully issued by a person who was at the time secretary, treasurer and transfer agent, and invested with authority to sign, countersign and seal valid certificates of stock, and who, when he issued the certificate in question, was acting within the scope of his apparent authority. Hellman v. Forty-second St. & Grand St. Ferry R. R. Co., 74 Hun 529 (1893), affd., 148 N. Y. 727.

When the officers of a corporation, authorized to issue stock certificates, fraudulently issue certificates for shares in excess of the number the corporation is authorized to issue, the corporation is liable to an innocent holder in damages for such overissue to the extent of the value of the shares. Archer v. Dunham, 89 Hun 387 (1895).

Where the certificates of stock of a company were under the by-laws to be signed by the president and treasurer and countersigned by the transfer agent, and the secretary of the company was such transfer agent, and after forging the name of the president to the certificate he affixed the corporate seal thereto and signed the same as transfer agent and thereupon issued the certificate, a holder for value can maintain an action for damages against the corporation, for being the transfer agent, the officer had the apparent authority to make the final declaration as to the validity of the shares and such issuance was a representation that the prior signatures were genuine. Fifth Ave. Bank v. Forty-second St. & Grand St. Ferry R. R. Co., 137 N. Y. 231 (1893).

A corporation having in charge of its transfers and of its stock ledger a transfer clerk who sold to the plaintiff a certificate bearing the genuine signatures of the proper officers and of the registrar of transfers and having on its face all the essential evidence of genuineness and having indorsed thereon a blank form of transfer purporting to be signed by the person named in the certificate witnessed by the clerk, is liable to a bona fide holder of said stock for damages sustained because of the fraud of the clerk. The corporation is estopped from denying the liability, for the certificate was presented for sale apparently in proper form for transfer by the very agent of the corporation whom it had held out to be the person having power to represent and act for it in making the transfer. Irrespective of the liability of the corporation because of the implied authority of the transfer agent to issue the certificates, it was held responsible because the purchasers of the certificate made inquiry both of the registrar and of the corporation and were informed by both that the certificate was in a condition for transfer. Jarvis v. Manhattan Beach Co., 148 N. Y. 652 (1896), affg. 75 Hun 100.

A corporation cannot maintain an action to enjoin its officers from transferring certificates claimed to be an overissue in the absence of allegations showing that the corporation has the right to issue stock, that the certificates are signed by officers having authority to execute them and that their circulation will injure the corporation or its bona fide stockholders. Reno Oil Co. v. Culver, 60 A. D. 129 (1901), revsg. 33 Misc. 717.

Corporate Liability where the Agent had no Authority.

A corporation is not liable to a bona fide holder of its stock where the president of the corporation who was previously transfer agent forged the name of a former treasurer to a blank certificate (which for convenience in making transfers during his absence had been signed by the former president), signed the same as transfer agent, antedated it and then negotiated it for value, because as the president was not then the transfer agent there was no apparent authority in him to sign as such nor did he have apparent authority as president to take part in the issue of a certificate bearing an earlier date. Manhattan Life Ins. Co. v. Forty-second St. & Grand St. Ferry R. R. Co., 139 N. Y. 146 (1893), distg. Fifth Ave. Bank v. Same, 137 N. Y. 146 (1893).

The act of a general manager of a corporation, without any express or implied authority to issue certificates for any purpose, in issuing as valid, as security for a personal debt, surrendered certificates of stock directed by its president to be canceled, and of which the company had never invested the manager with indicia of ownership, is a willful and criminal act, and upon no principle of agency can the corporation be made liable therefor, even at the suit of an innocent third party. Knox v. Eden Musee Co., 148 N. Y. 441 (1896), revsg. 74 Hun 483. The by-laws of a corporation are primarily for its own and stockholders' protection, and neglect by its officers in a single instance to obey a by-law which directs the cancellation of the certificates of stock is not such negligence as will render the corporation liable. Id.

The distinction between liability in cases where the agent has and where he has not authority to sign or issue certificates is clearly stated and the foregoing cases reviewed in Clarkson Home v. Mo., etc., Ry. Co., 182 N. Y. 47 (1905).

Where a board of directors appointed an executive committee, giving it no power to issue stock, and thereafter stock was issued by the president of the

corporation under the authority of such committee and the directors neither authorized nor ratified such issue, no title was conferred upon one who was not a purchaser in good faith for full value. Ryder v. Bushwick R. R. Co., 134 N. Y. 83 (1892).

Estoppel of Owner Because of Apparent Authority Conferred upon Agent or Broker.

Where the owner of a stock certificate pledges it with a broker to secure advances, having indorsed thereon a power of attorney to make all necessary transfers but with limited authority to use the same, and the broker in violation of his duty pledges the stock for his own purposes to an innocent third party, the latter need not surrender the certificates to the owner. The owner by conferring upon another apparent title to or power of disposition over the stock is estopped from asserting title as against an innocent third party who has dealt with the apparent owner on the strength of the indicia of ownership. McNeil v. Tenth Nat'l Bk., 46 N. Y. 325 (1871), modif'g 55 Barb. 59.

The same principle is applicable to a certificate of deposit. Moore v. Metropolitan Nat'l Bank, 55 N. Y. 41 (1873); unless it appears on its face to be assignable only on the books of the company. Zander v. N. Y. Security & Trust Co., 178 N. Y. 208 (1904).

Mere possession by whatever means acquired if there be no other evidence of property or authority to sell from the true owner will not enable the possessor to give good title. McNeil v. Tenth Nat'l Bank, supra; Bangor El. Lt. & Power Co. v. Robinson. 52 Fed. 520 (1892).

If the holder of the certificate indorsed in blank does not claim to be the owner but represents himself as agent having authority to borrow, the mere possession of the certificate does not clothe the agent with apparent authority to dispose of the same and thus estop the owner. Merchants' Bank v. Livingston, 74 N. Y. 223 (1878).

Where a bank in good faith makes a loan to its cashier on a certificate of stock which was indorsed in blank by the owner and left with the cashier either as security or for use in a note transaction, the bank obtains good title thereto even if the cashier had no authority to pledge the stock. The knowledge of the cashier was not that of the bank for he was not acting as its agent. Brady v. Mt. Morris Bank, 65 A. D. 212 (1901).

The owner of stock pledged it with brokers for a loan and transferred it to their names to enable them to collect dividends. Upon the redemption of the stock the brokers executed the usual power of attorney thereon and delivered the certificate to a messenger sent by the owner. The messenger converted it and disposed of the stock, and in an action in trover against the innocent holder the owner recovered because no indicia of ownership or apparent title had ever been conferred upon the messenger by the owner's voluntary act, nor were the brokers authorized to give such apparent title. The doctrine of estoppel cannot extend to a case where the certificate has been stolen or fraudulently obtained from the owner. Hall v. Wagner, 111 A. D. 70 (1906).

The owner is entitled to the stock as against all persons except the particular one who has actually in good faith advanced money upon the apparent title conferred by the owner upon his broker. Where therefore the broker pledged the certificates together with other certificates and the pledgee has been reimbursed from such other certificates belonging to other creditors of the broker, such other creditors are not entitled to contribution as they

cannot insist on the estoppel. Tompkins v. Morton Trust Co., 91 A. D. 274 (1904), affd. on op. below, 181 N. Y. 578; and where the creditor of the broker sells the stock wrongfully pledged together with other stock originally held by the broker as security for purchasers on margin and thus rightfully pledged, the owner of the converted stock is entitled to have his claim satisfied in full out of any surplus and need not share pro rata with those whose stock was pledged for margins. Matter of Mills, 125 A. D. 730 (1908).

If the owner simply indorses a certificate in blank but does not sign the power of attorney or assign the certificate, there is no apparent title in the holder and the owner is not estopped from asserting his right. Treadwell v. Clark, 114 A. D. 493 (1906), affd. on the ground that defendant was not a holder in good faith, 190 N. Y. 51 (1907).

To entitle a purchaser to the protection of a court of equity as against the legal title or a prior equity, he must not only be a purchaser without notice, but he must be a purchaser for a valuable consideration actually paid; he must have paid the purchase-money, or some part thereof, or have parted with something of value upon the faith of such purchase, before he had notice of the prior right or equity. Mere security given for the purchase-money, or a credit upon a pre-existent debt, is not sufficient. Weaver v. Barden, 49 N. Y. 286 (1872); Strickland v. Magoun, 119 A. D. 113 (1907), affd. on op. below, 191 N. Y. 545.

Rights Between Principal and Broker.

The broker who carries stock for a customer on margin is not the owner thereof but is essentially a pledgee. Neither the right of the broker to re-pledge the stock nor the right to sell for his protection when the margin is exhausted, nor the right to return different certificates alters the relation. Richardson v. Shaw, 209 U. S. 365 (1908), following Markham v. Jaudon, 41 N. Y. 235 (1869), and citing many New York cases; Strickland v. Magoun, 119 A. D. 113 (1907), affd. on op. below, 190 N. Y. 545 (1907).

Remedy of Stockholder Upon Corporation's Refusal to Transfer Stock on its Books.

A stockholder, upon tendering to the corporation certificates of stock duly transferred to him by the former owner, is entitled to have the transfer entered on the corporate books and to have new certificates issued to him. Powers v. Universal Film Mfg. Co., 162 A. D. 806 (1914); see, also, Brown v. Arbogast & Bastian Co., 162 A. D. 603 (1914).

Mandamus will not lie to compel a corporation to transfer stock on its books, the remedy of the holder of the stock being by action at law against the corporation which wrongfully refused to transfer the stock. Peo. ex rel. Rottenberg v. Utah Gold & Copper M. Co., 135 A. D. 418 (1909), and cases there cited.

If the refusal to transfer stock was wrongful an action for damages is an appropriate remedy, and a transferrer of the stock is entitled to maintain the action, for it is as much his right and duty to procure the proper transfer to be made upon the corporate books as it is of the transferree. Lockwood v. U. S. Steel Corpn., 153 A. D. 655 (1912), and cases cited; revsd. on other grounds, 209 N. Y. 375.

The fact that a foreign corporation maintains in the city of New York an office for the transfer of stock upon its books and of delivering new certificates when such transfers have been made, constitutes New York the

domicile of the corporation, so far at least as the registry and transfer of shares therein are concerned. Lockwood v. U. S. Steel Corpn., 209 N. Y. 375 (1913).

One who has sent a stock certificate to the proper officer to have it transferred and a new certificate issued cannot maintain an action against the officer personally for his refusal to make the transfer. His cause of action is against the corporation. Cooley v. Curran, 54 Misc. 221 (1907); id., 54 Misc. 572 (1907).

The improper refusal of a transfer agent to transfer stock does not render him personally liable for damages to the stockholder. The cause of action is against the corporation. Dunham v. City Trust Co., 115 A. D. 584, affd., 193 N. Y. 642 (1908).

When certificates of stock are transferable without restriction, the corporation cannot discriminate and refuse to transfer certificates to a person who is hostile to it. Rice v. Rockefeller, 134 N. Y. 174 (1892).

An owner and transferee of stock in a foreign corporation may compel the corporation to recognize the transfer, record it on their books and issue new stock in place of the old. Ernst v. Elmira Municipal Impt. Co., 24 Misc. 583 (1898).

Agreements Restraining Transfers.

An agreement between the stockholders of a corporation that no one of them will sell, assign or dispose of his stock, without having first given the other parties an opportunity to purchase, does not preclude a party from transferring a legal title to his stock without the consent of the others, and in violation of the agreement, and this although the transferee was cognizant of the agreement, at the time of the transfer. In re Argus Co. v. Manning, 138 N. Y. 557 (1893). Enforcement of specific performance of such an agreement by a court of equity is in the discretion of the court. Id.

An agreement between stockholders not to sell, assign, pledge or give power of attorney to vote, or agree to sell the stock respectively owned by the parties without the concurrent consent of all is void on its face. In re Argus Co. v. Manning, 138 N. Y. 557 (1893); Fisher v. Bush, 35 Hun 641 (1885). See, also, Titus v. Prest., etc., G. W. Turnpike Road, 61 N. Y. 237 (1874).

It seems that where an agreement is made between stockholders that if any of them desire to sell their stock, they shall give the preference to the other parties of the agreement before selling to any other party, that if the period of operation of such provision was unlimited it would be void as against public policy, as imposing a perpetual restraint on the power of alienation of the stock. Brown v. Britton, 41 A. D. 57 (1899). See, however, Scruggs v. Cotterill, 67 A. D. 583 (1902), holding that where four persons who were the sole parties in interest in a corporation gave to another party a first option to purchase his shares at a certain price whenever he desired to sell, the contract would be specifically enforced.

The right of a stockholder to vote and to transfer his stock can be limited, if at all, only by an express statutory provision, or by a provision in the certificate of incorporation. A by-law by which a stockholder is prevented from voting upon or transferring his stock until all dues thereon have been paid, is invalid, even as against a person who agreed to take his stock subject to the by-laws. Kinnan v. Sullivan County Club, 26 A. D. 213 (1898).

A provision on the face of a certificate of stock that the shares therein referred to are held "subject to the conditions and stipulations contained

in the articles of association above mentioned," is sufficient notice to put a purchaser of the shares upon inquiry to ascertain what the conditions and stipulations are. Gibbs v. Long Island Bank, 83 Hun 92 (1895).

When certificates of stock contain restrictions which were originally unauthorized, the stockholders may, by lapse of time and course of dealing, acquiesce in and ratify the restriction. Reynolds v. Bank of Mt. Vernon 6 A. D. 62, affd., 158 N. Y. 740 (1899).

Rights and Liabilities of Stockholders.

A stockholder may proceed against a corporation if it negligently cancels his stock and issues certificates therefor to another. St. Romes v. Levee Cotton Co., 127 U. S. 614 (1887).

Persons who are merely stockholders and not officers of a corporation hold no position of trust or confidence toward each other, and one in accepting an offer to purchase his stock by another is under no obligation to volunteer the information that the company is insolvent. Rothmiller v. Stein, 143 N. Y. 581 (1894), affg. 8 Misc. 137.

When an agreement has been made with a person, as a stockholder, for his protection as such, and another succeeds to his stock, his successors or assigns become entitled to the protection which the contract gave to him. Einstein v. Rochester Gas & Elec. Co., 77 Hun 149 (1894), affd., 146 N. Y. 46.

A stockholder has a right to transfer his certificate of stock, which is liable to assessment, and if the certificate so surrendered is delivered to the corporation and canceled by it, and a new certificate issued to the transferee, the corporation thereby surrenders all claim upon the original stockholder, and accepts the transferee in his place. Rochester & Kettle Falls Land Co. v. Raymond, 158 N. Y. 576 (1899), affg. 4 A. D. 600. See, also, cases therein cited.

Remedies of a stockholder who is denied recognition as such. King v. Barnes, 113 N. Y. 476 (1889); Robinson v. National Bk., etc., 95 N. Y. 637 (1884); Cushman v. Thayer Mfg. Co., 76 N. Y. 365 (1879); Burrall v. Bushwick R. R. Co., 75 N. Y. 211 (1878); Hughes v. Vermont C. M. Co., 72 N. Y. 207 (1878); Ormsby v. Same, 56 N. Y. 623 (1874); Peckham v. Van Wagenen, 83 N. Y. 40 (1883).

The complaint in an action by minority stockholders to restrain the majority stockholders from proceeding in fraud of their rights must set forth the unlawful acts of the defendants which disclose the alleged fraud; mere charges of conspiracy, fraudulent combination, evil intent, etc., are insufficient. Oelbermann v. N. Y. & Northern Ry. Co., 14 Misc. 131 (1895).

The majority stockholders owe to the minority much the same duty which directors owe to all the stockholders. All must be permitted to share equally in the benefits, and the law requires, both from the officers of the corporation and the majority stockholders, the utmost good faith in the management and control of the corporate business and property. But between themselves stockholders owe no duty to each other, and in the purchase and control of his stock or any of the corporate obligations each stockholder acts for himself, and he is in no sense a trustee for others. Farmers' Loan & Trust Co. v. N. Y. & N. Ry. Co., 78 Hun 213 (1894); Gamble v. Queens Co. Water Co., 123 N. Y. 91 (1890). See, also, 150 N. Y. 410 (1896).

Subscriptions to Stock.

See also cases cited under Stock Corporation Law, § 53, as to subscriptions after incorporation.

A subscription to the certificate of incorporation, with a statement of the number of shares opposite the name, is a binding subscription for the stock, and takes effect upon the filing of the certificate. Phœnix W. Co. v. Badger, 67 N. Y. 294 (1876); Powers v. Knapp, 71 Hun 371 (1893).

A subscriber who was an original incorporator of a company, and, as a director, took part for some months, in the conduct of its business, cannot, in an action against him to recover an alleged unpaid balance upon two separate subscriptions for shares of stock, one of which was an original subscription made for the purpose of organization, question the validity of the organization of the corporation. United Growers' Co. v. Eisner, 22 A. D. 1 (1897).

A written agreement to subscribe for shares of stock in a proposed corporation constitutes a valid subscription for such shares, which the corporation, when organized, may elect to enforce. Non-Electric Fibre Mfg. Co. v. Peabody, 21 A. D. 247 (1898).

Where the intention of subscribers to stock of a corporation about to be formed is clearly that they shall become stockholders without further action by them the corporation, when formed, may accept their subscriptions at any time before revocation. Avon Springs Sanitarium Co. v. Weed, 119 A. D. 560 (1907), revsd. on other grounds, 189 N. Y. 557; Buffalo & J. R. R. Co. v. Clarke, 87 N. Y. 294 (1882); Buffalo & P. R. R. Co. v. Hatch, 20 N. Y. 157 (1859); Buffalo & N. Y. C. R. R. Co. v. Dudley, 14 N. Y. 336 (1856).

A subscription for stock is not affected by a secret collateral contract. Yonkers Gazette Co. v. Jones, 30 A. D. 316 (1898).

Subscriptions to capital stock, induced by the false representations of an agent authorized to obtain subscriptions, may be set aside by an action in equity to rescind the subscription. Talmadge v. Sanitary Security Co., 31 A. D. 498 (1898).

A subscriber cannot be released from liability to a corporation upon his subscription to its stock by a promise to that effect, without consideration, by its president, in the absence of any action upon the part of the corporation itself. United Growers' Co. v. Eisner, 22 A. D. 1 (1898).

False representations in inducing subscription to the stock of a corporation considered. Seeber v. People's Building-Loan & Sav. Assn., 36 A. D. 312 (1899).

The directors who hold all the stock of the corporation, which has never done any business and has no creditors, and where none of the subscriptions to its stock have been paid in in cash, may release one another from the payment of their stock subscriptions. Non-Electric Fibre Mfg. Co. v. Peabody, 21 A. D. 247 (1898). See, also, provisions for the dissolution of such corporations. Gen. Corp. L. § 220 and § 221.

The distinction between, first, an agreement to form a corporation and subscribe to its stock, and secondly, an agreement merely to subscribe for stock in a corporation thereafter to be formed, without any promise to form such corporation is clearly stated in Yonkers Gazette Co. v. Taylor, 30 A. D. 334 (1898).

An instrument which, after referring to a plan to form a corporation, states that "the undersigned hereby subscribe for the number of shares set opposite our names," is absolute and unconditional, and is binding when it is acted upon by the corporation then in contemplation of formation, and the fact that it was incorporated under a different name, because of the Secretary of State's decision that the name originally adopted could not be used, does not relieve the subscriber from his liability. Yonkers Gazette Co. v. Taylor, 30 A. D. 334 (1898).

When a certificate of incorporation expresses no illegal purpose on the part of the promoters, and the transaction between the corporation and subscribers for its stock is valid on its face, subsequent corporate acts, manifesting an illegal purpose on the part of the directors, will not retroact so as to affect the corporation itself with the vice of illegality and render contracts of subscription void. U. S. Vinegar Co. v. Foehrenbach, 148 N. Y. 58 (1895).

The payment of ten per cent. when the agreement to incorporate is made is not essential to its validity. Yonkers Gazette Co. v. Taylor, 30 A. D. 334 (1898); United Growers' Co. v. Eisner, 22 A. D. 1 (1898).

An agreement to take stock in a corporation to be thereafter formed, becomes binding upon the organization of the corporation and its acceptance of the agreement. Buffalo & J. R. R. Co. v. Clarke, 87 N. Y. 294 (1882); Buffalo & P. R. R. Co. v. Hatch, 20 N. Y. 157; Buffalo & N. Y. C. R. R. Co. v. Dudley, 14 N. Y. 336.

The right to sell shares is a personal one, to be exercised by the stockholder as an individual and so is the right to grant or withhold assent to change their relative value. Campbell v. Am. Zylonite Co., 122 N. Y. 455, 34 St. Rep. 38 (1890).

Sales of Stock Induced by Fraud.

An individual stockholder who has been induced to sell stock to the managing officers of a corporation for an inadequate consideration by means of false representations as to the condition of the corporation and the amount of dividends it could pay is entitled to recover damages, even though the fraud may have wronged the corporation and would support an action on its behalf by the stockholder. Von Au v. Magenheimer, 126 A. D. 257 (1908), affd., 196 N. Y. 510.

Where plaintiff has been induced to sell stock because of defendant's misrepresentations as to its lack of value, it is necessary to allege and prove damage resulting therefrom. Cohen v. Kohler, 158 A. D. 435 (1913).

Purchases of Stock Induced by Fraud.

See, also, the provisions of section 35 of the Stock Corporation Law, ante, and cases cited thereunder.

A person who has been induced by fraudulent representations to purchase stock has, upon discovery of the fraud, three remedies, either of which he may elect. He may rescind the contract absolutely and sue in an action at law to recover the consideration parted with upon the fraudulent contract; but he must first restore, or offer to restore, to the party sued whatever he has received by virtue of the contract. He may bring an action in equity to rescind the contract and as such action is not founded upon a rescission, but to obtain one, it is sufficient to offer in the complaint to return what has been received and make tender of it on the trial. Lastly, plaintiff may retain what he has received and bring an action at law to recover the damages sustained, the measure of which is the difference between the actual value of the stock and what it should be if as represented. Vail v. Reynolds, 118 N. Y. 297, 302 (1890), and cases cited.

An allegation that the vendor falsely represented the stock to be fully paid is sufficient, since the cost of a thing is a material allegation well adapted to affect the action or judgment of the purchaser, for a false statement of which an action will lie. Van Slochen v. Villard, 207 N. Y. 587 (1913), affg. 154 A. D. 161.

An allegation in a complaint that the vendor falsely represented the stock to be non-assessable, knowing the statement to be false, is sufficient to sup-

port an action to recover damages for fraudulent representations, where the stock was that of a foreign corporation, since a foreign law is a matter of fact and our courts cannot decide, as a question of law upon a demurrer, that it is impossible under the laws of the foreign State that the stock can be assessed. Van Slochen v. Villard, 207 N. Y. 587 (1913), affg. 154 A. D. 161.

Directors, who are also the promoters, knowing that attempts are being made to induce the public to subscribe to the stock of the corporation, or to purchase its securities, cannot wilfully shut their eyes to the acts of other officers or agents of the corporation as to methods used to procure money from the public. They cannot authorize the issue of circulars and other appeals to the public to secure subscriptions and not be responsible for false and fraudulent statements by which investments in its securities are procured. Rives v. Bartlett, 156 A. D. 552 (1913).

The promoter of a corporation, whether he be a director or not, who knowingly issues or sanctions the circulation of a false prospectus containing untrue statements of material facts tending to mislead and to induce purchases of its stock or other securities is responsible to those who are injured thereby, and where there are a number of such promoters all of them are liable in damages for the fraud of an agent employed by them to effect the sale of the corporate securities without reference to their own moral guilt or innocence. Downey v. Finucane, 205 N. Y. 251 (1912), affg. 146 A. D. 209; see, also, Lane v. Fenn, 146 A. D. 205 (1911).

The fraudulent intent of the author and publisher of a prospectus may be inferred from the falsity of the statements therein contained. Where a prospectus is circulated, as an inducement to take stock in a corporation, the language is to be interpreted by the effect it would produce upon an ordinary mind; and, in estimating the probability of subscribers being misled, the court may take into consideration not only the facts stated therein but also the facts suppressed. Downey v. Finucane, 205 N. Y. 251 (1912), affg. 146 A. D. 209.

Where a person has been induced to purchase stock by false and fraudulent representations of material facts contained in a prospectus, he may rescind the purchase and recover back the purchase price from the corporation, and he is also entitled to recover from the individual directors who knowingly issued or sanctioned the circulation of such false prospectus any damage that he sustained in consequence of the fraud. Lehman-Charley v. Bartlett, 135 A. D. 674 (1909), affd., 202 N. Y. 524. Such individual directors and the corporation may be joined as defendants in one action. Id.

One who becomes a director to facilitate the sale of stock of a corporation, knowing it to be insolvent, is liable to a subscriber for such stock, especially when he had actual knowledge of false statements, circulars and reports issued by his co-directors. Directors owe a certain measure of duty not only to existing stockholders, but as well to those from whom the corporation solicits subscriptions for its stock or securities, and they are in that behalf bound to use some degree of both diligence and care in the performance of their duties, and in an action for damages by a stockholder, are liable for negligence in failing so to do. This is well established, although the degree of diligence and care varies with the circumstances of each case and no general rules will cover all states of facts. Childs v. White, 158 A. D. 1 (1913).

Corporate officers who, knowing that circulars offering stock for sale contain false statements as to the condition of the corporation, and reap the benefits of a sale so induced, are liable for fraud. Spotten v. DeFreest, 140 A. D. 792 (1910). The measure of damages for fraud in the sale of stock is the difference between the actual value of the stock sold and the value it

would have had if the stock had been as represented. Id.; Vail v. Reynolds, 118 N. Y. 297, 301 (1890); Hubbell v. Meigs, 50 N. Y. 480, 491 (1872); Krumm v. Beach, 96 N. Y. 398, 407 (1884); Whitney v. Allaire, 1 N. Y. 305, 312 (1848).

In an action against a corporation and its individual directors to rescind a purchase of stock and recover the purchase price, because of false and fraudulent representations, the plaintiff is not entitled to a lien on the property of the corporation to the extent of his judgment, where it appears that there are other stockholders in the same position as he who are not parties to the action. Lehman-Charley v. Bartlett, 135 A. D. 674 (1909), aff'd., 202 N. Y. 524.

In an action at law to recover damages for deceit whereby one was induced by fraudulent representations to make a contract for the purchase of stock, the six-year statute of limitations applies and begins to run at the date of the execution of the contract and not upon the making of a subsequent part payment for the delivery of the certificates. Ball v. Gerard, 160 A. D. 619 (1914).

A receiver will not be appointed in a representative action brought by a stockholder against directors alleged to have induced plaintiff to purchase stock by fraud and for unlawfully issuing stock and declaring dividends, where it appears that the directors, who had intrusted the shares of stock to a co-director, repudiated his unlawful acts when discovered, compelled partial restitution, removed him from the offices of treasurer and general manager, undertook criminal proceedings against him, and the stockholders had appointed a committee to preserve the assets and prevent further waste. Sedgwick v. Seward Dev. Co., 144 A. D. 455 (1911).

If a person makes or causes to be made to the public false statements as to the solvency and prosperity of a corporation for the purpose of inducing purchases of its stock, any person acting upon such representations and suffering loss thereby is entitled to damages. Keeler v. Seaman, 47 Misc. 292, 295 (1905); Brackett v. Griswold, 112 N. Y. 454 (1889).

To sustain an action for damages for misrepresentation and deceit, it is not necessary either that the false representation shall be made directly to the plaintiff by the defendant, or that it shall have been made to any one by the defendant personally, for if the latter authorized it and caused it to be made, his liability is the same as though he made the false representation himself. Keeler v. Seaman, 47 Misc. 292, 295 (1905).

The rule is that to rescind a contract for the sale of stock upon the ground of fraud, as to recover damages upon the ground of fraud, scienter must be alleged and proved; and while either the representation of a fact, knowing it to be false, made with intent to deceive, or representation of actual knowledge of a fact when no such knowledge exists and the fact is not true, is sufficient to support a cause of action, one of these conditions must be proved to exist to sustain any action based upon fraud. Garrett Co. v. Appleton, 101 A. D. 507 (1905), aff'd., 184 N. Y. 557.

Where a person has by fraud been induced to subscribe for stock, he may bring an equitable action to procure a rescission of the contract, a cancellation of his subscription and the removal of his name from the corporate books. Bosley v. Natl. Mach. Co., 123 N. Y. 550 (1890). The statute does not commence to run against the cause of action until after the discovery of the fraud. Id.

Mere false and fraudulent statements as to the value of shares of stock, made by a vendor, will not sustain an action for fraud by one who purchased in reliance upon such statements; but the rule is otherwise where false and

fraudulent statements are made in relation to the property owned by the corporation, its business, pecuniary condition, the price at which its stock was selling in the market, or any other fact affecting its value, with intent to deceive and defraud the vendee, where the latter in reliance thereon had made the purchase and been injured thereby. Ellis v. Andrews, 56 N. Y. 83, 87 (1874).

A delay in rescinding a contract which was induced by the statements of the vendor does not constitute laches. Jackson v. Foley, 53 A. D. 97, 104 (1900).

A false statement deliberately made by a vendor of property to the party proposing to purchase, as to the price which he paid for it shortly before to a former owner, which was intended to and did influence the purchaser, is a sufficient basis upon which to predicate a finding of fraud. Fairchild v. McMahon, 139 N. Y. 290 (1893).

Where the owner of stock represented that the corporation was regularly organized; that he was one of the original stockholders; that the stock was receiving dividends; that it was worth 100 cents on the dollar, and was "good high stock," and that the plaintiff took the stock at its par value, and it was shown that the company was not incorporated, but was a partnership, and was at the time insolvent; held, that the assertion as to the value and character of the stock was intended to be a warranty, and for a breach thereof defendant was liable. Titus v. Poole, 145 N. Y. 414 (1895).

A mere naked representation by a vendor of the value of stock sold is merely an expression of opinion and will not sustain an action for deceit, although the representation was known to the vendor to be untrue and was made with intention to deceive the purchaser. Titus v. Poole, 145 N. Y. 414, 425 (1895).

A vendor may give a warranty as to the value of stock sold; and if he makes a representation as to value, which is intended as a warranty, and which enters as a constituent element in the transaction, it becomes a part of the contract and may be enforced as a warranty. Titus v. Poole, 145 N. Y. 414, 425 (1895).

A contract may be rescinded for failure of consideration, fraud in making the contract, for inability to perform it after it is made, for repudiation of the contract or an essential part thereof and for such a breach as substantially defeats the purpose of the contract. Callanan v. Keeseville, Ausable Chasm & L. C. R. R. Co., 199 N. Y. 268 (1910).

The law not only requires a disaffirmance of the contract at the earliest practical moment after the discovery of the cheat, but a return of all that has been received under it, and a restoration of the other party to the condition in which he stood before the contract was made. Baird v. Mayor, etc., 96 N. Y. 599 (1884).

Where a person is induced to subscribe to the capital stock of a corporation by the representations of an agent, authorized to obtain subscriptions, that nearly all of the stock has been subscribed, when, in fact, no subscriptions have been received, except for a small amount, which were not cash subscriptions; and that two experts in the business for which the corporation was organized had subscribed to the stock, when, in fact, such stock had been given to them; and that the company was to have large and profitable contracts, whereas there were no such contracts in existence or pending, an action lies in equity to rescind the subscriptions induced by such representations. Talmadge v. Sanitary Security Co., 31 A. D. 498 (1898).

The fact that no authority was given to an agent, authorized to solicit subscriptions, to make statements affecting the value of stock, does not relieve

the corporation from responsibility therefor, the rule being that retention by the principal of the fruit of the fraud of the agent renders the principal liable, although innocent of participation in the wrong. Talmadge v. Sanitary Security Co., 31 A. D. 498 (1898).

An action in equity, to rescind a contract induced by representations false in fact, is not subject to the same stringent rules applicable to actions at law for damages for deceit. Talmadge v. Sanitary Security Co., 31 A. D. 498 (1898), and cases cited.

As to the liability of underwriters in a suit against them for money had and received by a purchaser of stock who relied upon representations that the entire issue was to be taken by the underwriters but who were afterwards released of part of their obligation by the corporation, see White v. Robinson, 145 A. D. 751 (1911).

Pledgor and Pledgee of Stock; Rights of, Generally.

A pledgor of stock has no individual right of action for an injury to the corporation common to all stockholders and the fact that the pledgee is a director or officer of the corporation does not impose any greater duty upon him in respect to the stock pledged than if he had no relation to the company. Milliken v. McGarrah, 159 A. D. 725 (1913). But if such pledgee uses his position as a director and his vote as stockholder intentionally to depreciate the pledgor's stock with the dishonest purpose of acquiring ownership at forced sale, this is a direct injury done to his pledgor, and he is liable directly to his pledgor although his wrongful acts involved an injury to the corporation for which it may also recover damages. Ritchie v. McMullen, 79 Fed. 522.

The general rule is that the pledgee of chattels loses his lien by returning them to the pledgor, but where the pledgee held stock as collateral and returned it to the pledgor for the special purpose of having it transferred to another on the corporate books with an understanding that the new certificates be delivered to the pledgee, which was done, no other lien having attached in the interval, the pledgee did not lose his lien as against the rights of creditors of the pledgor. Hickok v. Cowperthwait, 210 N. Y. 137 (1913), affg. 147 A. D. 900, and modfg. 147 A. D. 121.

A stockholder does not divest himself of his general property in the stock by a pledge of the same to the corporation. Subject to the lien of the pledgee, he remains the owner of the stock. Booth v. Cons. Fruit Jar Co., 62 Misc. 252 (1909).

A pledgee of stock in good faith from an executor is not responsible for the proper application of the money loaned on the security of such stock. Leith v. Wells, 48 N. Y. 585 (1872).

Where corporate stock, which was pledged without being assigned, has been stolen from a pledgee the pledgor may assert title against an innocent purchaser for value subject only to the discharge of the original lien. Treadwell v. Clark, 190 N. Y. 51 (1907).

Delivery of possession of property is ordinarily essential to create a pledge, but delivery of possession of shares of stock in a corporation cannot be effected because the scrip or certificate is not the stock itself, and as to such property, a pledge may be created by a written transfer thereof without manual delivery of the stock. First Natl. Bk. of Waterloo v. Bacon, 113 A. D. 612, affd., 189 N. Y. 533 (1907); Wilson v. Little, 2 N. Y. 443 (1849).

For the purposes of general definition the relationship between customer and broker in relation to stocks which have been purchased and are being

carried by the latter on margin is that of pledgor and pledgee. Matter of Mercantile Trust Co., 210 N. Y. 83 (1914), and cases cited.

When shares of stock have already been pledged as security to one party with a delivery of the certificate, they may be pledged thereafter to another party subject, however, to the prior lien, and the possession by the first pledgee may be regarded as the possession of the second pledgee through the agency of the former. First Natl. Bk. of Waterloo v. Bacon, 113 A. D. 612, affd., 189 N. Y. 533 (1907).

In every contract of pledge there is a right of redemption on the part of the debtor and the pledgor of stock held as security for a debt is not entitled to sell such stock until after he has demanded payment of the debtor. Wilson v. Little, 2 N. Y. 443 (1849). The rule is the same although the debt is payable without demand and although the pledge provides that the creditor may sell at public or private sale without notice to the debtor. Wilson v. Little, 2 N. Y. 443 (1849).

When the offer and tender of payment of the debt has been made to the pledgee the lien is discharged and the right of the pledgor to his property becomes absolute. Lawrence v. Maxwell, 53 N. Y. 19 (1873).

Where the pledgee has wrongfully sold the pledge, so that he cannot restore it, the pledgor is not required to tender payment in order to maintain an action for the wrongful sale. Wilson v. Little, 2 N. Y. 443 (1849).

Where shares of stock were pledged and the debtor offered to pay the debt, and requested a return of the stock, and the pledgee, who had already sold it, promised to return the shares, or others of the same kind, but neglected to do so, and in the meantime the stock rose in market value, the pledgor may recover the enhanced value. Wilson v. Little, 2 N. Y. 443 (1849).

Requisites of Subscription Prior to Incorporation.

Where defendant subscribed to stock in a new company, to be formed for a given purpose, agreeing to pay for the stock as soon as the company was incorporated and the stock delivered, and it does not appear that any other person subscribed, the subscription is not enforceable by a corporation thereafter formed. Such agreement to be binding must be one between two or more parties who agree to form the corporation and only after the formation by such parties or their authorized agents can the corporation enforce the subscription as it represents the parties to the agreement. Unless the corporation is formed pursuant to such a contract it is a stranger to the subscription agreement. Avon Springs Sanitarium Co. v. Weed, 119 A. D. 560 (1907), dissenting opinion, upon which the prevailing opinion was reversed in 189 N. Y. 557.

The distinction between first, an agreement to form a corporation and subscribe to its stock and, secondly, an agreement merely to subscribe to stock in a corporation thereafter to be formed without any promise to form such corporation is clearly stated in Yonkers Gazette Co. v. Taylor, 30 A. D. 334 (1898), quoted with approval in the dissenting opinion of 119 A. D. 560, supra. In the first class of agreements the company when formed can enforce the subscription without further act of the subscriber, whereas in the second a formal subscription after incorporation is necessary to permit recovery by the company.

In Woods Motor Vehicle Co. v. Brady, 181 N. Y. 145 (1905), the agreement did not provide for the formation of the company by the subscribers and it was held that it was enforceable if at all by the subscribers alone and that the corporation was not a party. The subscription was held unenforce-

able, however, upon the further and principal grounds that the corporation was formed for purposes other than provided for in the agreement, that the identity between the plaintiff and the corporation contemplated was not shown and that the agreement was too indefinite in that it failed to specify the amount of defendant's subscription and the par value of the shares. In so far as it contains dicta that the agreement would have been enforced if the purposes of the corporation had been in accordance with the agreement and if the terms had been definite this case must be deemed overruled by Avon Springs S. Co. v. Weed (supra), 189 N. Y. 557.

If, although the defendant cannot be held upon the agreement, he receives stock of the corporation formed and gives his check therefor, he is liable although he thereafter stops payment on his check and attempts to return the certificate. The acceptance of the certificate is sufficient consideration for the check. Avon Springs Sanitarium Co. v. Kellogg, 125 A. D. 51 (1908), affd., 194 N. Y. 567.

§ 51. Transfers of stock by stockholder indebted to corporation. If a stockholder shall be indebted to the corporation, the directors may refuse to consent to a transfer of his stock until such indebtedness is paid, provided a copy of this section is written or printed upon the certificate of stock.

Formerly L. 1890, ch. 564, § 26, as re-enacted by L. 1892, ch. 688.

A lien upon a stock certificate, which contained no reference to any provision limiting or restricting the right to sell or assign the same is not enforceable against the certificate, for an indebtedness to the corporation, in the hands of one who purchased the certificate without knowledge of any such provision or of any existing lien in favor of the corporation even when the provision is contained in the certificate of incorporation. Lyman v. State Bk. of Randolph, 81 A. D. 367 (1903), affd., 179 N. Y. 577.

When this section has not been written or printed upon a subscriber's stock certificate, and there is no provision in the by-laws or in the subscription agreement making the subscriber liable for the full amount of his subscription, or making the stock non-transferable until fully paid, a subscriber is not liable to pay in full for the stock after he has made a bona fide transfer of his shares. Roch. & Kettle Falls Land Co. v. Raymond, 158 N. Y. 576 (1899), affg. 4 A. D. 600.

In the absence of above provision the corporation has no lien which it can enforce and no authority to make a by-law embodying a similar provision. Driscoll v. West, B. & C. Mfg. Co., 59 N. Y. 96 (1874).

The fact that an unauthorized by-law is printed on the face of shares cannot be notice to a bona fide purchaser of them that his purchase will be subject to a lien upon the part of the corporation for the indebtedness of the stockholder to it. Buffalo German Ins. Co. v. Third Nat. Bk., 162 N. Y. 163 (1900), revsg. 29 A. D. 137.

As to rights of vendee of stock. Johnson v. Underhill, 52 N. Y. 203; McNeil v. Tenth Nat. Bk., 46 N. Y. 325 (1871).

A blank transfer on the back of a certificate, to which the holder has affixed his name, is a good assignment, and a person to whom it is delivered is authorized to fill it up, by writing a transfer and power of attorney over the signature. Kortright v. Com'l Bk. of Buffalo, 20 Wendell 91 (1838); Same v. Same, 22 Wendell 348 (1839).

When stock certificates contain restrictions which were originally unauthorized, the holders may, by lapse of time and course of dealing, acquiesce in and ratify the restriction. Reynolds v. Bank of Mt. Vernon, 6 A. D. 62 (1896), aff'd., 158 N. Y. 740.

The power conferred upon a corporation, by Gen. Corp. L. § 11, to make by-laws regulating the transfer of stock only authorizes it to prescribe the officer by whom stock shall be transferred and the mode of its transfer. Kinnan v. Sullivan County Club, 26 A. D. 213.

The current of authority in this State is to the protection of the bona fide vendee of stock against secret or equitable claims thereto of one who has indued the vendor with the indicia of ownership. Driscoll v. West Bradley & Cary Mfg. Co., 59 N. Y. 96 (1874).

One who was a creditor and stockholder of a corporation delivered his stock to the president upon the latter's agreement to transfer it to a third party for the purpose of inducing the latter to come to relief of the corporation by sustaining its credit but instead of so doing the president diverted the stock to his own use, and notwithstanding such diversion of the stock the credit of the corporation was maintained, held, that a fiduciary relation existed, and the stockholder was entitled to an accounting for the stock and also to rescind the transaction and secure a return of the stock so far as it remained under control of the president, or of persons not bona fide holders thereof, that he was, therefore, entitled to invoke the equitable jurisdiction of the court and was not limited to his remedy at law. Slayback v. Raymond, 93 A. D. 326 (1904).

No Lien Created in Favor of the Corporation.

This section does not give the corporation a lien on the shares of the stockholder who is indebted to it, but merely prevents a sale of the stock which will be recognized by the corporation, until the indebtedness is paid. There is no conflict between this section and section 26 of the Banking Law; therefore, the section applies to domestic banking corporations. Strahmann v. Yorkville Bk., 148 A. D. 8 (1911), aff'd., 210 N. Y. 536 (1913).

At common law a corporation has no lien upon its stock. Driscoll v. West Bradley & Cary Mfg. Co., 59 N. Y. 96, 102 (1874); Bank of Attica v. Manufacturers' & Traders' Bk., 20 N. Y. 501 (1859). And this rule is applied in this State, in the absence of statutory authority to the contrary, to banks and business corporations. Union Bank v. U. S. Exc. Bank, 143 A. D. 128 (1911).

Requisites to Sustain Refusal to Transfer Stock.

The right to refuse consent to a transfer of stock is given only when the provisions of this section are written or printed on the certificate. Delivery of a certificate assigned in blank with a power of attorney indorsed thereon, passes both the legal and equitable title, even if the charter or by-laws provide that stock is transferable only on the books of the company. Union Bank v. U. S. Exc. Bank, 143 A. D. 128 (1911).

Although the section only empowers a corporation to refuse to recognize a transfer of stock until the indebtedness is paid where a copy of this section appears upon the certificate of stock, yet when a copy of a by-law, containing a similar provision, or the substance thereof, is printed in the certificate, it is a sufficient compliance with the statute. Strahmann v. Yorkville Bank, 148 A. D. 8 (1911), aff'd., 210 N. Y. 536 (1913).

§ 52. Purchase of stock of other corporations. Any stock corporation, domestic or foreign, now existing or hereafter organized, except moneyed corporations, may purchase, acquire, hold and dispose of the stocks, bonds and other evidences of indebtedness of any corporation, domestic or foreign, and issue in exchange therefor its stock, bonds or other obligations if authorized so to do by a provision in the certificate of incorporation of such stock corporation, or in any certificate amendatory thereof or supplementary thereto, filed in pursuance of law, or if the corporation whose stock is so purchased, acquired, held or disposed of, is engaged in a business similar to that of such stock corporation, or engaged in the manufacture, use or sale of the property, or in the construction or operation of works necessary or useful in the business of such stock corporation, or in which or in connection with which the manufactured articles, product or property of such stock corporation are or may be used, or is a corporation with which such stock corporation is or may be authorized to consolidate. When any such corporation shall be a stockholder in any other corporation, as herein provided, its president or other officers shall be eligible to the office of director of such corporation, the same as if they were individually stockholders therein and the corporation holding such stock shall possess and exercise in respect thereof, all the rights, powers and privileges of individual owners or holders of such stock.

Part of former § 40, L. 1890, ch. 564, as am'd by L. 1892, ch. 688; L. 1902, ch. 601. See, also, note under § 50.

Form of statement of method of voting stock, see post, Forms.

Holding Companies.

In the matter of the organization of a holding corporation and the acquisition of stock of constituent companies at an alleged overvaluation see Blun v. Whitney, 185 N. Y. 232, cited under § 55, Stock Corp. Law.

When a certificate of incorporation provides for the purchase of stock and bonds of another corporation, as provided for in this section, it will permit a corporation to purchase the stock and bonds of a rival company in order to prevent ruinous competition. Rafferty v. Buffalo City Gas Co., 37 A. D. 618 (1899).

A proposed plan by which a majority of the stockholders empowered the directors to create a new corporation in which the old corporation should be the only stockholder with only the capital of the original corporation is illegal since one corporation may not create another, endow it with capital from its own assets and take all its capital stock in exchange. Schwab v. Potter Co., 194 N. Y. 409 (1909), affg. 129 A. D. 36.

The right of a corporation to purchase stock and bonds of another corporation, given under the foregoing section, confers upon the purchaser no authority to employ the stock and bonds for purposes condemned by the principles of equity. Farmers' Loan & Trust Co. v. N. Y. & Northern Ry. Co., 150 N. Y. 410 (1896), revsg. 78 Hun 213.

Holding companies: 18 ABA. J. 665, 687; 21 id. 253-4.

Stock of subsidiary corporations owned by a holding company constitutes issued and outstanding stock. McCallum v. Corn Products Co., 131 A. D. 617 (1909).

A corporation may acquire by purchase all the stock of another corporation. and yet the latter may continue a distinct and existing organization, with its own officers and board of directors. Einstein v. Rochester Gas & Electric Co., 146 N. Y. 46 (1895).

Unless expressly authorized by law so to do, a corporation cannot purchase or deal in stocks of other corporations, but may take such stock in payment of a debt. Holmes & G. Mfg. Co. v. Holmes & W. M. Co., 127 N. Y. 252 (1891); Milbank v. N. Y., L. E. & W. R. R. Co., 64 How. 20 (1882); Talmage v. Pell, 7 N. Y. 328 (1852); Kent v. Quicksilver M. Co., 78 N. Y. 159 (1879); Palmer v. Cypress H. Cem., 122 N. Y. 429 (1890).

A court of equity has not the power to restrain a corporation which has legally purchased stock of another corporation from voting on such stock, upon the allegation or proof that such corporation intends to cause a board of directors to be elected who may injure or prejudice the interests of the minority stockholders of the corporation whose stock has been so purchased. Oelbermann v. N. Y. & Northern Ry. Co., 77 Hun 332.

A corporation will not be permitted to acquire a controlling interest in the stock of another corporation when such ownership will defeat the policy of the State in prohibiting combinations for the purpose of stifling competition. Minn. v. Northern Securities Co., 184 U. S. 199 (1902); Peo. v. North River Sugar Ref. Co., 121 N. Y. 582 (1890).

This section is not violated by a transfer to a corporation of the stock of another corporation as a gift. Frothingham v. Broadway & Seventh Ave. R. R. Co., 9 N. Y. Civ. Pro. Rep. 304 (1886): King v. Barnes, 113 N. Y. 476 (1889).

When a corporation sells the stock of another corporation it is entitled to recover the purchase price, although the original acquisition of such stock may have been illegal. Sistare v. Best, 88 N. Y. 527 (1882); Holmes & G. Co. v. Holmes & Wessell Co., 53 Hun 52, affd., 127 N. Y. 252 (1891).

An agreement by which one corporation offers the stockholders of another corporation to purchase their stock in the latter company at 100 per cent. above par, upon the deposit with a trustee of a majority of the holdings, and to pay for the stock in cash or by bonds of the purchasing corporation, is not illegal, as this section permits such purchase. Phelan v. Edison Elec. Illg. Co., 24 Misc. 109 (1898).

It has been repeatedly decided by the courts of this States, and by many others, that, unless expressly authorized by law, it is ultra vires and contrary to public policy for any corporation to purchase the stock of another corporation. The Legislature of this State, however, has seen fit to make a radical change in the law, and, so long as the present statute remains in force, the courts must enforce it. Oelbermann v. N. Y. & Northern Ry. Co., 77 Hun 332 (1894).

A corporation may, with the consent of all its stockholders, sell its plant to another corporation and retire from business, taking payment in the stock of the other corporation. Holmes & G. Mfg. Co. v. Holmes & W. Metal Co., 127 N. Y. 252 (1891). But a transfer of its entire property is illegal as against creditors of the corporation. Cole v. Millerton Iron Co., 133 N. Y. 164 (1892); Hurd v. N. Y. & Com'l Laundry Co., 167 N. Y. 89 (1901), revsg. 52 A. D. 467. See, also, Wilson v. Æolian Co., 64 A. D. 337, affd., 170 N. Y. 618 (1902).

In an action by a stockholder against the directors, attacking the holding, by the corporation, of stocks of other companies, and seeking the distribution thereof, the burden is on the plaintiff to show that such stocks were illegally held. Burden v. Burden, 159 N. Y. 287 (1899), affg. 8 A. D. 160.

When one corporation obtains control of the board of directors of another corporation, and thereafter, without consideration, obtains the property of the latter corporation, and so arranges its affairs as to render all the shares of its stock, other than those held by the controlling corporation, valueless, a stockholder of the corporation which has been thus despoiled may maintain an action to redress the wrong done to his company. Pondir v. N. Y., L. E. & W. R. R. Co., 72 Hun 385 (1893).

A corporation cannot acquire the majority of the stock of another corporation, obtain control of its affairs, divert the income of its business, refuse business which would have enabled it to pay interest on its bonds and avoid default, and then institute an action in equity to enforce defaulted obligations against such corporation, with the avowed purpose of obtaining entire control of its property to the injury of the minority stockholders. Farmers' Loan & Trust Co. v. N. Y. & Northern Ry. Co., 150 N. Y. 410 (1896). See, also, cases therein cited.

Although the power to purchase stock of other corporations must be exercised so as not to contravene the statutes against monopolies, the purchase of stock of public lighting companies, even if intended to prevent competition, does not create a monopoly so as to permit the price of gas and electricity to be arbitrarily fixed by the corporation, both of these matters being within the control of the Legislature. Matter of Attorney-General v. Cons. Gas. Co., 124 A. D. 401 (1908). The purchase of stock for the purpose of preventing competition is not of itself illegal, unless it results in the creation of such monopoly as limits the supply and enhances the cost of the commodity dealt in. Id.

Suit to Restrain Holding Company from Selling Stock.

A court of equity will not, at the suit of minority stockholders, enjoin the majority stockholder, a railroad corporation, from selling its holdings to another corporation so as to vest the latter with control, where there is nothing in the complaint showing damage to the minority stockholders as distinguished from the damages which may be suffered by the corporation itself. Delavan v. N. Y., N. H. & H. R. R. Co., 154 A. D. 8 (1912), and cases cited.

Identity Between Holding Company and Subsidiaries.

Where a holding company owns all the capital stock of two other corporations and all keep common offices and have common officers and directors, one who contracts with the two subsidiary corporations with knowledge of the situation may not join in all three corporations in one action for damages for breach of separate contracts made with each of the two subsidiary corporations, as they are to be deemed separate entities. N. Y. Air Brake Co. v. Inter'l Steam Pump Co., 64 Misc. 347 (1909), aff'd., no op., 136 A. D. 931, distg. Anthony v. Am. Glucose Co. 146 N. Y. 407 (1894).

A corporation which owns the majority stock of another corporation and controls its corporate organization is not liable for negligence of the latter corporation where the two companies remain legally distinct and separate and the controlled company makes its own contracts and runs its affairs independently of the holding company. Stone v. Cleveland, Cin., C. & St. L. Ry. Co., 202 N. Y. 352 (1911); Senior v. N. Y. City Ry. Co., 111 A. D. 39 (1906) aff'd., no op., 187 N. Y. 559.

Under this section a railroad corporation has, in addition to the right to purchase the stock of other railroad companies, the right also to participate in the election of directors of said companies without limitation, so that in effect it may become the equitable owner of such other corporations and become charged with the duty of maintaining them in a manner which shall enable them to discharge their duties to the public and to their stockholders, and may by virtue of section 6 of this law borrow money for such purpose and issue its obligations to secure payment of the same. Venner v. N. Y. Central & H. R. R. R. Co., 160 A. D. 127 (1914).

Stocks of Railroad, Gas and Electrical Corporations.

The right of corporations to acquire shares of stock of railroad corporations and certain other common carriers and gas or electrical corporations, is regulated and limited by the Public Service Commissions Law, §§ 54 and 70. The full text of said law, annotated, is printed in this volume, post, but, for the purpose of convenience, parts of sections 54 and 70 are inserted here, as follows:

No railroad corporation, or street railroad corporation, domestic or foreign, shall hereafter purchase or acquire, take or hold, any part of the capital stock of any railroad corporation or street railroad corporation or other common carrier organized or existing under or by virtue of the laws of this state, unless authorized so to do by the commission empowered by this act to give such consent; and save where stock shall be transferred or held for the purpose of collateral security only with the consent of the commission empowered by this act to give such consent, no stock corporation of any description, domestic or foreign, other than a railroad corporation or street railroad corporation, shall purchase or acquire, take or hold, more than ten per centum of the total capital stock issued by any railroad corporation or street railroad corporation or other common carrier organized or existing under or by virtue of the laws of this state. Nothing herein contained shall be construed to prevent the holding of stock heretofore lawfully acquired. Part of § 54, Pub. Serv. Com. L.

No gas corporation or electrical corporation shall transfer or lease its franchise, works or system or any part of such franchise, works or system to any other person or corporation or contract for the operation of its works and system, without the written consent of the proper commission. The permission and approval of the commission, to the exercise of a franchise under section sixty-eight of this act, or to the assignment, transfer or lease of a franchise under this section shall not be construed to revive or validate any lapsed or invalid franchise or to enlarge or add to the powers and privileges contained in the grant of any franchise or to waive any forfeiture. No such corporation shall directly or indirectly acquire the stock or bonds of any other corporation incorporated for, or engaged in, the same or a similar business, or proposing to operate or operating under a franchise from the same or any other municipality, unless authorized so to do by the commission. Save where stock shall be transferred or held for the purpose of collateral security only with the consent of the commission empowered by this act to give such consent, no stock corporation of any description, domestic or foreign, other than a gas or electrical corporation, shall purchase or acquire, take or hold, more than ten per centum of the total capital stock issued by any gas corporation or electrical corporation organized or existing under or by virtue of the laws of this state. Nothing herein contained shall be construed to prevent the holding of stock heretofore lawfully acquired. Part of § 70, Pub. Serv. Com. L.

The term "common carrier" for the purpose of the Pub. Serv. Com. L. is defined by that act, § 2. But a stage coach company operating in New York city is also to be included in the term. Transp. Corp. Law, § 24.

Guaranty of Dividends.

It would seem that a corporation having power to purchase and sell the stock of other corporations, has power, when selling such stock, to guarantee the payment of dividends thereon, and that, if it makes such a guaranty, it is estopped from denying its power to do so when the guaranty is sought to be enforced. Mason v. Standard Distilling & D. Co., 85 A. D. 520 (1903).

A guarantee of payment of dividends on stock of another corporation, expressed in the following language, "For good and valuable consideration, the receipt of which is hereby acknowledged the undersigned hereby guarantees and agrees to pay to the holder of record of the within certificate, so long as said certificate shall be outstanding, but not to exceed the present unexpired term of the period for which said Spirits Distributing Company is incorporated, one and one-half per cent. dividend on the 15th days of January, April, July and October, in each year beginning with the year 1899, on every share of first preferred stock of said Spirits Distributing Company represented by the within certificate," contemplates the continued existence of the corporation issuing the stock and will not survive its voluntary dissolution pursuant to the authority of the law under which it was organized. 85 A. D. 520, supra.

Guaranty of Notes.

An indorsement by a corporation of notes of another corporation is not an accommodation in a legal sense and void as ultra vires but is a guaranty, based on a valuable consideration and valid where the indorsing corporation, at the time, owned all the stock of the other. In re N. Y. Wheel Works, 141 Fed. 430 (1905).

§ 53. Subscriptions to stock. If the whole capital stock shall not have been subscribed at the time of filing the certificate of incorporation, the directors named in the certificate may open books of subscription to fill up the capital stock in such places and after giving such notices as they may deem expedient, and may continue to receive subscriptions until the whole capital stock is subscribed. At the time of subscribing, every subscriber, whose subscription is payable in money, shall pay to the directors ten per centum upon the amount subscribed by him in cash, and no such subscription shall be received or taken without such payment.

Formerly L. 1890, ch. 564, § 41, as re-enacted by L. 1892, ch. 688.

For forms of subscription, see Forms Nos. 218, 219.

By the amendment of 1892, ch. 688, the words "whose subscription is payable in money" were inserted in the second sentence. It should be carefully noted that under the amendment it is only the subscriber, "whose subscription is payable in money," who is required to pay ten per cent. in cash at the time of subscribing.

The provisions of this section apply only to subscriptions for stock made subsequent to incorporation. The section has no application whatever to the

original subscriptions made by the incorporators and set forth in the certificate of incorporation at the time of the organization of the corporation. United Growers Co. v. Eisner, 22 A. D. 1 (1897); Van Schaick v. Mackin, 129 A. D. 335 (1908); South Buffalo Natural Gas Co. v. Bain, 9 Misc. 425 (1894); Phœnix Warehousing Co. v. Badger, 67 N. Y. 294 (1876).

Payment of Ten Per Cent.

A subscription after incorporation is not binding until at least ten per cent. has been paid. N. Y. & O. M. R. R. Co. v. Van Horn, 57 N. Y. 473 (1874); South Buffalo Natural Gas Co. v. Bain, 9 Misc. 425 (1894), and cases therein cited. Actual payment of such percentage after subscription, with intent to complete the same, satisfies the statute. Beach v. Smith, 30 N. Y. 116 (1864); B. R. & U. R. R. Co. v. Clarke, 25 N. Y. 208 (1862). Such payment may be made in services rendered the corporation. Id.; Veeder v. Mudgett, 95 N. Y. 295 (1884).

An action cannot be maintained to recover the amount of stock subscribed after incorporation unless ten per cent. thereof is paid in cash at the time of the subscription. Excelsior Grain Binder Co. v. Stayner, 25 Hun 91 (1881); Perry v. Hoadley, 19 Abb. N. C. 76 (1887).

A check given in payment of the subscription, which check was countermanded, is not sufficient. The payment must be in cash, or its actual equivalent. Excelsior G. B. Co. v. Stayner, above. See, also, Durant v. Abendroth, 69 N. Y. 148 (1877).

The giving of a note for ten per cent. of the subscription does not satisfy this section. Hapgoods v. Lusch, 123 A. D. 23 (1908). But notes given upon which payment was afterward enforced satisfy the statute. O. C. & R. R. R. Co. v. Wooley, 1 Keyes 118 (1864).

Payment in patent-rights of unascertained value is not a compliance. Tasker v. Wallace, 6 Daly 364 (1876).

Subscription, what Constitutes.

Delivery of stock to a contractor as payment for work does not constitute him a "subscriber" or render him liable for the par value of the stock. Bostwick v. Young, 118 A. D. 490 (1907), affd., 194 N. Y. 516.

A mere promise to subscribe to the capital stock of a corporation is void. General Electric Co. v. Wightman, 3 A. D. 118 (1896).

In litigation between a corporation and one who has sold goods to it, where a counterclaim based upon a stock subscription is interposed, the contract to subscribe can only be enforced according to its terms. Elliot v. N. Y. Endowment Co., 73 Hun 519, affd., 148 N. Y. 752 (1896). The contract of subscription is to be deemed in writing where the subscription was accompanied by a letter stating that a certain amount would be paid in cash, and the balance by deducting a percentage from the subscriber's monthly accounts with the corporation. Id.

The corporation must be named as a party to the agreement of subscription for shares. Lake Ontario S. R. R. Co. v. Curtiss, 80 N. Y. 219 (1880).

Each subscription constitutes a separate and independent agreement. There can be no presumption that a person was induced to subscribe because another had done so. Whittlesey v. Frantz, 74 N. Y. 456 (1878). But see contra White Mts. R. R. v. Eastman, 34 N. H. 124, cited with approval in Meyer v. Blair, 109 N. Y. 605 (1888).

Subscriptions for Stock Induced by Fraud.

See, under section 50, ante, "Purchases of Stock Induced by Fraud."

Rescission of Subscription.

See also, section 50 of this law, under "Purchases of Stock Induced by Fraud."

An action in equity to rescind a subscription for stock, to perpetually enjoin the assertion of the validity of the agreement and the bringing or maintaining of any action based thereon, upon the ground that it was obtained by fraud, is properly brought not only against the corporation but also against the officers by whose false representations the subscription was induced. Mack v. Latta, 178 N. Y. 525 (1904), revsg. 83 A. D. 242.

Where rescission of a stock subscription is decreed the plaintiff is entitled to recover the amount paid with interest. Lambert v. Elmendorf, 124 A. D. 758 (1908).

A complaint in an action to rescind a stock subscription on the ground of fraud and to recover for stock already paid for in full need not allege a tender of the stock. Cawthra v. Stewart, 59 Misc. 38 (1908).

Where, contemporaneous with a subscription to stock, the subscriber and the corporation enter into an agreement by which the subscriber, in consideration of the delivery of the stock, agrees to advance moneys to the corporation up to the par value of said stock, the sums so advanced to be repaid to him "immediately upon the receipt and payment of such contracts for which such sums have been advanced," such agreement is not, as against creditors, to be read in connection with his subscription. Beals v. Buffalo Expanded Metal Constn. Co., 49 A. D. 589 (1900). The execution by the subscriber, with knowledge of the insolvency of the corporation, of an assignment of the agreement to a third person, who assumes the subscribers' obligations thereunder, and of a release to the corporation of all demands existing, and those subsequently accruing which might inure to the subscriber, and the transfer of the agreement, by the assignee thereof, to, and its acceptance by, the corporation, do not operate to release the subscriber from liability upon his unpaid subscription. Id.

A person who has, by fraud, been induced to subscribe for stock may bring an equitable action for rescission of the contract, cancellation of his subscription, and removal of his name from the books of the corporation. Bosley v. Nat'l Mach. Co., 123 N. Y. 550. The statute of limitations does not commence to run against the action until after discovery of the fraud. Id.

Where the certificate of incorporation expresses no illegal purpose, and the transaction between the corporation and subscribers is valid on its face, subsequent corporate acts tending to manifest an illegal purpose on the part of the directors neither affect the validity of the incorporation nor render void contracts of subscription to the stock. U. S. Vinegar Co. v. Fochrenbach, 148 N. Y. 58 (1895), discussing 143 N. Y. 537, affg. 74 Hun 435.

Where the right is reserved by the Legislature to alter or repeal the charter of a corporation, a subscriber to its capital stock is not discharged from his subscription by a subsequent amendment to the charter, but will be regarded as having consented to the change. Union Hotel Co. v. Hersee, 79 N. Y. 454 (1880).

No one can be made a stockholder without his consent, express or implied. Glenn v. Garth, 133 N. Y. 18 (1892).

In a suit by a corporation against a stockholder to rescind a sale of stock the court may properly enjoin the defendant from assigning the stock pendente lite but should not prevent him from voting or exercising other rights incident to ownership. Maine Products Co. v. Alexander, 115 A. D. 112 (1906).

Enforcement of Subscription.

An action brought directly upon a stock subscription is one to recover a debt due the corporation and may be maintained by its receiver; it is not an action to enforce the statutory liability of stockholders nor to enforce contribution for the benefit of creditors. Myers v. Sturgis, 123 A. D. 470 (1908).

Specific Performance.

An action to compel specific performance of a contract, whereby the plaintiff was to receive a quantity of the stock of the defendant corporation in return for personal services rendered by him cannot be maintained in the absence of an allegation in the complaint and proof upon the trial that the stock had a peculiar value or that the plaintiff could not fully recover in an action at law the damages resulting from breach of contract. Kennedy v. Thompson, 97 A. D. 296 (1904); Butler v. Wright, 103 A. D. 463 (1905); Clements v. Sherwood-Dunn, 108 A. D. 327 (1905). See, also, Ehrich v. Grant, 111 A. D. 196 (1906).

§ 54. Time of payment of subscriptions to stock. Subscriptions to the capital stock of a corporation shall be paid at such times and in such instalments as the board of directors may by resolution require. If default shall be made in the payment of any instalment as required by such resolution, the board may declare the stock and all previous payments thereon forfeited for the use of the corporation, after the expiration of sixty days from the service on the defaulting stockholder, personally, or by mail directed to him at his last-known post-office address, of a written notice requiring him to make payment within sixty days from the service of the notice at a place specified therein, and stating that, in case of failure to do so, his stock and all previous payments thereon will be forfeited for the use of the corporation.

Such stock, if forfeited, may be reissued or subscriptions therefor may be received as in the case of stock not issued or subscribed for. If not sold for its par value or subscribed for within six months after such forfeiture, it shall be canceled and deducted from the amount of the capital stock. If by such cancellation, the amount of the capital stock is reduced below the minimum required by law, the capital stock shall be increased to the required amount within three months thereafter or an action may be brought or proceedings instituted to close up the business of the corporation as in the case of an insolvent corporation. If a receiver of the assets of the corporation has been appointed,

all unpaid subscriptions to the stock shall be paid at such times and in such instalments as the receiver or the court may direct.

Formerly § 43, ch. 564, L. 1890, as am'd by L. 1892, ch. 688.

For form of subscription list, see post, Form No. 219.

The location and section number of this section was changed by the consolidated laws so as to follow the section relating to subscriptions to stock.

The second paragraph, providing for reissue, sale or cancellation of forfeited stock, for proceedings to close up affairs of corporation, and for payment of subscriptions in case of receivership, was added by L. 1892, ch. 688.

Certificate of Incorporation as Stock Subscription Agreement.

A certificate of incorporation containing a statement of the number of shares of stock which each subscriber thereto agreed to take constitutes a valid subscription for the stock, which takes effect upon the filing of the certificate, and creates a legal liability on the part of each subscriber to pay for the number of shares stated in the certificate. Rathbone v. Ayer, 121 A. D. 355 (1907); Phoenix Warehousing Co. v. Badger, 67 N. Y. 294 (1876); Powers v. Knapp, 71 Hun, 371, 375 (1893).

The certificate of incorporation, when filed, becomes binding on the subscribers, and their liability is fixed by their subscription without the formal issuance of stock to them. Stevens v. Episcopal Church History Co., 140 A. D. 570, 582 (1910), citing Buf. Expanded Metal Const. Co., 49 A. D. 589; United Growers Co. v. Eisner, 22 A. D. 1.

By-Laws as Part of Subscription Contract.

Where one becomes a subscriber to the stock of a corporation and the by-laws provide the manner of payment and how calls for installments shall be made, such by-laws become a part of the contract with the corporation, and one becoming a stockholder after the adoption of such a by-law is entitled to the benefit thereof. Seymour v. Sturgess, 26 N. Y. 134 (1862).

Calls for Payment of Installments; When Unnecessary.

In an action upon the original subscription, it is not necessary to allege calls after the lapse of two years from the time of incorporation, for the reason that when no time for payment is specified the subscriber undertakes to pay for his shares within the period prescribed by law for the payment of capital stock. Phoenix Warehousing Co. v. Badger, 67 N. Y. 294 (1876).

Transferee of Stock Liable for Installments.

The transferee of stock is liable for calls made after his name has been registered on the stock book and, being thus liable, there is an implied promise that he will pay calls made upon such stock while he continues its owner. Webster v. Upton, 91 U. S. 65, 68 (1875).

Action for Unpaid Installments.

The remedy by forfeiture is merely cumulative, and does not prevent an action for the installments until the forfeiture is resorted to. Troy & Boston R. R. Co. v. Tibbits, 18 Barb. 297 (1854); Northern R. R. Co. v. Miller, 10 Barb. 260 (1851); O., R. & C. R. R. Co. v. Frost, 21 Barb. 541 (1856); B. & N. Y. C. R. R. Co. v. Dudley, 14 N. Y. 336 (1856); Mann v. Currie, 2 Barb. 294 (1848).

When actions cannot be maintained for amounts unpaid on stock. Christensen v. Eno, 106 N. Y. 97 (1887); Zel. M. Co. v. Meyer, 28 St. Rep. 759 (1889); Williams v. Taylor, 120 N. Y. 244 (1890).

A corporation may enforce payment of the subscriptions to its capital stock against persons who subscribed its articles of association before the corporate body had a legal existence. Dorris v. French, 4 Hun 292 (1875); Buffalo & N. Y. C. R. R. Co. v. Dudley, 14 N. Y. 336 (1856); Troy & Boston R. R. Co. v. Tibbits, 18 Barb. 297 (1854).

When there has been no formal subscription the corporation cannot recover an amount unpaid upon its stock, unless a promise to pay the same, either express or implied, has been made by the person sought to be charged, and if there be no such agreement the sole remedy for the corporation is by the sale of the shares of the delinquent members. Rochester & Kettle Falls Land Co. v. Roe, 7 A. D. 366 (1896).

A secret agreement of a corporation, with certain of its subscribers, whereby they are to have some advantage not common to all the stockholders, or be released from payment of the stock, is no defense to an action brought to collect the subscription of one who was not promised the same advantages. Armstrong, etc. v. Danahy, 75 Hun 405 (1894). Such secret agreements are void. Id.

A subscriber failing to pay as required by the terms of his subscription, is properly chargeable with interest from the time of the default, and cannot compel the corporation to issue the stock until both the principal and interest are paid. Gould v. Town of Oneonta, 71 N. Y. 298 (1877).

An order of the court directing the receiver of a corporation to collect its outstanding assets authorizes an action by him, without a previous demand, to enforce payment of a subscription for stock. Armstrong v. Danahy, 75 Hun 405 (1894).

A general assignee of an insolvent corporation of another State, appointed in that State, can maintain in the courts of this State an action in equity against all original stockholders residing here, to enforce their common-law contractual liability to pay the subscription price of their stock. Stoddard v. Lum, 159 N. Y. 265 (1899), revsg. 32 A. D. 565.

Where a corporation has been dissolved and its assets have proven insufficient to pay its debts a creditor need not sue the corporation before bringing action against a stockholder to recover unpaid subscriptions. Ford v. Chase, 118 A. D. 605, affd., 184 N. Y. 504 (1907).

Stockholder's Defenses.

A purchaser of stock who has been sued for unpaid subscriptions should be allowed to prove that his transferrer represented that the stock was fully paid and that he was also so informed by the directors of the corporation at the time when he made the purchase. Rochester & Kettle Falls Land Co. v. Roe, 7 A. D. 366 (1896).

Where books of account, upon which depend the right of a corporation to forfeit the stock of the subscriber for his failure to pay assessments, are much confused, he is entitled to maintain an action in equity to enjoin the sale of his stock and for an accounting to determine whether he is indebted to the corporation. Schnetz v. German-American Real Estate Co., 21 A. D. 163 (1897).

Forfeiture of Stock; Enforcement of.

Forfeitures are not favored by the law and parties who seek to enforce them must pursue exactly all the necessary requirements to enable them to exercise this power. In re N. Y. & Westchester Town Site Co., 145 A. D. 623 (1911).

A forfeiture of stock is not a ministerial act. It is a corporate act involving the exercise of judgment and discretion by the board of directors. It cannot be performed by the secretary. In re N. Y. & Westchester Town Site Co., 145 A. D. 623 (1911).

Where a forfeiture of stock is declared, it is necessary that the act should be that of the directors convened as a board, a quorum being present, in order to make the forfeiture valid. A forfeiture declared by less than a quorum is ineffective even when the directors acting thereon were members of the executive committee. In re N. Y. & Westchester Town Site Co., 145 A. D. 623 (1911).

Effect of Forfeiture.

After a forfeiture, the holder is divested of his title in the shares, which is then vested in the corporation and remaining stockholders. Weeks v. Silver Islet C. M. & L. Co., 23 J. & S. 1, affd., 120 N. Y. 620 (1890).

When stock is declared forfeited, the liability of the holder thereof to the corporation for further payment thereon ceases. Mills v. Stewart, 41 N. Y. 389 (1869); Small v. Herkimer Mfg. Co., 2 N. Y. 330 (1849).

At any time prior to the sale of shares declared forfeited the stockholder may redeem them by payment of the calls, expenses and interest. Mitchell v. Vermont Copper Mining Co., 67 N. Y. 280 (1875).

Insolvent Corporations.

When a corporation is insolvent and proceedings are pending to wind up its affairs and distribute its assets, no call or assessment is necessary before the institution of suits to collect unpaid balances on subscriptions to its stock. Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co., 72 Fed. 957 (1896).

When a certificate of incorporation provides that the corporation shall begin business with the full amount of capital stock paid in, and no call for payment of installments has been made by the directors, and the corporation becomes bankrupt, the right to call for unpaid subscriptions passes to a trustee in bankruptcy. Rathbone v. Ayer, 84 A. D. 186 (1903). In such case no call or demand by the board of directors is required. Phœnix Warehousing Co. v. Badger, 67 N. Y. 294 (1876); Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co., 72 Fed. 957 (1896).

An unpaid stock subscription is a contract liability, which the corporation, if solvent, could have enforced in the courts of this State, and, in the event of insolvency, vests in the general assignee for the benefit of creditors, in a representative in bankruptcy, or in a receiver duly appointed. Stoddard v. Lum, 159 N. Y. 272 (1899); Hatch v. Dana, 101 U. S. 215 (1879); Rathbone v. Ayer, supra; Sanger v. Upton, 91 U. S. 56 (1875).

Transfer of Partly Paid Stock.

In the absence of special provisions to the contrary, either in the statute under which a corporation was organized or in its by-laws, an original subscriber to its stock can transfer his stock to another, and, if the transfer is in good faith, his liability ceases and the transferee will be substituted in his place, with the same rights and liabilities as the original holder. Rochester & Kettle Falls Land Co. v. Raymond, 158 N. Y. 576 (1899), affg. 4 A. D. 600.

One who has made an absolute transfer of stock, in good faith, to another, is thereby released from further liability upon calls for payment of the stock. Billings v. Robinson, 94 N. Y. 415; Cutting v. Damerel, 88 N. Y. 410 (1882).

When stock has been transferred as full paid, in good faith, to pay a contractor, the certificate does not render the holder liable to pay for the stock. Van Cott v. Van Brunt, 82 N. Y. 535 (1880).

A transfer upon the books renders the transferee liable, although he holds the stock as collateral security for a debt. Roosevelt v. Brown, 11 N. Y. 148; Cutting v. Damerel, 88 N. Y. 410 (1882).

§ 55. Consideration for issue of stock and bonds. No corporation shall issue either stock or bonds except for money, labor done or property actually received for the use and lawful purposes of such corporation. Any corporation may purchase any property authorized by its certificate of incorporation, or necessary for the use and lawful purposes of such corporation, and may issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be full paid stock and not liable to any further call, neither shall the holder thereof be liable for any further payment under any of the provisions of this chapter; and in the absence of fraud in the transaction the judgment of the directors as to the value of the property purchased shall be conclusive; and in all statements and reports of the corporation, by law required to be published or filed, this stock shall not be stated or reported as being issued for cash paid to the corporation, but shall be reported as issued for property purchased.

Formerly L. 1890, ch. 564, § 42, as am'd by L. 1892, ch. 688; L. 1901, ch. 534.

This section formerly provided that no stock shall be issued for less than its par value and no bonds for less than the fair market value thereof, but by the amendment of 1901, chapter 354, these restrictions were abolished and the additional provisions inserted, permitting a corporation to purchase any property authorized by its certificate of incorporation, and in the absence of such authorization permitting it to purchase any property necessary for the use and lawful purposes of the corporation and to issue stock to the amount of the value thereof in payment therefor, and declaring stock so issued to be full-paid stock and not liable to any further call. Said amendment also added the provision that "in the absence of fraud in the transaction the judgment of the directors as to the value of the property purchased shall be conclusive." These new features are upon the lines of the English Companies Act and the New Jersey statute upon the same subject. The foregoing important modifications will preclude the serious questions which occasionally occurred under the former practice as to the legality and validity of the issue of stock of a corporation in payment for properties not having a determinable market value.

Effect of Violation.

Although a corporation has issued stock without the consideration in money, labor or property, required by this section, one who purchases such stock from the person to whom it was illegally issued cannot recover the face value thereof from his vendor under a complaint not charging him with fraud

or deceit, but seeking a recovery solely upon the ground that the stock was void because illegally issued. Stock issued in violation of this section is not void nor are the directors or vendor of such stock liable to a subsequent holder for loss caused through failure to comply with the statute. Ersfeld v. Exner, 128 A. D. 135 (1908).

The assignee of a corporation has no right to enforce against a person to whom stock has been issued for less than par a liability to the corporation for the difference between the amount paid and its par value. It is a personal right vested in the creditor and not a right that vested in the corporation. Thompson v. Knight, 74 A. D. 316 (1902).

Overvaluation of Property Through Error of Judgment.

A mere mistake or error of judgment by the directors as to the necessity of the purchase of property or the value thereof will not subject a holder of stock issued for property to individual liability. Schenck v. Andrews, 57 N. Y. 133 (1874).

Presumption of Validity of Issue of Stock.

There is a presumption that stock has been regularly issued and for value until the contrary is shown. Matter of Seneca Oil Co., 153 A. D. 594 (1912), affd., 208 N. Y. 545.

Fraudulent Overvaluation of Property.

Where stock was issued in payment for property, with knowledge on the part of the directors that the value of the property was much less than the amount of the stock issued therefor, no other fraudulent intent than that which is evidenced by the action of the directors need be shown to authorize the recovery. Natl. Tube Works Co. v. Gilfillan, 124 N. Y. 302 (1891).

The actual value of the property is an important item of evidence, and, with other circumstances, may be sufficient to establish fraud. Boynton v. Hatch, 47 N. Y. 225 (1872); see, also, Douglass v. Ireland, 73 N. Y. 100 (1878), and cases there cited.

Statute Intended for Benefit of Creditors.

The requirements of this section were designed for the benefit and protection of creditors and can only be satisfied as to them (1) by labor theretofore performed, (2) by actual payment in money, or (3) by the purchase, at what is in good faith deemed its fair and reasonable value, of property having a pecuniary value capable of ascertainment and which the corporation might lawfully purchase as necessary to its business. Stevens v. Episcopal Church History Co., 140 A. D. 570, 581 (1910), and cases cited.

Issuance of Corporate Bonds at Less Than Par.

The issuance of corporate bonds for a price less than their par value does not violate this section, in view of the amendment of 1901, chapter 354. Macquoid v. Queens Estates, 143 A. D. 134 (1911); 127 N. Y. Supp. 867. Even prior to the amendment of 1901, the issuance of corporate bonds at less than their par value was valid, in the absence of fraud or breach of fiduciary duty, because the repeal of the usury law as to corporations enabled them to issue bonds at a discount. Gamble v. Queens Co. Water Co., 123 N. Y. 91, 108 (1890).

Capitalization of Funds Expended for Improvements.

The fact that stock is worth more than par and sells for a premium does not in itself afford a basis for capitalizing such premium, but where net earnings have been used to pay off indebtedness and the stockholders have received no dividends and the funds have been expended for improvement of the corporate property, the stockholders should be allowed to receive new capital obligations of the company for the corporate debts which have thus been paid. Matter of Watertown Gas Light Co., 127 A. D. 462 (1908).

Upon the reorganization of a railroad corporation after a mortgage foreclosure under sections 9-12 of this law, the public service commissioners were held not justified in refusing consent to an issue of securities even though the value of the property was less than the securities to be issued; development expenses are taken into consideration in determining the value of railroad property as a whole for the purpose of capitalization. Peo. ex rel. Third Ave. Ry. Co. v. Pub. Serv. Com., 203 N. Y. 299 (1911), affg. 145 A. D. 318; Peo. ex rel. Third Ave. R. R. Co. v. Tax Comrs., 157 A. D. 731, 749 (1913).

Cancellation of Excessive Stock Issues.

Where a promoter of a corporation falsely misrepresented the price for which real estate could be acquired, and received from the corporation stock which was not covered by any actual payment but which represented merely the proceeds of his misrepresentation, there was, as between him and the corporation, no consideration for his stock and it was properly cancelled as void, either in his hands or in the hands of one claiming under him. Travis v. Travis, 140 A. D. 191 (1910), citing Duncomb v. N. Y., H. & N. R. R. Co., 84 N. Y. 190 (1881); Redhead v. Parkway Driving Club, 148 N. Y. 471 (1896).

A judgment directing cancellation of stock issued for secret formulæ and requiring copies of the same to be delivered to a receiver appointed to take possession of the property until the interests of the parties would justify his discharge, is reversible where the facts do not bring the case within the provisions for the appointment of a receiver and where prior to the judgment the stockholder had returned the stock to the corporation which had rescinded the resolution authorizing its issue. Brewster v. Brewster Co., 145 A. D. 812 (1911), modfd., 204 N. Y. 687.

Stock Issued in Payment for Services.

Services rendered in bringing a corporation into existence are not a valid consideration for the issuance of stock. If it were, the entire capital stock could be thus disposed of, and the only asset of the corporation would be its naked existence. Herbert v. Duryea, 34 A. D. 578 (1898), aff'd., 164 N. Y. 595, 596.

The only work or services for which the issuance of capital stock is authorized is work or services performed before the stock is issued, and this does not embrace services in promoting the corporation. Stevens v. Episcopal Ch. History Co., 140 A. D. 570, 582 (1910), citing 34 A. D. 478, supra.

An executory contract for the performance of services in the future does not constitute property within the meaning of this section and stock issued for the purchase of such a contract is not full-paid stock; hence, one receiving stock upon such transaction is liable to the corporate creditors. Stevens v. Episcopal Church History Co., 140 A. D. 570 (1910).

Stock Issued to Purchase Assets of Foreign Corporation.

Where a stockholder of a foreign corporation, under an agreement by which a domestic corporation acquires the assets of such foreign corporation and assumes its liabilities, surrenders his stock in exchange for stock of the domestic corporation, he becomes a holder of full-paid stock in such domestic corporation, subject to the rights and liabilities imposed by the State of New York, and the domestic corporation is not bound by an agreement of such foreign corporation to deliver its bonds to the stockholder or to return the purchase price of his stock. Haule v. Consumers' Park Brewg. Co., 150 A. D. 582 (1912).

Issue of Stock for Property.

A contract for the formation of a corporation to purchase patents by an issue of stock, agreed upon in advance, is not void as against public policy on the theory that the directors are thus debarred from determining the true value of the patents. It must be assumed as a matter of law that the consideration was not excessive. Electric Fireproofing Co. v. Smith, 113 A. D. 615 (1906).

Stock issued for good will is issued for property actually received within the meaning of the statute. Washburn v. National W. P. Co., 81 Fed. Rep. 17 (1897).

The value of good will may be fairly determined by multiplying the average net annual profits by a number of years suitable and proper having reference to the nature and character of the business under consideration. Von Au v. Magenheimer, 115 A. D. 87 (1906).

In determining whether this section has been violated, the value of a franchise of a corporation to be acquired under a contract is to be considered, as well as the value of the plant and tangible properties of the company secured thereby. Rafferty v. Buffalo City Gas Co., 37 A. D. 618 (1899).

An issue of stock to a promoter is not an issue for cash or property. Herbert v. Duryea, 34 A. D. 478, affd., 164 N. Y. 596 (1900).

In determining whether a proper valuation was placed on property received in payment for stock the law makes allowances for variations in the judgment of different men and errors of judgment when honestly made, but does not countenance intentional or fraudulent overvaluations. Flour City Nat. Bk. v. Shire, 88 A. D. 401 (1903), affd., 152 N. Y. 647.

When parties become entitled to receive stipulated amounts of stock, immediately upon the acceptance by the corporation of a transfer of property, such stock will be treated as issued and outstanding within the meaning of this section. 88 A. D. 401, supra.

In a case with features peculiar to itself, held where several persons own an entire property or business, incorporate a company for purposes of convenience in dealing with the property, and the organization so formed does not intend other persons to join them as stockholders it is immaterial what value is attached to the property or the amount of the stock or bonds issued. Seymour v. Spring Forest Cemetery Assn., 144 N. Y. 333 (1895).

Where two directors of a corporation, organized under the laws of West Virginia, which laws provide that a corporation shall not sell its stock for less than par, transfer to the corporation certain patents for the entire $3,000.000 of capital stock, $750,000 of which they subsequently return to the corporation, the measure of the corporation's rights is to rescind the transaction, and, upon tendering a reassignment of the patents, to compel such directors to retransfer to it the stock received by them for the patents and to

account to the corporation for the value of that portion of such stock which they are unable to transfer. Insurance Press v. Montauk Fire Detecting Wire Co., 103 A. D. 472 (1905).

In an action against a foreign corporation, the entire capital stock of which was issued as fully paid in consideration of an assignment of patents at an excessive valuation, the right of a purchaser of the stock to have the entire issue adjudged illegal depends not on the law of this State, but upon the law of the domicile of the corporation. Insurance Press v. Montauk Fire Detecting Wire Co., 83 A. D. 259 (1903), affd., 178 N. Y. 623.

Where a corporation promoted by officers and directors of other corporations, was organized to acquire the capital stock of such other corporations, known as the "constituent companies," the capital stock of the new or holding corporation to be equal to the aggregate capitalization of the constituent companies, the stock of the latter to be exchanged for that of the holding corporation, held, a stockholder of the holding corporation cannot maintain in its behalf an action to recover alleged secret profits in the acquisition of the constituent companies because the stockholders of such companies and the defendants as organizers of the holding corporation dealt wholly between themselves as sellers and buyers and even if fraud had been practiced by any one of the organizers upon those associated with him the cause of action would have vested in the party injured and not the holding corporation. Blun v. Whitney, 185 N. Y. 232 (1906), affg. 111 A. D. 922. See, also, Old Dom. Copper M. & S. Co. v. Lewisohn, 210 U. S. 206 (1908).

An agreement by a railroad company with a responsible contractor to pay for the construction of the road in advance by the issue of bonds and stock does not violate this section as the promise to build was the consideration for the promise to pay and was presumably full consideration. Hudson River and Washington Co. Midland R. R. v. Hanfield, 36 A. D. 605 (1899), and cases cited, and see Lake St. El. Co. v. Ziegler, 99 Fed. 114 (1900).

Even if such agreement be voidable for any reason but has been fully executed, neither a stockholder nor the corporation can complain if they have acquiesced in the transaction and do not offer to return the consideration. Pocantico Water Wks. v. Low, 20 Misc. 484 (1897); Drake v. N. Y. Suburban Water Co., 26 A. D. 499 (1898).

A contract by a railroad to pay a contractor in bonds and full-paid non-assessable stock of the corporation for his work, labor and materials in constructing and equipping the road is not a stock subscription by the contractor, which makes him liable for the par value of the stock. Such contract is not a purchase of the stock and bonds to be paid for in work and property, but is a contract to accept full-paid stock and bonds as payment for the building of the road. A receiver appointed on the insolvency of such corporation is not entitled to recover from the contractor the alleged value of the stocks and bonds received as compensation for the construction of the road, when it is not alleged that the cost of constructing the road and the value of the properties acquired from the contractor were of less value than the par value of the stock and bonds delivered in payment. In any event, although the payment of the contractor in bonds and stocks were fraudulent, the receiver not being vested with rights personal to the creditors and merely standing in the place of the corporation, cannot recover from the contractor the alleged value of the stock and bonds, being, like the corporation, bound by an equitable estoppel. Fraud may furnish sufficient ground for rescinding a contract or for an action by a creditor, but it cannot be availed of as a means of recovery by a party to the scheme. Bostwick v. Young, 118 A. D. 491 (1907), and cases cited.

Actual Value and Good Faith.

In a case involving an interpretation of this section the facts were as follows:

In an action by the trustee of a bankrupt corporation against a stockholder and director, it appeared that the capital stock stated in the certificate was $500,000, all of which was subscribed for by the incorporators, among them the defendant. One of the directors had previously purchased a steel plant for $85,000, and on the formation of the corporation a resolution was adopted authorizing the purchase of the plant for $500,000. To effect the purchase the subscription for the whole capital stock was called in, being paid by the various stockholders, who were also directors, by personal checks which were deposited to the credit of the corporation. Thereupon the corporation gave its check for $500,000 to the director holding title to the steel plant and received from him a conveyance thereof. Thereafter the $500,000 was distributed by the seller to the stockholders who had paid the same to the corporation in the same proportions as paid in. *Held*, that there had been an unauthorized disposal of the assets for which the defendant was liable. Rathbone v. Ayer, 121 A. D. 355 (1907). Judge Cochrane, reviewing the cases on the subject of issuing stock for property, said at p. 359 to 361:

"It is urged by the defendant that he and his associates were at liberty to make a profit on the property and that they had a right to sell it to their corporation at such a price as they might reasonably have supposed it was fairly worth to the corporation. That is probably true, but their good faith and the price at which they might reasonably have supposed the property to be fairly worth to the corporation were matters of inference to be drawn from the evidence and circumstances disclosed by the evidence. Gamble v. Queens County Water Company, 123 N. Y. 104; Douglas v. Ireland, 73 id. 100; Brockway v. Ireland, 61 How. Pr. 372, 376; National Tube Works Co. v. Gilfillan, 124 N. Y. 302, 306; White, Corbin & Co. v. Jones, 86 Hun 57. The actual value of the plant when it was turned over to the corporation was an important element as bearing on that question.

"In Huntington v. Attrill (118 N. Y. 365), it was held that the question was as to the fair value of the property at the time of its sale to the corporation not 'dependent upon subsequent success or failure of the investment further than such result may have been legitimately within evidential contemplation at the time of the sale in view of the uses for which it may have had available advantages within itself.'

"In Douglas v. Ireland (73 N. Y. 104), it is said that all is necessary 'is to prove two facts: 1st. That the stock issued exceeded in amount the value of the property in exchange for which it was issued; and, 2nd. That the trustees deliberately, and with knowledge of the real value of the property, overvalued it, and paid in stock for it an amount which they knew was in excess of its actual value. The value must be determined in any action in which the question arises upon such evidence as may be given, having respect to the circumstances and the nature of the property, and the scienter and guilty action of the trustees may be proved either directly or inferred from circumstances.' In the same case it is said that 'the seller of the property may well be presumed to know its value.'

"In Lake Superior Ice Company v. Drexel (90 N. Y. 91), it seems to have been held that trustees might testify directly to their good faith in the transaction and to their belief as to the value of the property, an opportunity of which this defendant failed to avail himself. It must not be over-

looked that these directors who are charged with having improvidently wasted the corporate assets by purchasing their individual property constituted the full board of directors, and the circumstances affecting their motives and the value of the property were peculiarly within their own knowledge, and it is not a harsh rule that in such a case slight evidence and few circumstances be deemed sufficient to put them to their proof.

"There was also such a remarkable disparity between the price paid by the defendant and his associates and the price at which they as individuals sold to themselves as directors the same property as to naturally suggest the necessity of an explanation not only as to this marvelously enhanced value but also as to the rectitude of their motives and their good faith in selling the property to themselves as directors and in making such an extremely large profit out of the treasury of the corporation of which they were officers. In Boynton v. Andrews (63 N. Y. 93) it was said: 'While a disparity as to value might not establish fraud of itself, cases may arise where the acknowledged difference between the price allowed or agreed upon and the actual value is so erroneous as to bear upon its face clear and unmistakable indiciæ that a fraud was intended to be perpetrated. It cannot be questioned that where property, the value of which is well known and understood, or capable of being easily ascertained, is taken at a most exorbitant estimate, far beyond any intrinsic and real value, it raises a strong presumption that the valuation is not in good faith and was made for a fraudulent purpose. This presumption will be conclusive unless it is rebutted by evidence which fully explains the apparent bad faith.' See, also, to the same effect, Douglas v. Ireland, supra."

New Jersey Decisions.

Under section 49 of the General Corporation Law of New Jersey, which is practically identical with the law of New York on the subject of issuing stock for property, the leading cases hold as follows:

In Donald v. American Smelting & Refining Company, 62 N. J. Eq. 729, the Court said, per Dixon, J., p. 731:

"'The meaning of Section 48 is not questionable; the money must equal the face value of the stock. The language of section 49 is even more explicit; the corporation may issue stock to the amount of the value of the property. The value of the property in one case, just as the value of the money in the other, must at least equal the face value of the stock. Such was the view expressed for this court by Mr. Justice Depue in Wetherbee v. Baker, 35 N. J. Eq. 501, and supported by abundance of authority.

"The cases in this state to which we are referred (Elkins v. Camden & Atlantic R. R. Co., 36 N. J. Eq. 241; Park v. Grant Locomotive Works, 40 N. J. Eq. 114, aff'd., 45 N. J. Eq. 244; Ellerman v. Chicago Junction Rys. Co., 49 N. J. Eq. 217; Willoughby v. Chicago Junction Rys. Co., 50 N. J. Eq. 656; Sewell v. East Cape May Beach Co., 50 N. J. Eq. 717; Edison v. Edison United Phonograph Co., 52 N. J. Eq. 620), in support of the proposition, that the honest judgment of the managers of a corporation with respect to matters intra vires cannot be disturbed at the instance of stockholders, all relates to transactions for which the legislature has set up no other criterion than the discretion of those managers. But the original issue of corporate stock is a special function in the exercise of which the legislature has fixed the standard to be observed, and it is the duty of the courts, so far as their jurisdiction extends, to see that this standard is not violated, either intentionally or unintentionally.

"'When corporate stock has once been issued for property purchased, then the legislature has directed the application of a different rule. In the words of the same section 49 the stock so issued shall be full-paid stock, and not liable to any further call, neither shall the holder thereof be liable for any further payment under the provisions of this act; and in the absence of actual fraud in the transaction, the judgment of the directors as to the value of the property purchased shall be conclusive.' Under these provisions, after the property has been purchased and the stock issued therefor, nothing short of actual fraud in the transaction can impair the right of the holder to hold his stock as full-paid stock, free from further call. The cases of Bickley v. Schlag, 46 N. J. Eq. 533, and Rural Homestead Co. v. Wildes, 54 N. J. Eq. 668, indicate that the completed transaction was equally secure, even before the statute received its present decisive form.'"

In Goodnow v. American Writing Paper Co., 66 Atl. Rep. 607, the Court of Chancery of New Jersey, per Bergen, V. C., said that stock issued as full paid and not subject to further call, at an admitted overvaluation, but without fraud, cannot be held unpaid stock as between the corporation and the stockholders receiving such stock. Dividends declared from the annual net profits cannot be suppressed to make up the deficiency between the value of the assets turned in and the par value of the stock where the value of the assets when declaring such dividends is not impaired.

In Edgerton v. Electric Improvement, &c., Co., 50 N. J. Eq. 354, decided in 1882, the Court said, per V. C. Green, at p. 361:

"To justify a corporation in issuing stock under our act for property purchased, there should be an approximation at least in true value of the thing purchased to the amount of the stock which it is supposed it represents."

In Easton Nat'l Bank v. American Brick & Tile Co., 70 N. J. Eq. 732, the Court said, per Pitney, J., at p. 740:

"'The express prohibition of section 54' (Act 1875), 'and the whole spirit and policy of the act are so clearly opposed to any arrangement by which corporate stock shall be issued without receipt by the company of an equivalent in value to its par, that any agreement to this effect must be deemed void as contrary to the policy of the law.'"

In See, Receiver of Columbia Straw Paper Co., v. Heppenheimer et al., 69 N. J. Eq. 36, the facts are as follows:

"Defendants promoted a corporation to consolidate various industrial plants, for which they paid $2,250,000, which were transferred to the corporation to sustain an issue of $1,000,000 bonds, secured by first mortgages on the properties, and $3,000,000 of common and preferred stock, which was issued as a bonus to purchasers of the bonds to the extent of $600 stock for each $1,000 of bonds purchased; the $1,000,000 raised by the sales of the bonds to be applied $750,000 to the purchase of the mills, $50,000 to the promoters' attorneys for legal services and expenses, and $200,000 to working capital. These bonds were sold largely under a prospectus headed 'Confidential, for private circulation only,' which stated the proposed corporation to have $4,000,000 of stock, ten thousand shares of eight per cent. preferred and thirty thousand shares of common, closing with the words 'the vendors and their friends retain $800,000 of the preferred stock and $2,600,000 of the common stock,' and that $1,000,000 in cash was to be raised by bonds secured by mortgage, of which $750,000 was to be paid the vendors, 'being about one-third of the appraised value of the property.' Held, that the stock of the corporation was issued at an inflated valuation and not in good faith for a property actually delivered, as required by statute.

"A holder with notice of unpaid stock of a corporation is liable thereon to creditors, regardless of whether he subscribed for it or not, if the capital paid in is insufficient to satisfy their claims."

The Court, per Vice-Chancellor Pitney, said, p. 73:

"Now, it seems to me that it is impossible to avoid the conclusion from those facts that the contract of sale procured to be adopted by this board of directors on the very day on which they were elected by the management of these three men whose names have just been mentioned, and the formal contract entered into in pursuance of it, was a palpable fraud on the act of the legislature, and was entirely unwarranted thereby, and operated as a fraud, not only on the future stockholders of the company, as was directly held by the Supreme Court of the United States (176 U. S. 203) in the opinion so often referred to, but especially upon the future creditors of the company."

In Knickerbocker Importation Co. v. Assessors, 65 Atl. Rep. 913, p. 915, the Court of Errors and Appeals of N. J., per Dill, J., said:

"'Neither bookkeeping nor mere recitative language in resolutions of a board of directors, creating values can be accepted as the equivalent of the proof of bona fide value required by our statute where stock is issued for property purchased.'"

Lawful Purpose, what Constitutes.

The purpose of a corporation to secure itself against ruinous competition is "a lawful purpose" within the meaning of this section. Rafferty v. Buffalo City Gas Co., 37 A. D. 618 (1899).

A leasehold of a building required by a corporation for a manufactory constitutes property necessary for the business of the corporation. Close v. Noye, 147 N. Y. 597 (1895).

Issue of Stock as a Bonus.

Under a New Jersey statute, nearly identical with this section, held that an issue of stock as a bonus with bonds would not be binding upon subsequent creditors of the company, for the stockholders cannot thus enable the company to obtain credit upon the strength of its capital stock without paying into its treasury the par value of their stock or delivering to the company property of equal value. Kraft v. Griffon Co., 82 A. D. 29 (1903), and cases cited.

Stock Issued as a Gratuity.

Under a statute of another State Judge Andrews held "that the liability of a shareholder to pay for stock does not arise out of his relation as a stockholder, but depends upon his contract, expressed or implied, or upon some statute, and in the absence of either of these grounds of liability, we do not perceive how a person to whom shares have been issued as a gratuity has, by accepting them, committed any wrong upon creditors of the corporation, or made himself liable to pay the nominal face value of the shares, as upon a subscription or contract." Christiansen v. Eno, 106 N. Y. 97 (1887).

No question of this precise character has arisen under the above section, since its enactment in 1901, and in view of the prohibition in this section against the issuance of stock except for full value it would be well to consider whether or not the point could not be successfully raised in case of stock issued by a corporation as a gratuity that the person accepting the same does so under an implied promise to make payment therefor as in the case of an issue of stock for property in excess of the fair value thereof.

So far as the corporation is concerned in making such an issue of stock it would create a situation for annulment proceedings under the General Corporation Law, section 131, sub-division 1 Ed.

Miscellaneous Cases.

A contract, by which a railroad corporation agrees to pay for the construction of a railroad by issuing its bonds and the greater part of its stock to the contractor and covenants to make such payment in advance, is not, in the absence of evidence showing that the par value of the stock and the market value of the bonds was greater than the value of the contract obligation received therefor to build the road, invalid. Hudson River & Washington Co. Midland R. R. Co. v. Hanfield, 36 A. D. 605 (1899).

Bonds issued under a trust mortgage by an embarrassed corporation upon the surrender by creditors of notes given by the corporation for money and property actually received by it for its use and lawful purposes, and accompanied by an extension to it of the time of payment, are not invalid. Matter of Snyder, 29 Misc. 1 (1899).

Where a corporation having no creditors, and only three stockholders, each holding one share, enters, with the consent of two stockholders, and without objection on the part of the third, into a contract for the construction of its plant, whereby it agrees to pay the constructing firm the balance of its issue of stock, and the contract is fully performed on both sides, a person, who subsequently buys stock which was issued to his assignor in payment for services rendered to the constructing firm, cannot claim that the contract was invalid upon the ground that it was executed in fraud of the rights of the stockholders. Drake v. N. Y. Suburban Water Co., 26 A. D. 499 (1898).

Where a corporation issues to a person, in payment for his lands, certificates of stock bearing on their face the words "shares $100 each. Full-paid and non-assessable beyond $10 per annum," the corporation cannot subsequently assess the shares as the statute does not authorize an assessment, and the acceptance of such shares with such clause does not amount to an assent upon the part of the holder to an assessment which is not authorized by law. Sullivan County Club v. Butler, 26 Misc. 306 (1899).

A person was employed by the directors of a corporation to obtain subscriptions to its capital stock on a commission to be paid by the company. To facilitate the matter a number of stock certificates were prepared in the names of various persons. The certificates were made out in various round amounts, and regularly issued and certified by the corporate officers, indorsed in blank by the so-called holders, and deposited with a trust company, so that when sales were accomplished deliveries could be made by the trust company. Held to be a violation of this section. Brooklyn Heights Realty Co. v. Kurtz, 100 N. Y. Supp. 723 (1906).

§ 56. Liabilities of stockholders. Every holder of capital stock not fully paid, in any stock corporation, shall be personally liable to its creditors, to an amount equal to the amount unpaid on the stock held by him for debts of the corporation contracted while such stock was held by him. As to existing corporations the liability imposed by this section shall be in lieu of the liability imposed upon stockholders of any existing corporation, under any

general or special law, excepting laws relating to moneyed corporations, and corporations and associations for banking purposes, on account of any indebtedness hereafter contracted or any stock hereafter issued; but nothing in this section contained shall create or increase any liability of stockholders of any existing corporation under any general or special law.

Formerly part of § 57, L. 1890, ch. 564, as am'd by L. 1892, ch. 688, § 54; L. 1901, ch. 354.

Matter contained in this section was the first part of former section 54 (originally L. 1890, ch. 564, § 57). It has been divided into three sections (sections 56, 57, 58), with two new headings for the purpose of making its provisions stand out clearly. It is re-enacted without change of wording and its place in article has been changed so as to follow in logical sequence.

Prior to 1892 it was necessary to file a certificate of full payment of capital stock in order to relieve stockholders from personal liability. This requirement of the statute was eliminated by Laws of 1892, chapter 688, and the liability feature was modified so as to read as follows: "The stockholders of every stock corporation shall, jointly and severally, be personally liable to its creditors, to an amount equal to the amount of the stock held by them respectively, for every debt of the corporation, until the whole amount of its capital stock issued and outstanding at the time such debt was incurred shall have been fully paid in." But this burdensome liability has also been abolished by Laws of 1901, chapter 534, amending the foregoing section, so that now each stockholder's liability is limited to the amount, if any, remaining unpaid upon his stock, and only for debts of the corporation contracted while such unpaid stock was so held. Another noteworthy change effected by the amendment of 1901 was the insertion of the provisions that this limited liability of stockholders is in lieu of any liability heretofore imposed upon stockholders of existing corporations by any general or special law on account of any indebtedness hereafter contracted or any stock hereafter issued, and that nothing contained in the amended section shall create or increase any liability of stockholders of any existing corporation.

Under this section prior to the amendment of 1901 a stockholder was liable to an amount equal to the amount of stock held by him for every debt of the corporation until the whole amount of its capital stock issued and outstanding at the time such debt was incurred should have been fully paid. Under the section as amended a holder of capital stock not fully paid is personally liable only to an amount equal to the amount unpaid on the stock held by him. Lancaster v. Knight, 74 A. D. 255 (1902).

Judgment Creditor Subrogated to Right of the Corporation; Judgment Against Corporation as Evidence Against Stockholder.

This section does not impose any penalty upon the stockholder or any original liability, but confers upon the creditor of the corporation the right to pursue, for the satisfaction of his claim, the indebtedness of the stockholder to the corporation for his unpaid subscription to the corporate stock. The liability of the stockholder is not created or enlarged by statute but rests upon his contract with the corporation; and the creditor, in seeking payment of his debt, is merely subrogated to the claim of the corporation against its debtor, in case he avails himself of his statutory right to pursue the stockholder as such debtor to the corporation. The creditor thus claims

through the corporation, and to entitle him to this statutory subrogation, he need only show that he is a corporate creditor; therefore, the creditor's judgment obtained against the corporation is competent evidence against the stockholder to establish the title of the creditor to succeed to the rights of the corporation and of the amount due him. Stephens v. Fox, 83 N. Y. 313 (1880), distg. Miller v. White, 50 N. Y. 137, and McMahon v. Macy, 51 N. Y. 155; Assets Realization Co. v. Howard, 211 N. Y. 430 (1914), approving and distg. 83 N. Y. 313, supra. The judgment against the corporation, in the absence of fraud or collusion, is conclusive to establish the status of the plaintiff as a corporate creditor and the amount of his claim. Caesar v. Bernard, 156 A. D. 724, 728 (1913), affd. on op. below, 209 N. Y. 570. In the case of Assets Realization Co. v. Howard, 211 N. Y. 430, supra, the judgment against the corporation was held not to be evidence against the corporation but in that case the liability was an original one to the creditor created by statute and not based upon a prior contractual relation to the corporation. In Miller v. White, 50 N. Y. 137, and McMahon v. Macy, 51 N. Y. 155, supra, the defendant was not pursued as a debtor to the corporation, nor for any pre-existing liability of his own, but upon an original liability created by the statute, and in those cases it was held that if the stockholder is not a debtor to the corporation a prior judgment against the corporation is not admissible against him, because it was not in the power of the corporation to admit away the stockholder's case or suffer a recovery which should be binding upon him and create, as against him, a liability to which he was not previously subject.

Unpaid subscriptions are assets of the corporation, bound in equity for the payment of its debts, and a creditor, after exhausting his remedy at law against the corporation, is subrogated to the right of the corporation in order to reach such assets. Wheeler v. Millar, 90 N. Y. 353, 361 (1882). It follows, therefore, that a creditor claiming through the corporation has no greater right than belongs to it and his recovery on account of unpaid stock necessarily rests upon a promise to pay, express or implied, which must be proved by competent evidence. Seymour v. Sturgess, 26 N. Y. 134 (1862); Glenn v. Garth, 133 N. Y. 18, 42 (1892); Jones v. Beaver Nat. Bk., 150 A. D. 145, 148 (1912).

Where corporate property has been divided among stockholders before its debts have been paid, a judgment creditor, after the return of an execution against the corporation unsatisfied, may proceed against a stockholder to reach what he received, and the judgment against the corporation is prima facie competent evidence against the stockholder to establish the title of the creditor to succeed to the rights of the corporation. Hastings v. Drew, 76 N. Y. 9, 15, 16 (1879); Stephens v. Fox, 83 N. Y. 313 (1880).

Where property of a corporation has been divided among stockholders before all its debts have been discharged, if any one stockholder is compelled to pay more than his proportionate share of any unpaid debt, he may resort to his associates for equitable contribution; but with that proceeding the creditor has nothing to do, unless he chooses to intervene to settle equities that may exist between his debtors. Bartlett v. Drew, 57 N. Y. 587 (1874).

Stockholder's Liability to Creditors.

In a case arising under this section as it existed prior to 1901 (when a stockholder whose stock was fully paid continued to be liable to creditors for an amount equal to his stock until the entire outstanding capital stock was fully paid in), it was held that the liability was purely statutory and in the nature of a penalty, and that the right to enforce it was vested in the creditors, not

in the corporation, and did not pass to a trustee in bankruptcy proceedings. Rathbone v. Ayer, 84 A. D. 186 (1903). But that unpaid subscriptions to the capital stock are debts belonging to the corporation which it can collect, and are corporate assets which pass to the trustee in bankruptcy. Id.

In 1901 the statutory liability was reduced as to claims originating after that time, so that now, aside from the special liability to laborers, the stockholder is liable to creditors only for the amount which is unpaid upon his own stock, in which respect the statutory liability and the liability in equity are alike. Leighton v. Leighton Lea Association, 62 Misc. 73 (1909). However, the distinction is retained between the equitable action to reach assets of the judgment debtor and the legal cause of action conferred only by statute, as illustrated in 84 A. D. 186, supra, and Lang v. Lutz, 83 A. D. 534, affd., 180 N. Y. 254.

Prior to 1901 a creditor of the corporation could maintain an action at law to enforce the statutory liability for his individual benefit. Weeks v. Love, 50 N. Y. 568. Under the section as amended in 1901, a creditor cannot maintain an action at law for his own exclusive benefit to enforce the liability thereby imposed upon the stockholders, but his remedy is to bring a suit in equity on behalf of himself and all other creditors. Lang v. Lutz, 83 A. D. 534 (1903), and cases cited, affd., 180 N. Y. 254.

The obligation of the holder of partly paid stock is personal to the creditors and cannot be enforced by a general assignee for their benefit. Thompson v. Knight, 74 A. D. 316 (1902).

An action brought directly upon a stock subscription is one to recover a debt due the corporation and may be maintained by its receiver; it is not an action to enforce the statutory liability of stockholders nor to enforce contribution for the benefit of creditors. Myers v. Sturgis, 123 A. D. 470 (1908).

The statutory obligation which a stockholder assumes becomes a part of the contracts made by the corporation with its creditors until the corporation is so far organized and completed that its stock is subscribed for and paid in, at which time the statute relieves the stockholder from further liability. Until that time his relation is deemed contractual. Close v. Potter, 155 N. Y. 145 (1898), citing Cochran v. Wiechers, 119 N. Y. 399.

A change made by amendment respecting liability of stockholders would not affect the right of a creditor which existed at the time the amendment took effect. Lancaster v. Knight, 74 A. D. 255 (1902).

Under a by-law of a corporation which provides that "When there are not sufficient funds in the Treasurer's hands to pay the indebtedness of the corporation an assessment shall be made on the stockholders to cover the amount necessary to cancel said indebtedness, unless otherwise arranged and paid by the Board of Directors", an assessment for the estimated expenses for the current year is authorized. Delaware Valley Telephone Co. v. Tiffany, 131 A. D. 343 (1909).

It has been held that subscribers to stock after incorporation are not bound to pay assessments until the whole capital stock of the corporation has been subscribed for, but a subscriber may waive that implied condition by the payment of prior assessments without objection. Myers v. Sturgis, 123 A. D. 470 (1908). The statement that a subscriber is not bound to pay assessments unless the entire capital stock has been subscribed for should not be regarded as the correct rule respecting the stock subscriptions of corporations. The court appears to have relied upon the dictum in the case of Bray v. Farwell, 81 N. Y. 600, and to have overlooked the fact that in the latter case the court was discussing subscriptions for stock of a joint stock association which is

quite a different sort of institution from a corporation. In a joint stock association the shareholders are individually liable for all the debts of the association to the same extent as a member of a partnership. The correct rule respecting subscriptions to the stock of business corporations has been laid down by the Court of Appeals in a case in which it was held that subscriptions to the entire authorized capital stock are not essential as a condition precedent to the legal existence of a corporation or for the purpose of making stock subscriptions enforceable. Schenectady & Saratoga Plankroad v. Thatcher, 11 N. Y. 106 (1854). Directors may call for installments on stock subscriptions before the whole amount is subscribed. Id. And regardless of the amount subscribed a corporation organized under the Business Corporations Law is permitted to transact business and incur debts whenever the amount of capital stated in the certificate of incorporation as the amount with which it will begin business shall have been paid in, in money or property. Bus. Corp. Law. § 3. Provided the amount is at least $500. Ed.

In the case of Stevens v. Lippman, 85 Misc. 347 (1914), the court cited the case of Myers v. Sturgis, 123 A. D. 470, and in doing so followed the error of that case in holding that a subscriber to stock is not bound to pay assessments unless the whole capital of the company has been subscribed.

A stockholder is liable for debts when his stock has been issued for property which was substantially and intentionally overvalued. Nat'l Tube Works Co. v. Gilfillan, 124 N. Y. 302 (1891). See, also, Moosbrugger v. Walsh, 89 Hun 564 (1895); Briggs v. Cornwell, 9 Daly 439 (1881); Briggs v. Waldron, 83 N. Y. 582 (1881); McDowell v. Sheehan, 129 N. Y. 200 (1891); Herbert v. Duryea, 34 A. D. 479, affd., 164 N. Y. 596 (1900).

If a shareholder, in contemplation of the insolvency of a corporation, in respect to which he is under some liability as a shareholder, or in case his stock has not been fully paid for, assigns his shares to an irresponsible person for the purpose of escaping liability, he remains liable to the then existing creditors of the corporation. Sinclair v. Dwight, 9 A. D. 297, affd., 158 N. Y. 607 (1899).

Where stockholders submit to an assessment equal to the overvaluation of property for which stock was issued and pay the amount into the treasury, they are not liable to creditors whose claims thereafter accrue. White-Corbin & Co. v. Jones, 167 N. Y. 159 (1901), revsg. 45 A. D. 241.

Certificates of stock of a corporation issued in excess of the limit imposed by its charter are void, and the holder of them is not entitled to the rights, nor subject to the liabilities of a holder of authorized stock. Scoville v. Thayer, 105 U. S. 143 (1881).

Stockholder's Liability at Common Law.

At common law a stockholder who paid less than par for his stock was not liable for the balance unpaid, for his liability depended upon his contract. Southworth v. Morgan, 205 N. Y. 293 (1912).

Creditor's Action to Enforce Stockholder's Liability not Barred by Dissolution of Corporation.

An action by a judgment creditor of a corporation against a holder of its stock not fully paid is not barred by a dissolution of the corporation and the appointment of a receiver of its assets. Lyell Av. Lumber Co. v. Lighthouse, 137 A. D. 422 (1910); Ford v. Chase, 118 A. D. 605 (1907), affd., 189 N. Y. 504.

Liability of Estate of Deceased Stockholder.

When a stockholder dies his estate continues to be the holder of the stock and it becomes responsible for any obligations accruing during such ownership and such estate is liable for the debts contracted by the corporation as long as the relation of stockholder exists. During the solvency of the corporation, the estate may free itself by a sale of the stock. Bailey v. Hollister, 26 N. Y. 112 (1862).

Trust Fund Doctrine.

See also, the above topic, under the Stock Corp. Law, § 66, post.

The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it bona fide for a valuable consideration and without notice. It is publicly pledged to those who deal with the corporation, for their security. Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company, as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due to the company. As regards creditors, there is no distinction between such a demand and any other assets which may form a part of the property and effects of the corporation. Sanger v. Upton, 91 U. S. 56, 60 (1875).

Enforcement of Stockholders' Liability by Trustees in Bankruptcy; New York and New Jersey Statutes, Distinction.

A trustee in bankruptcy cannot maintain an action to enforce the liability of stockholders to creditors under this section. Since, in this State, the liability of stockholders to creditors is not an asset of the corporation, no authority is given to a trustee by the Bankruptcy Act to maintain such action. Breck v. Brewster, 153 A. D. 800 (1912).

Under the foregoing and succeeding sections the holder of stock which is not fully paid is personally liable to certain classes of corporate creditors for the unpaid balance upon his stock, but the corporation itself has no claim or right of action against such stockholder, and no right of action thereunder passes to a trustee in bankruptcy of the corporation in behalf of its general creditors to enforce payments from stockholders to whom full paid stock was issued for property which was not equal to the par value of the stock. In re Jassoy Co., 178 Fed. 515 (1910), and cases cited.

The New Jersey statute does not, like the law of this State, authorize a creditor of a corporation to maintain an action against a stockholder, whose stock has been issued to him by the corporation at less than its par value, to recover from him the unpaid balance to satisfy such creditor's debt. Therefore, no such action against a stockholder of a New Jersey corporation lies in the courts of this State. Under the New Jersey law, which in such a case is controlling on the courts of this State, a cause of action, if any, in such a case, belongs to the corporation itself, not to its creditors, and upon the bankruptcy of the corporation, passes to its trustee, who alone may maintain such suit. Manufacturers' Com'l Co. v. Heckscher, 144 A. D. 601 (1911), affd., 203 N. Y. 560; see, also, In re Remington Automobile Co., 153 Fed. 345.

Creditor's Action on Behalf of All Creditors to Enforce Stockholders' Liability; Parties Defendant.

A creditor of a corporation suing in equity on behalf of all its creditors to enforce the liability of stockholders for unpaid subscriptions to the capital stock must join as defendants all stockholders who are liable under the statute as well as the personal representatives of those who have died, so that each stockholder may be compelled to contribute pro rata and all creditors may share in the fund recovered. Warth v. Moore Blind Stitcher & Overseamer Co., 146 A. D. 28 (1911), citing and distg. cases decided prior to amendments of the statute; affd., 207 N. Y. 673. It is not essential to make the owner of stock not fully paid a defendant if he be insolvent, bankrupt or without the jurisdiction. Id., per Judge Ingraham, concurring.

In the above case the court said there is no particular hardship in requiring the plaintiff to bring in all the stockholders who are liable, because after judgment against the corporation and return upon the execution, the plaintiff may, by an examination of the corporate officers, readily ascertain who its stockholders were and who are liable under the statute on account of the stock not having been paid in full.

Only One Recovery May Be Had upon the Same Share of Stock.

The judgment creditors of a corporation are only entitled to collect from a subscriber to the capital stock so far as necessary the amount unpaid thereon and, although two or more defendants may be liable, only one satisfaction may be had as to the same stock or that issued in place thereof. Stevens v. Episcopal Church History Co., 140 A. D. 570, 582 (1910).

Judgment Creditor's Action to Sequestrate Corporate Property.

A representative action in the right of the corporation may be maintained by a judgment creditor for sequestration of the corporate property and to recover on the personal liability of the subscribers to the capital stock, for the amounts unpaid thereon. Stevens v. Episcopal Church History Co., 140 A. D. 570 (1910); Beals v. Buffalo Expanded Metal Const. Co., 49 A. D. 589 (1900). Such liability may be enforced in an action brought pursuant to General Corporation Law, section 100 et seq. (formerly Code, § 1784 et seq.), and the plaintiff is not required to seek his remedy under the Stock Corporation Law, section 56. 49 A. D. 589, supra. A receiver has no power to enforce such liability against stockholders. Farnsworth v. Wood, 91 N. Y. 308 (1883).

Denial of Corporate Existence as a Defense.

A person who subscribed to the capital stock of a corporation cannot dispute the validity of the incorporation. Phœnix Warehousing Co. v. Badger, 67 N. Y. 294 (1876); Buf. & Allegany R. Co. v. Carey, 26 N. Y. 75 (1862). The same principle applies in respect to a subscriber to an increase of the capital stock. Veeder v. Mudgett, 95 N. Y. 295, 310 (1884).

When a person has received the property of a corporation through a contract made with it in its corporate name, and there is also extrinsic proof of the user by it of corporate powers, he is estopped from disputing its incorporation in an action brought to compel an accounting for such property. Com'l Bk. of Keokuk v. Pfeiffer, 108 N. Y. 242, 254 (1888).

A stockholder of a corporation is estopped from denying the legal existence of the corporation; therefore, a defect in the proceedings to organize the

corporation is no defense to the stockholder when sued to enforce his individual liability. Aspinwall v. Sacchi, 57 N. Y. 331, 338 (1874); Eaton v. Aspinwall, 19 N. Y. 119 (1859).

A plaintiff may not raise any question as to the corporate character of a company where he was a member of that body and had contracted with it in its corporate character. Whitford v. Laidler, 94 N. Y. 145, 151 (1883).

Where the incorporators did not sign a certificate of incorporation at the end thereof but did sign it above the attestation clause and their acknowledgment of the execution thereof was duly attested and such certificate was filed as required by law, there was at least a de facto corporation. A stockholder cannot question the legal existence of such a corporation in order to escape liability to creditors upon stock not fully paid. Lyell Ave. Lumber Co. v. Lighthouse, 137 A. D. 422 (1910); 151 A. D. 902, affd., 208 N. Y. 628; Locke v. Taylor, 161 A. D. 44 (1914).

Corporate Books as Evidence of Stockholder's Relation.

See, also, section 32 of the Stock Corporation Law, under "Corporate Books as Evidence."

Where the name of a person appears on the stock book of a corporation as a stockholder, it is presumptive evidence that he is so, and in an action against him as a stockholder, the burden of proving that he is not is thrown upon him. Hoagland v. Bell, 36 Barb. 57.

A person to whom stock is transferred on the corporate books and who appears upon such books to be the legal owner, is liable as a stockholder, though it was transferred to and held by him as security for a debt. Rosevelt v. Brown, 11 N. Y. 148 (1854); see, also, 133 N. Y. 18, 42.

A person is, as between himself and the creditors of a corporation, a stockholder, when he holds a certificate of stock and the corporate books disclose this to be his relation to the corporation. Wakefield v. Fargo, 90 N. Y. 213 (1882).

Stock of Proposed Corporation; Liability of Subscriber.

A holder of stock not fully paid is liable to creditors where he signed a preliminary subscription agreement, providing for the organization of the company, although he did not sign the certificate itself, and although the certificate gives wider powers to the corporation than those originally contemplated, if he held himself out as a stockholder and issued a proxy as such. Lyell Ave. Lumber Co. v. Lighthouse, 137 A. D. 422 (1910). The legal effect of such subscription is not altered by an oral agreement. Id.

A subscriber to the stock of a proposed corporation, who has by his conduct held himself out as a stockholder after the formation of the corporation, cannot defeat his liability by showing that his subscription was made on an oral condition which had not been fulfilled. Lyell Ave. Lumber Co. v. Lighthouse, 137 A. D. 422 (1910).

Copartnership Liability upon Failure to File Certificate.

Where parties ineffectually attempt to create a corporation and they assume to enter into contracts, they are deemed to be engaged in a joint venture and become individually liable upon principles applicable to a copartnership. Worthington v. Griesser, 77 A. D. 203, 208 (1902), citing King v. Barnes, 109 N. Y. 267; Wilcox v. Pratt, 125 N. Y. 688.

The mere execution and acknowledgment of a certificate of incorporation does not create a corporation de facto, and, if the subscribers to such cer-

tificate, before the filing thereof, transact business in the name of the corporation, they doubtless thereby become liable as co-partners. Stevens v. Episcopal Church History Co., 140 A. D. 570, 578 (1910).

Parties assuming to act in a corporate capacity without being incorporated are liable as partners to those with whom they contract. Fuller v. Rowe, 57 N. Y. 23 (1874).

Where the term of corporate existence had expired and the stockholders agreed to continue the business in the corporate name, by one of their number as manager, and to furnish money to carry on the business in proportion to the amount of stock held by each in the corporation, they became liable as partners to third persons and for all the debts contracted by such agent in carrying on the business, on the ground that he had the power as partner to bind the others. Nat'l Union Bk. v. Landon, 45 N. Y. 410 (1871).

Where, after the term of existence of a corporation had expired, its general agent continued the business and contracted debts in the corporate name, and the stockholders, six months after the expiration of the charter, received dividends as from the earnings of the corporation, without notice that they were not so paid, and without knowledge of the expiration of the charter, such stockholders are not liable as co-partners. Central City Sav. Bk. v. Walker, 66 N. Y. 424 (1876).

Where there is no actual user of corporate powers, and the sole attempt to create a corporation consisted in filing a certificate of incorporation with a county clerk in New Jersey, but not with the Secretary of State, a de facto corporation does not exist and the parties to a contract made in such a case are liable as partners. Perrine v. Levin, 68 Misc. 327 (1910), citing Stout v. Zulick, 48 N. J. 601.

Stockholder as a Corporate Creditor.

There is a sense in which every shareholder is a creditor of the corporation to the extent of his contribution to the capital stock. In that sense every corporation includes its capital stock among its liabilities. But that creditor relation is one which extends only between the corporation and its shareholders. It is a liability which is postponed to every other liability, and no part of the capital stock can be lawfully returned to the stockholders until all debts are paid or provided for. Hamlin v. Continental Trust Co., 78 Fed. 664.

Liability of Resident Stockholders of Foreign Corporations.

The liability of a stockholder in a foreign corporation is to be determined by the laws of the State under which the corporation was formed, in so far as such laws do not violate a statute or the settled policy of this State. Southworth v. Morgan, 205 N. Y. 292 (1912). The laws of other States are facts which must be alleged and proved and of which judicial notice cannot be taken. Id.

Where the statutes of another State attempt to impose upon directors or stockholders a liability not arising out of contract or known to the common law, the courts of this State will not enforce the same, there being no obligation of comity to enforce a statute which is penal and not contractual. Worthington v. Grieser, 77 A. D. 203, 208 (1902), citing Marshall v. Sherman, 148 N. Y. 9. Contractual obligations incurred in other States are enforceable in our courts in a proper action. Stoddard v. Lum, 159 N. Y. 265 (1899).

Where an action is brought to enforce the liability of a stockholder of a New Jersey corporation who had subscribed and paid for stock at less than

par, no recovery can be had without alleging and proving some New Jersey statute imposing the obligation to pay the balance, for the courts of New York will not take judicial notice of the foreign statutes and will presume the common law to prevail. Under the common law there was no such obligation. Southworth v. Morgan, 205 N. Y. 293 (1912), followed in Milliken v. Caruso, 205 N. Y. 559 (1912).

A stockholder assumes the liability imposed by constitutions and statutes as a part of his subscription agreement. Prior to 1903 the Ohio Constitution provided for the double liability of stockholders. In such a case, when a corporation becomes insolvent, all the stockholders may be made parties to an action by the receiver and non-residents may be brought in by publishing notice of the action. The receiver appointed is a quasi-trustee and the court may direct him to prosecute actions in his own name against stockholders in other jurisdictions. He may bring an action against stockholders residing in New York, but they are entitled to any personal defense which they may have against the creditor's action, and since the period of limitations in Ohio for such an action is eighteen months, section 390a of the New York Code of Civil Procedure applies and the action is barred. Shipman v. Treadwell, 208 N. Y. 404 (1913).

The courts of one State will not enforce the penal laws of other States or allow a recovery for a penalty imposed upon a corporation or its officers by the State in which the corporation was created. Hutchinson v. Stadler, 85 A. D. 424, 430 (1903).

The statutory liability of stockholders in foreign corporations for corporate debts cannot be enforced except at the domicile of the corporation. Marshall v. Sherman, 148 N. Y. 9 (1895), revsg. 84 Hun 186; explained and discussed in Knickerbocker Trust Co. v. Iselin, 185 N. Y. 54 (1906); see, also Coulter Dry Goods Co. v. Rosenbaum, 74 Misc. 579 (1911).

Where a creditor of a foreign corporation brought an action at law against a single stockholder, residing in this State, to enforce a liability created by the statutes of such foreign State, which imposed upon the stockholder a liability for the debts of the corporation, in addition to his unpaid subscription, in an amount equal to the stock held by him, it was held that such liability was statutory and not contractual and could only be enforced in the domicile of the corporation, and that if the action was maintainable it could not be instituted at law by a single creditor against a single stockholder, but the proper remedy would be a suit in equity on behalf of all the creditors against all the stockholders. Marshall v. Sherman, 148 N. Y. 9 (1895); see, also, Stoddard v. Lum, 159 N. Y. 265 (1899).

An action at law, by a single creditor of an insolvent foreign corporation against a single stockholder, to enforce the latter's statutory liability for double the amount of stock at its par value held by him in such corporation, is not maintainable under the laws of this State. Knickerbocker Trust Co. v. Iselin, 185 N. Y. 54 (1906). The law of this State relieves the owner of full-paid stock from further liability and furnishes no remedy primarily by an action by a single creditor against a single stockholder. Coulter Dry Goods Co. v. Rosenbaum, 74 Misc. 579 (1911).

Upon the principle of comity a foreign receiver has the right to bring an action in this State to enforce rights recognized by the common or statutory law of a foreign State. This includes the enforcement of assessments legally made by the courts of such foreign State. The liability of stockholders of foreign corporations falls within this rule. Howarth v. Angle, 162 N. Y. 179 (1900); Stone v. Penn Yan, etc., Ry. Co., 197 N. Y. 279 (1910); Shipman v. Treadwell, 208 N. Y. 404 (1913), affg. 150 A. D. 57.

A receiver, being a quasi-trustee and representing the creditors, has the right to enforce the liability of stockholders for debts imposed by the statutes of the State where the corporation has its domicile. In the interest of interstate comity he may bring an action in this State to enforce the liability of a resident stockholder, where it appears that the same liability has been determined as to all the stockholders in the foreign court, and where the remedy involves no departure from our practice and does not conflict with public policy nor work injustice to any of our citizens. Howarth v. Angle, 162 N. Y. 179 (1900); Shipman v. Treadwell, 200 N. Y. 472, 476 (1911).

Shipman v. Treadwell, 200 N. Y. 472, and 208 N. Y. 404, decides that after a court of competent jurisdiction in a foreign State has determined the liability of all stockholders under a statute providing for double liability, and the receiver has been directed to collect by proper proceedings in this State, the receiver may bring an action in this State to recover of resident stockholders their share to pay the debts of the corporation. The judgment in the foreign court is conclusive as to the assets and liabilities of the foreign corporation and as to the necessity for and amount of the assessment.

A foreign trustee, receiver or liquidator may, in a proper case, maintain an action in New York courts to recover from a stockholder resident therein his proportionate liability as such stockholder. An allegation that under his appointment as liquidator all the property, effects and choses in action to which the corporation was or appeared to be entitled came into plaintiff's custody or under its control is sufficient to show title in the plaintiff. Royal Trust Co. v. Harding, 155 A. D. 104 (1913). An allegation that the court in which the foreign judgment was rendered is one of general jurisdiction and that one service of notice of application for said judgment was given is sufficient to establish prima facie the validity of the foreign judgment. Id.

The enforcement of a liability against a resident stockholder for debts of an insolvent foreign corporation does not rest upon the theory that the laws of the foreign State are in force in this State, but upon the contractual obligation he voluntarily assumes to meet the liability by becoming a stockholder. Howarth v. Angle, 162 N. Y. 179 (1900), affg. 39 A. D. 151.

An action for unpaid calls may be maintained in this State by a foreign corporation against a transferee of stock personally served with process in this State and not a resident of, nor subject to, the jurisdiction of another State, after appointment of a Federal receiver in that State. Sigua Iron Co. v. Brown, 171 N. Y. 488 (1902), affg. 58 A. D. 436.

A stockholder's liability to creditors, fixed by a foreign statute creating the corporation, at double the par value of the stock held, is not enforceable in New York since the liability is penal and not contractual. Knickerbocker Trust Co. v. Iselin, 185 N. Y. 54 (1906). The courts of one State will not enforce the penal laws of other States, or allow a recovery for a penalty imposed upon a corporation or its officers by the State in which the corporation was created. Hutchinson v. Stadler, 85 A. D. 424, 430 (1903).

Stockholder of Foreign Corporation; When Common-Law Rule Applies.

In an action in this State against a stockholder of a Maryland corporation to compel him to pay the amount unpaid upon his stock, in the absence of any statute of that State affecting his liability, it is to be determined by the common law. Seymour v. Sturgess, 26 N. Y. 134 (1862).

The liability of stockholders to corporate creditors is not a common-law liability. Such liability when it exists at all is regulated and created by statutory enactment; therefore, the double liability of stockholders in for-

eign corporations to creditors thereof cannot be enforced except at the domicile of the corporation where the obligation was created. Coulter Dry Goods Co. v. Rosenbaum, 74 Misc. 579 (1911).

§ 57. Liabilities of stockholders to laborers, servants or employees. The stockholders of every stock corporation shall jointly and severally be personally liable for all debts due and owing to any of its laborers, servants or employees other than contractors, for services performed by them for such corporation. Before such laborer, servant or employee shall charge such stockholder for such services, he shall give him notice in writing, within thirty days after the termination of such services, that he intends to hold him liable, and shall commence an action therefor within thirty days after the return of an execution unsatisfied against the corporation upon a judgment recovered against it for services.

Formerly part of § 57, L. 1890, ch. 564, as am'd by L. 1892, ch. 688, § 54; L. 1901, ch. 354. See, also, note to § 56 as to source of section.

For form of notice to stockholder, see Form No. 260a, post.

"Laborers, Servants or Employees," Defined.

An attorney employed, but not exclusively, by a corporation, at a weekly salary, and not having his office in any building nor upon any property of the corporation, cannot maintain an action under this section, as he is neither a laborer, servant nor employee. Bristor v. Kretz, 22 Misc. 55, affd., 29 A. D. 624 (1898); affd., sub nom. Bristor v. Smith, 158 N. Y. 157 (1899); compare Matter of Stryker, 158 N. Y. 526 (1899).

One employed at a yearly salary as a bookkeeper and general manager is not a laborer or servant within the meaning of the statute. Wakefield v. Fargo, 90 N. Y. 213 (1882).

Notice to Stockholder.

Notice to the stockholder required to be given under this section is sufficient when given by an authorized attorney of the plaintiff. Card v. Groesbeck, 140 A. D. 30, 32 (1910), affd. on this point, 204 N. Y. 301, 306 (1912).

Liability of Stockholder for Costs.

Where the recovery against the corporation includes other causes of action, no costs can be recovered against the stockholder, for it may be that the corporation would not have defended had it been sued for services only. Card v. Groesbeck, 204 N. Y. 301 (1912), modfg. 140 A. D. 30.

If verdict in the action against the corporation included items other than services and the amount of such other items can be ascertained by the stockholder only by outside estimates and figures, the latter is not liable in the statutory action. Card v. Groesbeck, 204 N. Y. 301 (1912), modfg. 140 A. D. 30.

Sufficiency of Return on Executions.

A return of "nulla bona" on the execution against the corporation is sufficient, as it is understood to mean that the execution is uncollectible. Card v. Groesbeck, 140 A. D. 30 (1910), affd. on this point, 204 N. Y. 301, 306 (1912).

An employee who has obtained a judgment against the corporation in a court not of record and the return of an execution unsatisfied, is not required to file a transcript of his judgment in a court of record before proceeding against the stockholders. Padros v. Swarzenbach, 134 A. D. 811 (1909). It is sufficient if he exhausts his remedy against the personal property of the corporation by the execution of a city court. Id.

§ 58. Non-liability in certain cases. No person holding stock in any corporation as collateral security, or as executor, administrator, guardian or trustee, unless he shall have voluntarily invested the trust funds in such stock, shall be personally subject to liability as a stockholder; but the person pledging such stock shall be considered the holder thereof and shall be liable as stockholder, and the estates and funds in the hands of such executor, administrator, guardian or trustee shall be liable in the like manner and to the same extent as the testator or intestate, or the ward or person interested in such trust fund would have been, if he had been living and competent to act and held the same stock in his own name, unless it appears that such executor, administrator, guardian or trustee voluntarily invested the trust funds in such stocks, in which case he shall be personally liable as a stockholder.

Formerly part of § 57, L. 1890, ch. 564, as am'd by L. 1892, ch. 688, § 54; L. 1901, ch. 354. See, also, note to § 56 as to source of section.

Pledgor and Pledgee of Stock; Rights of, Generally.

See Stock Corporation Law, section 50, ante, under the above topical heading.

Where corporate stock which was pledged without being assigned has been stolen from a pledgee the pledgor may assert title against an innocent purchaser for value subject only to the discharge of the original lien. Treadwell v. Clark, 190 N. Y. 51 (1907).

§ 59. Limitation of stockholder's liability. No action shall be brought against a stockholder for any debt of the corporation until judgment therefor has been recovered against the corporation, and an execution thereon has been returned unsatisfied in whole or in part, and the amount due on such execution shall be the amount recoverable, with costs against the stockholder. No stockholder shall be personally liable for any debt of the corporation not payable within two years from the time it is contracted, nor unless an action for its collection shall be brought against the corporation within two years after the debt becomes due; and no action shall be brought against a stockholder after he shall have ceased to be a stockholder, for any debt of the corporation, unless brought within two years from the time he shall have ceased to be a stockholder.

Formerly L. 1890, ch. 564, § 58, as re-enacted by L. 1892, ch. 688, § 55.

Additional Cases Applicable to This Section.

In addition to the cases hereinafter cited, see, also, collection of authorities under section 56, ante, and comments thereon.

Judgment and Execution of City Court.

There is no requirement under this section that the judgment against the corporation shall be recovered in a court of record or made the judgment of such court, and that execution must be issued out of such court. In an action against a stockholder it is sufficient when judgment against the corporation has been obtained in a city court having jurisdiction, and that execution thereon was issued by such court and returned unsatisfied. Padros v. Swarzenbach, 134 A. D. 811 (1909).

Creditor's Actions.

The complaint must show that the corporation was a stock corporation other than a moneyed corporation. Dyer v. Drucker, 108 A. D. 238 (1905).

The complaint need not allege that the defendant was a stockholder within two years prior to the commencement of the action. If such was not the fact it is a matter of defense to be set up in the answer. Castner v. Duryea, 16 A. D. 249 (1897).

Where the complaint in an action to enforce a stockholder's liability alleges that at the time the debt was created defendant was a stockholder and contains other sufficient allegations it need not allege that defendant ceased to be a stockholder, if such was the fact, nor that the action was brought within two years, as these latter are matters of defense. Citizens' Bank of Buffalo v. Weinberg, 26 Misc. 518 (1899).

The assignee of a creditor and holder of the notes of a business corporation whose capital stock has never been fully paid, and which has been dissolved, after the appointment of the receiver, is entitled to maintain an action against a stockholder, who has paid nothing for his stock, in order to recover a debt of the corporation, not exceeding the par value of his stock. Thompson v. Nicolai, 21 Misc. 700 (1897). It is unnecessary for a plaintiff to join in his action, other creditors, the corporation, its receiver, or other stockholders; nor, in view of the dissolution, need he show an execution against the corporation unsatisfied. Thompson v. Nicolai, 21 Misc. 700 (1897).

In an action brought by a judgment creditor to enforce the statutory liability before the amendment of 1901, a defense, first, that the corporation had property subject to levy and sale under the execution when it was returned unsatisfied; and, second, that the return was made by the sheriff acting in collusion with the plaintiff, can only be sustained by establishing both propositions. Berwind-White Coal Mining Co. v. Wadsworth, 27 A. D. 550 (1898).

In an action against a stockholder whose stock has not been paid for in money or property as required by the statute, to recover for legal services by the plaintiff's assignors, the fact that one of the plaintiff's assignors is a stockholder does not preclude a recovery, where it appears that the employment and services of the plaintiff's assignors were joint and not several. Montgomery v. Brush Electric Illg. Co., 48 A. D. 12, affd., 168 N. Y. 657 (1901).

Where many creditors of an insolvent corporation have brought separate actions against stockholders who are severally individually liable for its debts, the court has power, at the instance of a creditor suing on behalf of himself and of all other creditors, to secure an accounting and adjudication

as to the respective liabilities of the stockholders, to restrain the creditors who have brought individual actions from the further prosecution of their actions, to the end that the rights of all the creditors and the liabilities of all the stockholders may be adjudged in one action. Bagley & Sewall Co. v. Ehrlicher, 8 A. D. 581 (1896).

In an action against a stockholder of an insolvent corporation to enforce a debt upon the ground that the whole amount of the authorized capital stock has never been paid in, proof that certain stock was never in fact paid for either in cash or property, is competent. Herbert v. Duryea, 34 A. D. 478 (1898), aff'd., 164 N. Y. 595, 596.

Proof that the holder of notes made in the name of a corporation knew that the corporation was insolvent and that the notes had been issued after insolvency had become known, and that he was aware that the stock had not been fully issued or paid for, and that the notes were payable to the corporation and were transferred to himself without other indorsement than that of the corporation, are sufficient to raise a question of fact as to whether he is a bona fide holder. Close v. Potter, 155 N. Y. 145 (1898), revsg. 11 Misc. 729.

The statutory cause of action for the enforcement of stockholders' personal liability is not governed by the rules controlling commercial paper; and it seems that the rules applicable to a bona fide holder as against the maker are not available to a plaintiff seeking to enforce stockholders' liability, based upon a note made by the corporation. Close v. Potter, 155 N. Y. 145 (1898), revsg. 11 Misc. 729.

The fact that a stockholder was induced by fraud to subscribe for and take his stock is no defense to an action by a creditor of the corporation to enforce his individual liability. Moosbrugger v. Walsh, 89 Hun 564 (1895).

Condition Precedent.

A creditor of a corporation, seeking to charge a stockholder under the statute, must allege and prove all the facts upon which the liability depends; he must aver the performance of conditions precedent, or set forth facts which in law excuse their performance. Hirshfield v. Bopp, 145 N. Y. 84 (1895); Cuykendall v. Corning, 88 N. Y. 130, 137 (1882).

The proceeding against the corporation is only required for the benefit of the stockholders, as a part of the immunity against a primary personal liability vouchsafed by law to corporators shielding them from action until a bona fide attempt has been made and exhausted to obtain payment from the corporate property. Hardman v. Sage, 124 N. Y. 25 (1891).

The issuing and return of an execution against a corporation is a condition precedent to the right of a judgment creditor to maintain an action against a stockholder, and before a stockholder can be made liable it must appear that the judgment creditor has attempted in good faith to collect his judgment from the corporation. Berwind-White Coal Mining Co. v. Ewart, 90 Hun 60 (1895).

In order to be entitled to a recovery from a stockholder, the issuance and return unsatisfied of an execution on the judgment which is the foundation of the suit, must be shown. Terry v. Rothschild, 83 Hun 486 (1895).

A stockholder is not primarily liable for the debts of the corporation. It is only after the creditor has obtained judgment against the company, issued execution, which has been returned unsatisfied, that he becomes liable. Close v. Potter, 155 N. Y. 145, revsg. 11 Misc. 729; United Glass Co. v. Levett, 24 Misc. 429 (1898).

This section treats the corporation as the primary debtor and the liability of the stockholder as ultimate and subsidiary. Handy v. Draper, 89 N. Y. 337 (1882).

A proceeding affecting only specific property of the corporation attached and execution against that property is not a compliance with the condition of this section. Rocky Mt. Nat. Bk. v. Bliss, 89 N. Y. 338 (1882).

Compliance with the condition precedent is excused when rendered legally impossible. Shellington v. Howland, 53 N. Y. 371 (1873); Kincaid v. Dwinelle, 59 N. Y. 548 (1874); Cuykendall v. Corning, 88 N. Y. 129 (1882).

A complaint need not show the recovery of a judgment against the corporation and return of an execution unsatisfied, where it contains an allegation that a judgment of dissolution had been rendered which restrained creditors from instituting actions against it. Lang v. Lutz, 180 N. Y. 254 (1905), affg. 83 A. D. 534; Thompson v. Nicolai, 21 Misc. 700 (1897). The judgment demanded does not affect corporate property but that of the stockholders only, therefore the receiver is not a necessary party. Id. See, also, Hunting v. Blun, 143 N. Y. 511 (1894).

In an action against stockholders for corporate debts to an amount equal to the amount unpaid on their stock it appeared that the claim was proved against the corporation in bankruptcy proceedings and that plaintiff received a dividend in partial payment thereon, held that the condition precedent to an action against a stockholder that there must be an unsatisfied judgment against the corporation, is excused by the discharge of the corporation in bankruptcy. Firestone Tire & Rubber Co. v. Agnew, 194 N. Y. 165 (1909), revsg. 128 A. D. 518. After proceedings in bankruptcy have been commenced against the corporation it is unlawful for the plaintiff to prosecute his action. Shellington v. Howland, 53 N. Y. 371 (1873); Hardman v. Sage, 124 N. Y. 25 (1891).

Whenever the condition precedent to an action against a stockholder becomes impossible of performance by the act and operation of law, it is no longer of force, and the creditor has his action at once against the stockholders without the necessity of an attempt first to recover the debt of the corporation. Hardman v. Sage, 124 N. Y. 25 (1891); Shellington v. Howland, 53 N. Y. 371 (1873); United Glass Co. v. Vary, 152 N. Y. 121 (1897), affg. 79 Hun 103. A dissolution of the corporation by judicial decree during the time in which the creditor might bring his suit dispenses with the condition. Id. But a court order restraining creditors from bringing actions, made as a mere preliminary and precautionary order in a suit by a stockholder against the corporation for an order appointing a receiver of its property, is not sufficient to excuse a creditor, who has made no effort to procure a modification of the order, from proceeding to judgment and execution against the corporation before bringing an action to enforce the liability of a stockholder. United Glass Co. v. Vary, 152 N. Y. 121 (1897). In the latter case Mr. Justice Andrews said the case of Hunting v. Blun, 143 N. Y. 511 (1894), goes further than any other case in excusing the creditor from first proceeding against the corporation. In that case a sequestration action had been brought by a creditor against a corporation under the Code, § 1748 (now Gen. Corp. L. § 100), in which a receiver had been appointed pendente lite of the corporate property, accompanied by a restraining order against suits by creditors. The action went to final judgment of sequestration and the injunction was made perpetual. A creditor of the corporation subsequently commenced action against a stockholder to enforce the statutory liability without having obtained judgment against the corporation, and although there was a question

as to jurisdiction of the court to render judgment of sequestration, yet the condition precedent of an unsatisfied judgment against the corporation was excused.

Where a corporation has been dissolved and its assets have proven insufficient to pay its debts a creditor need not sue the corporation before bringing action against a stockholder to recover unpaid subscriptions. Ford v. Chase, 118 A. D. 605, affd., 189 N. Y. 504 (1907).

Statute of Limitations.

The waiver of a statute of limitations or of a condition precedent, at least for a limited time, is not invalid on the ground that it is against public policy, if the contract be for a good consideration and is reasonable. Watertown Nat'l Bk. v. Bagley, 134 A. D. 831 (1909), followed in 138 A. D. 917.

The parties may, by a reasonable contract founded upon a good consideration, extend or shorten the time within which an action may be brought Watertown Nat'l Bk. v. Bagley, 134 A. D. 831 (1909), followed in 138 A. D. 917.

If a clause in a statute, saving a cause of action accrued under a law thereby repealed, provided it be brought within a certain time, is a condition precedent to bringing the action, it must be alleged and proved by the plaintiff, and, if it is a statute of limitations, by the defendant. Watertown Nat'l Bk. v. Bagley, 134 A. D. 831 (1909), followed in 138 A. D. 917.

An action does not lie in favor of all the creditors of the corporation, but only in favor of that class who have a debt payable within two years from the time it was contracted and who have secured judgment and had executions returned unsatisfied, and, if the action is against a stockholder who has ceased to be such, it must be brought within two years from the time he ceased to be such stockholder. Citizens' Bank of Buffalo v. Weinberg, 26 Misc. 518 (1899).

Stockholders of a building and loan association, incorporated under Laws of 1851, ch. 122, are not individually liable for a corporate debt incurred in the purchase of land where the debt is not payable until ten years afterward. Leighton v. Leighton Lea Assn., 62 Misc. 73 (1909).

The time within which an action must be commenced begins to run on the day when the debt first became due. Hardman v. Sage, 124 N. Y. 25 (1891); Jagger Iron Co. v. Walker, 76 N. Y. 522 (1879).

If the time of payment of a debt is extended by the taking of a promissory note, which is sued more than a year (now two years) after the debt became due, the claim of the creditor against the stockholders is lost and they cannot be charged with the payment of the debt. Hardman v. Sage, 124 N. Y. 25 (1891), distg. 89 N. Y. 335 and 338.

The statute does not begin to run in favor of a stockholder until after the return of execution against the corporation. Handy v. Draper, 89 N. Y. 334 (1882).

If a stockholder is divested of his interest in the corporation by judgment of dissolution the time limited begins to run from the date of entry of such judgment. Hollingshead v. Woodward, 107 N. Y. 96 (1887).

The giving of renewal notes by a corporation does not operate to prevent the running of the statutory limitation upon stockholders' liability for the original indebtedness. Close v. Potter, 155 N. Y. 145 (1898), revsg. 11 Misc. 729.

Foreign Corporations.

The limitations of time contained in this section do not apply to foreign corporations. Bernheimer v. Converse, 206 U. S. 516 (1907).

Full Liability Corporations.

The statute of limitations contained in this section applies to actions brought against stockholders of full liability corporations under the Business Corp. Law, § 6. Adams v. Wallace, 82 A. D. 118 (1903); Adams v. Slingerland, 87 A. D. 312 (1903); Sanford v. Rhoads, 113 A. D. 782 (1906).

Section Applicable to Banking Corporations.

The provisions of this section apply also to an action brought by a creditor of a banking corporation, although they do not apply when the action is by the superintendent of banks under section 19 of the Banking Law. Mosler Safe Co. v. Guardian Trust Co., 208 N. Y. 524 (1913); Gause v. Boldt, 49 Misc. 340 (1906), affd., 115 A. D. 897; 208 N. Y. 546.

The superintendent of banks has authority to institute actions to enforce the liability imposed upon stockholders by Banking Law, section 196, and such action is not subject to any of the limitations contained in Stock Corporation Law, section 59. Van Tuyl v. Scharmann, 208 N. Y. 53 (1913).

§ 60. Partly paid stock. The original or the amended certificate of incorporation of any stock corporation may contain a provision expressly authorizing the issue of the whole or of any part of the capital stock as partly paid stock, subject to calls thereon until the whole thereof shall have been paid in. In such case, if in or upon the certificate issued to represent such stock, the amount paid thereon shall be specified, the holder thereof shall not be subject to any liability except for the payment to the corporation of the amount remaining unpaid upon such stock, and for the payment of indebtedness to employees pursuant to sections fifty-seven, fifty-eight and fifty-nine of this chapter; and in any such case, the corporation may declare and may pay dividends upon the basis of the amount actually paid upon the respective shares of stock instead of upon the par value thereof.

Formerly § 62, added by L. 1901, ch. 354.

For form of certificate, see Form No. 250.

This section provides a desirable method for the issue of partly paid stock subject to assessment, with a right to dividends upon the amount actually paid thereon. In case a corporation intends to issue this species of stock a provision to that effect must be inserted in the certificate of incorporation, or in the event that an existing corporation proposes to issue such stock it must make and file an amended certificate, pursuant to Stock Corp. Law, § 18, authorizing the same.

The transferee of partly paid stock which is expressly subject to future calls is bound by acceptance to pay future calls on such stock. Sigua Iron Co. v. Brown, 171 N. Y. 488 (1902), affg. 58 A. D. 436.

§ 61. Preferred and common stock. Every domestic stock corporation may issue preferred stock and common stock and different classes of preferred stock, if the certificate of incorporation so provides, or by the consent of the holders of record of two-thirds of the capital stock, given at a meeting called for that purpose upon notice such as is required for the annual meeting of the corporation. A certificate of the proceedings of such meeting, signed and sworn to by the president or a vice-president, and by the secretary or assistant secretary, of the corporation, shall be filed and recorded in the offices where the original certificate of incorporation of such corporation was filed and recorded; and the corporation may, upon the written request of the holders of any preferred stock, by a two-thirds vote of its directors, exchange the same for common stock, and issue certificates for common stock therefor, upon such valuation as may have been agreed upon in the certificate of organization of such corporation, or the issue of such preferred stock, or share for share, but the total amount of such capital stock shall not be increased thereby.

Formerly L. 1890, ch. 564, § 47, as am'd by L. 1892, ch. 688, § 47; L. 1901, ch. 354.

See forms of preferences, conversion and non-voting clauses, Forms Nos. 243–249.

For statement of shares of different par values, see Form No. 274.

As amended in 1901, this section authorizes the classification of stock into common and preferred, and into different classes of preferred stock by a vote of the holders of two-thirds of the capital stock of the corporation, instead of by unanimous consent, which was required prior to this amendment. This change harmonizes the section with the statutes of nearly all the other States.

Where a corporation issued certificates of indebtedness with which to retire its preferred stock, and immediately thereafter converted such certificates into common stock, such transaction should be considered as a whole; hence the issuance of the certificates and retirement of the preferred stock did not operate as a reduction of capital, nor the issuance of such additional common stock as an increase of capital stock. Weidenfeld v. No. Pacific Ry. Co., 129 Fed. 305 (1904).

Preferred Stock and Bonds; Distinctions.

The fact that an instrument is called a bond does not determine its character. The distinguishing feature of a bond is that it is an obligation to pay a fixed sum with stated interest. It may or may not be secured, but if it is, and the security proves to be insufficient, the indebtedness is not thereby wiped out. The distinguishing feature of stock is that it confers upon the holder a part ownership of the assets and right to participate according to the amount of his stock in the surplus profits of the corporation, and ultimately on its dissolution in the assets remaining after the payment of its debts. A stockholder, whether common or preferred, cannot have a lien on the property of the corporation even though the stock by its terms is accorded

a lien; therefore, where an instrument denominated a bond contains a promise to pay a stated sum of money at a fixed time, and to pay meanwhile a stated rate of interest, but also provides that after certain fixed dividends have been paid on the common and preferred stock, the holder of the bond is "entitled to a proportionate share in the surplus income, if any," it is a species of preferred stock. Cass v. Realty Securities Co., 148 A. D. 96 (1911), affd., 206 N. Y. 649.

So-called debenture bonds issued by a corporation which contain a clause providing that they should be subordinate to the claims of general business creditors, that upon liquidation or dissolution such creditors would be entitled to priority of payment over the holders of such bonds, that the bonds should bear cumulative interest payable out of the earnings before any dividends should be paid on the stock, and that upon liquidation or dissolution the bonds after the payment of corporate debts should be entitled to the whole residue of the corporate assets, are in effect preferred stock, since the distinguishing feature of a bond is an obligation to pay a fixed sum with stated interest, while the distinguishing feature of stock is a part ownership of the assets and a right to participate in the management and share in the surplus profits and in surplus assets upon dissolution. In re Fechheimer-Fishel Co., 212 Fed. 357 (1914).

Right to Deny or Limit Voting Privileges.

There being no statute to the contrary, a certificate of incorporation which classifies stock into common and preferred, may provide that one class of stock shall be deprived of voting power. Such a provision is but an arrangement between different classes of stockholders, which does not concern the public and does not violate any rule of the common law or any rule of public policy. The Legislature did not intend to compel every class of stockholders to be endowed with the right to vote, nor to prohibit the formation of a corporation which deprived one class of stockholders of the voting power. Peo. ex rel. Browne v. Koenig, 133 A. D. 756 (1909); 118 N. Y. Supp. 136, citing with approval, State ex rel. Frank v. Swanger, 190 Mo. 561.

Amendment Authorizing Creation of Preferred Stock by Two-Thirds Vote is Constitutional.

The amendment by chapter 354, Laws of 1901, of section 47 of the Stock Corporation Law (now § 61) in such manner as to allow a corporation whose certificate of incorporation did not provide for preferred stock, to issue such stock upon obtaining the consent of two-thirds of the stockholders, instead of the consent of all the stockholders, as provided prior to the amendment, was a valid exercise of the power reserved to the Legislature to alter or repeal the charter granted to any corporation. Lord v. Equitable Life Assur. Soc., 194 N. Y. 234 (1909); Hinckley v. Schwarzschild & Sulzberger Co., 107 A. D. 470 (1905); appeal dismissed, 193 N. Y. 599. The latter case distinguishes Campbell v. Am. Zylonite Co., 122 N. Y. 455, and Kent v. Quicksilver Min. Co., 78 N. Y. 159. See, also, Colby v. Equitable Trust Co., 124 A. D. 262 (1908), affd., 192 N. Y. 535.

Right to Vote Unless Restricted.

The right to vote, incident to stock ownership, is a property right. To absolutely deprive a stockholder of the right to vote is to deprive him of an essential attribute of his property, and to so undermine that right as to essentially affect the stockholder's right of protection in voting for directors undermines the right to property involved in the ownership of stock. Lord

v. Equitable Life Assur. Soc., 194 N. Y. 212, 229 (1909), citing Stokes v. Continental Trust Co., 186 N. Y. 285 (1906). But it is lawful to provide in the certificate of incorporation in which different classes of stock are provided for that one class shall have no vote upon all or certain questions relating to the management of the corporation, because such a provision is an agreement between the stockholders which does not concern the public and does not violate any rule of the common law or of public policy. Peo. ex rel. Browne v. Koenig, 133 A. D. 756, 759 (1909); 118 N. Y. Supp. 136.

Distribution of Dividends to Preferred and Common Stockholders; Provision in Certificate of Incorporation Constitutes a Valid Contract.

When not governed by statute the relation of common and preferred stockholders to each other and to the corporation is entirely contractual, and where the rights of preferred stockholders are prescribed in the certificate of incorporation they are restricted to the preferential dividend thus prescribed in any distribution of the surplus profits or gains, however derived; therefore, when the certificate of incorporation provides that "preferred stock shall be entitled, in preference and priority over the common stock of said corporation, to dividends in each and every fiscal year, at such rate not exceeding 4 per cent. per annum, payable out of net profits, as shall be declared by the board of directors. Such dividends are to be non-cumulative, and the preferred stock is entitled to no other or further share of the profits," under such a provision the gains and profits made by fortunate investments in the stocks and bonds of other corporations and in converting its bonds into common stock may be distributed as dividends in the discretion of the directors in the same manner as gains and profits made in the corporate operations, to-wit, to the common stockholders only, to the exclusion of the preferred stockholders, whose contractual rights have been fully met. Equitable Life Assur. Soc. v. Union Pacific R. R. Co., 212 N. Y. 360 (1914); 162 A. D. 81.

A provision in the certificate of incorporation and in the certificates of preferred stock that such stock shall receive dividends at a specified rate before any dividends shall be paid on the common stock, that such dividends shall be cumulative, and in case of non-payment shall bear interest at a fixed rate from the date when payable, constitutes a valid contract which is binding upon all the stockholders. Roberts v. Roberts-Wicks Co., 184 N. Y. 257 (1906).

A corporation and its stockholders may make any agreement that they may see fit respecting the rights and privileges of the holders of preferred stock. Utica Trust & Deposit Co. v. Kellogg & Sons Co., 126 A. D. 176 (1908).

Provision in Stock Certificates Regulating Dividends Constitutes a Contract.

Where certificates of preferred stock stated that such stock was entitled to dividends at a fixed rate, payable semi-annually, and also to share pro rata with the other stock in any excess, and that payment of the dividends was guaranteed, and thereafter by resolution the directors declared that dividends on such stock should always be paid out of any net earnings before any portion should be applied to pay dividends on the other stock, this was in effect a contract as expressed in the certificate and under it the dividends were a specific charge upon the accruing profits, and in case of failure in any year to earn sufficient to pay such dividends the arrears were payable prior to dividends upon the common stock. Boardman v. Lake Shore & Mich. Southern Ry. Co., 84 N. Y. 157 (1881).

Dividends on Cumulative Preferred Stock; Payment of Arrearages.

When the dividends upon the preferred stock are cumulative, and in case of non-payment are to bear interest at a fixed rate while such dividends are in arrears, it is the duty of the directors thereafter in dividing the surplus profits to apply them first to the satisfaction of the arrearages due to the preferred stockholders before declaring any dividend on common stock. Roberts v. Roberts-Wicks Co., 184 N. Y. 257 (1906).

Surplus Created by Reduction of Capital Stock; Distribution of.

Surplus created by a reduction of capital stock cannot be applied in payment of arrears of dividends due to preferred stockholders, as a surplus thus created is not to be regarded as surplus profits arising from the business of the corporation. Its distribution, when made, can only be legally effected by dividing it among all the stockholders ratably and without preference. Roberts v. Roberts-Wicks Co., 184 N. Y. 257 (1906).

In case of a reduction of capital stock the excess of funds or property on hand, over and above the sum which the corporation is required to keep as capital, is converted into a surplus fund which it is permitted to divide among its stockholders. Its right to make this distribution depends upon general principles and not upon any statutory provision. Strong v. Bklyn. Cross-Town R. R. Co., 93 N. Y. 426, 434 (1883).

Distribution of Assets Between Holders of Preferred and Common Stock upon Dissolution; Determination of Controversy.

Where in a proceeding by the directors for the voluntary dissolution of a solvent corporation, no receiver has been appointed, and a controversy arises as to a preference on the distribution of the assets, the referee appointed may be authorized to determine the controversy between the stockholders, and the court may provide by its final order for the distribution of the assets among those entitled thereto. Matter of Seneca Oil Co., 153 A. D. 594 (1912), affd., 208 N. Y. 545.

Holders of Preferred Stock Not Entitled to Subscribe for Unissued Common Stock.

Where preferred stock is entitled to cumulative dividends at a fixed rate and to preference in the distribution of assets until the par value and accumulated dividends have been paid and to no further dividend or distribution, and the corporation has not issued all of its authorized common stock it may permit the holders of the common stock to subscribe at par for such unissued stock, although it has a market value greatly in excess of par, and in such circumstances the corporation is not required to extend the same privilege to holders of its preferred stock when the dividends upon the latter are paid and the capital remains unimpaired. Russell v. Am. Gas & Elec. Co., 152 A. D. 136 (1912), distg. Stokes v. Continental Trust Co., 186 N. Y. 285, and Page v. Am. & British Mfg. Co., 129 A. D. 346.

Classification of Preferred Stock after Incorporation.

Where the certificate of incorporation provides that the corporation may issue from time to time preferred stock of one or more classes and classify into preferred and common stock any duly authorized stock of the corporation, and thereafter under this section, divides its authorized increase of capital stock into $200,000 common and $600,000 preferred, it is empowered to divide the preferred stock into two classes, known as A and B, respec-

tively, the first to bear a preferential dividend of six per cent. and the second seven per cent. per annum. It is unnecessary, at the time of filing the certificate authorizing such classification, to state how much of such $600,000 shall be apportioned to class A and to class B. This is a matter for the corporation itself to determine by some action on its part thereafter. Opinion of Atty. Gen., March 18, 1914.

Cases Superseded.

The following cases respecting preferred stock arose before the enactment of the provisions of the foregoing section, and, therefore, the decisions therein laid down principles of law which do not, in their entirety, apply to issues of preferred stock made pursuant to the above statute, which expressly authorizes such stock. This fact should be borne in mind in order that these early decisions may not be misleading. The cases referred to are as follows:

The right of every shareholder to his proportion of the profits is a vested individual right, and, in the absence of some power conferred by statute or by the articles of association to change the relative value of shares by giving some preference over others, as to dividends, the power cannot be implied, and no such change can be made without unanimous consent. Campbell v. American Zylonite Co., 122 N. Y. 455, revsg. 23 J. & S. 562 (1890).

Neither a corporate body, nor a majority of its stockholders, has power to provide in by-laws for the creation of preferred stock, so as to bind a minority of the stockholders not assenting thereto. Kent v. Quicksilver M. Co., 78 N. Y. 159 (1879).

The holding and owning of a share of common stock gives a right which cannot be divested without the assent of the owner and holder, or unless the power so to do has been reserved in some way. Mech. Bk. v. N. Y. & N. H. R. R. Co., 13 N. Y. 599 (1856).

In the absence of a statute reserving such power, a corporation cannot issue preferred stock to the prejudice of the owners of its common stock, without their unanimous consent. Ernst v. Elmira Municipal Improvement Co., 24 Misc. 583 (1898), and group of cases therein cited.

§ 62. Increase or reduction of capital stock. Any domestic corporation may increase or reduce its capital stock in the manner herein provided, but not above the maximum or below the minimum, if any, prescribed by general law governing corporations formed for similar purposes. If increased, the holders of the additional stock issued shall be subject to the same liabilities with respect thereto as are provided by law in relation to the original capital; if reduced, the amount of its debts and liabilities shall not exceed the amount of its reduced capital, unless an insurance corporation, in which case the amount of its debts and liabilities shall not exceed the amount of its reduced capital and other assets. The owner of any stock shall not be relieved from any liability existing prior to the reduction of the capital stock of any stock corporation. If a banking corporation, whether the capital be increased or reduced, its assets shall at least be equal to its debts and

liabilities and the capital stock, as increased or reduced. A domestic railroad corporation may increase or reduce its capital stock in the manner herein provided, notwithstanding any provision contained herein, or in any general or special law fixing or limiting the amount of capital stock which may be issued by it.

Formerly L. 1890, ch. 564, § 44, as am'd by L. 1892, ch. 688; L. 1894, ch. 346; L. 1899, ch. 696; L. 1901, ch. 354.

For forms of certificates of increase and reduction of capital stock, notice of meeting, proof for State Comptroller's information upon reduction, waiver of notice of meeting and certificate of increase or reduction by unanimous consent of stockholders, see Forms Nos. 295–299, post.

Suggestion for clause in certificate of incorporation restricting increase of capital stock, see Form No. 26, post.

Limitation in certificate of incorporation of stockholder's right to subscribe for new stock, see Form No. 27, post.

Upon an increase of capital stock a tax of one-twentieth of one per cent. is payable. Tax Law, § 180, ante, page 287.

A corporation organized under the Business Corporations Law is required, after payment of one-half of the capital stock, to file a certificate of such payment (section 5 of said act), and a navigation corporation organized under the Transportation Corporations Law is required, upon full payment of the capital stock, to file a certificate of such fact (section 12 of said law), but there is no provision upon an increase of the capital stock of any class of corporations for the filing of a certificate of the payment of any part of such increase.

A railroad corporation is not permitted to increase its capital stock until authorized so to do by the Public Service Commission. Pub. Serv. Com. Law, § 55, post. A gas or electric corporation before increasing its capital stock must obtain like authority. Pub. Serv. Com. Law, § 69, post.

It has been held respecting the consent of stockholders to a corporate mortgage that stock owned by the corporation cannot be included to make up the requisite two-thirds, but that an assent by two-thirds of the issued stock is sufficient. Vail v. Hamilton, 85 N. Y. 453 (1881); Lyceum v. Ellis, 30 St. Rep. 242 (1890). By parity of reason it should follow that stock owned by the corporation is not to be included to make up the majority of all the shares of stock required by the foregoing section to attend a meeting for the purpose of increasing or reducing the amount of capital stock, but that an attendance at such meeting of stockholders representing a majority of the capital stock issued and outstanding is sufficient, and also in case of an increase or reduction by unanimous consent in writing if the consent is given by holders of the entire issued and outstanding stock it satisfies the requirements of the statute. Ed.

Effect of Amendments.

By L. 1899, ch. 696, this section was amended so as to permit a railroad company incorporated by special act to increase or reduce its capital stock in conformity with this law, notwithstanding any restriction in such special act fixing or limiting its capitalization.

By the amendment of 1901, ch. 354, the wording of this section was changed in such a manner as to empower a stock corporation created by special act of the Legislature to make an increase or reduction of its capital

stock in conformity with this law, notwithstanding any provision in the special act of incorporation, fixing or limiting the amount of the capitalization of such corporation.

Authority is Statutory.

A corporation has no implied authority to increase or reduce its capital stock. Sutherland v. Olcott, 95 N. Y. 100 (1884).

The capital stock of a corporation cannot be increased except in the manner prescribed by statute. There is no such thing as an implied authority to increase or diminish the capital stock of a company. Einstein v. Rochester Gas & Electric Co., 146 N. Y. 46 (1895).

Penal Law.

Punishment for frauds committed in increasing or reducing capital stock. Penal Law, §§ 661, 664, 667, post.

Right to Increase Capital Stock May Not be Restricted by Promoters' Agreement.

A corporation is not bound by an agreement made between its promoters prior to its organization unless it ratifies such agreement; therefore, an increase in the capital stock for the legitimate corporate purposes will not be enjoined, at the suit of a promoter, who claims that under an agreement with another promoter prior to the organization of the corporation he was to have a one-sixth interest therein, and that the proposed increase will defeat such agreement. Martin v. Remington-Martin Co., 95 A. D. 18 (1904).

Right of Stockholder to Maintain Existing Relation Between His Stock and the Entire Capital Stock.

The right of a stockholder to maintain an existing proportion and relation between his stock and the entire capital stock is a property right and a fraudulent increase made to change that relation may be set aside. Witherbee v. Bowles, 201 N. Y. 427 (1911).

Where holders of a majority of a corporation's capital stock contracted to purchase substantially all the minority interest, and two blocks of stock were deposited as security for payment in installments and the minority interests caused such stock to be prematurely sold without notice and distributed among themselves and thereafter became majority stockholders by a fraudulent issue of new stock, an action will lie to restore the lawful majority to their original position and to cancel the new issue. Such action belongs to the majority stockholders in their individual right, and those not involved in the controversy need not be joined as parties. Witherbee v. Bowles, 201 N. Y. 427 (1911).

An issue of stock without opportunity to existing stockholders to purchase it is not an injury to the corporation and an action cannot be maintained by a stockholder in the right of the corporation to set aside the transaction, for the corporation itself has no such right. The stockholder's remedy is against the corporation. Waters v. Waters & Co., 201 N. Y. 184 (1911).

A stockholder's right to subscribe for a proportionate part of increased capital stock must be exercised within a fixed or reasonable time and failure to exercise such right within such time works a forfeiture of the right. When there was no notice of such forfeiture and the stock had not been transferred to any one else, the stockholder is entitled to have the shares upon tendering the price thereof. Sommer v. Armor Gas & Oil Co., 71 Misc. 211 (1911), citing Stokes v. Continental Trust Co., 186 N. Y. 285.

A stockholder may not be deprived of his right to participate in the corporate affairs by voting upon his stock to the same extent as other stockholders in the proportion that his holdings bears to theirs, and, unless the statutes so provided before he became a stockholder, his share or interest in the corporation cannot be impaired without his consent, or, except in case of stock issued for property, without affording him an opportunity to purchase stock in proportion to his holdings in any increase of capital stock. Bond v. Atlantic Terre Cotta Co., 137 A. D. 671, 680 (1910), citing Stokes v. Continental Trust Co., 186 N. Y. 285 (1906); Lord v. Equitable Life Assur. Soc., 194 N. Y. 212 (1909); Page v. Am. & British Mfg. Co., 129 A. D. 346 (1908); Kinnan v. Sullivan County Club, 26 A. D. 213 (1898).

A corporation may increase its capital stock for legitimate purposes and stockholders hold their stock subject to that right. An increase will not be enjoined at the suit of a promoter who claims, under an agreement made prior to the organization of the corporation, that he was to have a certain proportionate interest therein and that the increase will defeat such agreement. Martin v. Remington-Martin Co., 95 A. D. 18 (1904).

A stockholder has an inherent right to a proportionate share of new stock issued for money only and not to purchase property for the purposes of the corporation or to effect a consolidation. While he can waive his rights, he cannot be deprived of them without his consent except when the stock is issued at a fixed price not less than par and he is given the right to take at that price in proportion to his holdings or in some other equitable way that will enable him to protect his interest by acting on his own judgment and using his own resources. Stokes v. Continental Trust Co., 186 N. Y. 285 (1906), revsg. 99 A. D. 377.

Increase of Capital Stock.

In disposing of the increased capital stock, the managing board are to be considered as trustees for holders of the original stock, and must so dispose of the increase that as much value as possible shall be returned to the corporation for its business purposes. Williams v. W. U. Tel. Co., 9 Abb. N. C. 419, 93 N. Y. 162 (1881). The term "capital stock" means the property of the corporation contributed by the stockholders or otherwise obtained, to the extent required by its charter (or certificate of incorporation). Property in excess of that limit is surplus, which may be divided either in money or property, or in a "scrip dividend," provided an increase of the share capital has been lawfully authorized. Id.

Upon an increase of capital stock, the provisions of section 34 of this law apply only to such increased capital. Veeder v. Mudgett, 95 N. Y. 295 (1884). See, also, Cuykendall v. Douglas, 19 Hun 577 (1880).

When three corporations consolidate and purchase a majority of the stock of a fourth corporation, exchanging five shares for each one of the latter and the latter continues its separate organization, the transaction does not amount to an increase of the capital stock of such fourth corporation. Einstein v. Rochester Gas & Electric Co., 146 N. Y. 46 (1895), 77 Hun 149.

Right of Stockholder to Subscribe Pro Tanto for Future Issues of Authorized Stock.

When all the authorized stock of a corporation is not at once subscribed for and issued, the subscribers to whom stock is issued have no right, in the absence of bad faith, to participate pro tanto in subsequent issues of such

unissued authorized stock. Russell v. Am. Gas & Elec. Co., 152 A. D. 136 (1912). However, when the certificate of incorporation contains a clause providing that whenever there are any unissued shares either of the original stock or of any increase thereof that each stockholder shall be entitled to subscribe pro rata for any subsequent issue of such authorized stock, this constitutes an enforceable contract and is a provision authorized by the General Corporation Law, section 10, and this view seems to be supported by the reasoning in Waters v. Waters & Co., 130 A. D. 678, p. 685, affd. on other grounds, 201 N. Y. 184 (1911).

Where preferred stock is entitled to cumulative dividends at a fixed rate and to preference in the distribution of assets until the par value and accumulated dividends have been paid and to no further dividend or distribution, and the corporation has not issued all of its authorized common stock it may permit the holders of the common stock to subscribe at par for such unissued stock although it has a market value greatly in excess of par, and in such circumstances the corporation is not required to extend the same privilege to holders of its preferred stock when the dividends upon the latter are paid and the capital remains unimpaired. Russell v. Am. Gas & Elec. Co., 152 A. D. 136 (1912), distg. Stokes v. Continental Trust Co., 186 N. Y. 285, and Page v. Am. & British Mfg. Co., 129 A. D. 346.

Reduction of Capital Stock.

The capital stock of a corporation may be increased or reduced as authorized by statute, and although it may be competent for the Legislature to provide that corporations to be organized in the future may reduce common or preferred stock separately without impairing the vested rights of stockholders who became such after the enactment, yet in the absence of such statutory provision the right of an individual stockholder to a voice in the management of the corporate affairs proportionate to the amount of stock held by him must be preserved. Page v. Am. & British Mfg. Co., 129 A. D. 346 (1908).

The amount of capital stock may be reduced before it has been actually paid in. The reduced amount may still exceed the sum actually paid in. In such case the stockholders must pay it in after the reduction. Strong v. Brooklyn C. T. R. R. Co., 93 N. Y. 426 (1883). There can be no surplus for distribution in such case. Id.

One who subscribes for stock of a corporation under a statute permitting a reduction of capital stock must be deemed to have done so subject to that possibility, and is not released because the capital was afterward reduced. Myers v. Sturgis, 123 A. D. 470 (1908).

It seems that a reduction of capital stock does not authorize the distribution among stockholders of a sum equal to the difference between the original and reduced amount, unless the corporation has on hand actual capital for payment of debts, exceeding the amount to which it has reduced its stock. Strong v. Brooklyn Cross-Town R. R. Co., 93 N. Y. 426 (1883).

Where stockholders have taken valid action for a reduction of capital stock and the directors subsequently provide for the issue of debenture bonds payable in part by stock, the court will interfere with such reduction of stock only so far as it is incidental to the proposed issue of bonds. Merz v. Interior Conduit & Insulation Co., 20 Misc. 378 (1897).

An order of reference, obtained by three directors of a corporation having seven originally, requiring the parties in interest to show cause why the corporation should not be dissolved, ought not to be granted when, at the time dissolution proceedings were begun, directors, who were at least such

de facto and represented a majority of the stockholders, were, to the knowledge of the petitioning directors, in control of the corporation and had given notice to stockholders of a meeting to reduce the capital stock, with a view of avoiding dissolution or threatened insolvency, actual insolvency not being alleged in the petition for dissolution. Matter of Bay State Shoe & Leather Co., 26 Misc. 571 (1899).

§ 63. Notice of meeting to increase or reduce capital stock. Every such increase or reduction must be authorized either by the unanimous consent of the stockholders, expressed in writing and filed in the office of the secretary of state and in the office of the clerk of the county in which the principal business office of the corporation is located, or by a vote of the stockholders owning at least a majority of the stock of the corporation, taken at a meeting of the stockholders specially called for that purpose in the manner provided by law or by the by-laws. Notice of the meeting, stating the time, place and object, and the amount of the increase or reduction proposed, signed by the president or a vice-president and the secretary, shall be published once a week, for at least two successive weeks, in a newspaper in the county where its principal business office is located, if any is published therein, and a copy of such notice shall be duly mailed to each stockholder or member at his last-known post-office address at least two weeks before the meeting or shall be personally served on him at least five days before the meeting.

Formerly L. 1890, ch. 564, § 45, as am'd by L. 1892, ch. 688; L. 1893, ch. 700; L. 1901, ch. 354.

For form of notice of meeting, see Form No. 296.

Amendments.

By amendment of 1901, ch. 354, two important changes were made in this section, as follows:

An increase or reduction of capital stock is authorized, without holding a meeting of the stockholders, by filing a written unanimous consent.

When a special meeting of stockholders is to be held for the purpose of increasing or reducing the capital stock, it may be called "in the manner provided by law, or by the by-laws." When called in the manner provided by law, the notice is not required to be signed by a majority of the directors as heretofore, but may be signed only by the president or the vice-president and the secretary. The time for mailing notices for such meetings has been reduced from three weeks to two weeks prior to the meeting, and such mailing may be dispensed with by a personal service of the notice on a stockholder at least five days before the meeting.

Notice of Meeting.

Since the enactment of ch. 672, L. 1895, special meetings of stockholders to increase capital stock, without notice of meeting and without the lapse of

any period of time, have been sanctioned, provided such action were authorized and the statutory requirements were waived in writing by all the stockholders, pursuant to Gen. Corp. Law, § 42.

The book of minutes of the corporation and the certificate showing that the requisite number appeared in person or by proxy and voted for an increase of stock, established, in the absence of evidence that due notice of the meeting was not given to the stockholders, that the stock was increased at a regularly assembled meeting of stockholders. Cuykendall v. Douglas, 19 Hun 577 (1880).

The cost of publishing notices of stockholders' meetings is a corporate charge. Lawyer's Advertising Co. v. Consolidated Ry. Lighting Co., 187 N. Y. 395, modfg. 110 A. D. 892 (1907).

§ 64. Conduct of such meeting; certificate of increase or reduction. If, at the time and place specified in the notice, the stockholders shall appear in person or by proxy in numbers representing at least a majority of all the shares of stock, they shall organize by choosing from their number a chairman and secretary, and take a vote of those present in person or by proxy, and if a sufficient number of votes shall be given in favor of such increase or reduction, or if the same shall have been authorized by the unanimous consent of stockholders expressed in writing signed by them or their duly authorized proxies, a certificate of the proceeding showing a compliance with the provisions of this chapter, the amount of capital theretofore authorized, and the proportion thereof actually issued, and the amount of the increased or reduced capital stock, and in case of the reduction of capital stock the whole amount of the ascertained debts and liabilities of the corporation, shall be made, signed, verified and acknowledged by the chairman and secretary of the meeting, and filed in the office of the clerk of the county where its principal place of business shall be located, a duplicate thereof in the office of the secretary of state, and, if a corporation formed under or subject to the banking law, a triplicate thereof in the office of the superintendent of banks, and if an insurance corporation, a triplicate thereof in the office of the superintendent of insurance. In case of a reduction of the capital stock, except of a railroad corporation or a moneyed corporation, such certificate or consent hereinafter provided for shall have indorsed thereon the approval of the comptroller, to the effect that the reduced capital is sufficient for the proper purposes of the corporation, and is in excess of its ascertained debts and liabilities; and in case of the increase or reduction of the capital stock of a railroad corpo-

ration or a moneyed corporation, the certificate or the unanimous consent of stockholders, as the case may be, shall have indorsed thereon the approval of the public service commission having jurisdiction thereof, if a railroad corporation; of the superintendent of banks, if a corporation formed under or subject to the banking law, and of the superintendent of insurance, if an insurance corporation. When the certificate herein provided for, or the unanimous consent of stockholders in writing, signed by them or their duly authorized proxies, approved as aforesaid, has been filed, the capital stock of such corporation shall be increased or reduced, as the case may be, to the amount specified in such certificate or consent. The proceedings of the meeting at which such increase or reduction is voted, or, if such increase or reduction shall have been authorized by unanimous consent without a meeting, then a copy of such consent shall be entered upon the minutes of the corporation. If the capital stock is reduced, the amount of capital over and above the amount of the reduced capital shall, if the meeting or consent so determine or provide, be returned to the stockholders pro rata, at such times and in such manner as the directors shall determine, except in the case of the reduction of the capital stock of an insurance corporation, as an alternative to make good an existing impairment.

Formerly L. 1890, ch. 564, § 46, as am'd by L. 1892, ch. 688; L. 1893, ch. 700; L. 1901, ch. 354; L. 1902, ch. 286; L. 1904, ch. 123; L. 1913, ch. 305.

The amendment of 1913 added the provision requiring triplicate certificates of moneyed corporations to be filed with the superintendent of banks and insurance respectively.

The last clause, embodying the exception relative to insurance corporations, was added by L. 1902, ch. 286.

The amendment of 1901 changing the requisite consent from unanimous to two-thirds was a valid exercise of the power reserved to the Legislature (Const. Art. 8, § 1), to alter or repeal the corporate charter. Hinckley v. Schwarzschild & Sulsberger Co., 107 A. D. 470 (1905), appeal dismissed, 193 N. Y. 599.

It seems that the approval of the Comptroller is not necessary in the case of a corporation organized prior to 1878. Peo. ex rel. Eden Musee v. Carr, 36 Hun 488, affd., 100 N. Y. 641 (1885).

Where a corporation has increased its capital stock in a legal manner, a failure to file the certificate of increase, until a motion has been made for a receiver, does not necessarily show that the directors in control withheld the certificate for a wrongful purpose, nor is bad faith shown by their refusal, under advice of counsel, to allow holders of stock, by the record, to vote thereon, where the actual interest of such holders was only that of pledgees. Thalmann v. Hoffman House, 27 Misc. 140 (1899).

§ 65. Change in par value of shares. The number of shares into which the capital stock of any stock corporation is divided may be increased or reduced by a two-thirds vote of all stock duly represented at a meeting held and conducted in like manner, and upon filing a like certificate, as required for the increase or reduction of its capital stock. If such increase or reduction of the number of shares be so authorized, the corporation shall issue to each stockholder certificates for as many shares of the new stock as equal in par value the shares of the old stock held by him, upon surrender and cancellation of such old stock. This section does not authorize the increase or reduction of the capital stock of such corporation.

Formerly § 56, added by L. 1893, ch. 196, and am'd by L. 1901, ch. 354.
L. 1901, ch. 354, amending this section, made no substantial change.
For form under this section, see post, Form No. 303.

§ 66. Prohibited transfers to officers or stockholders. No corporation which shall have refused to pay any of its notes or other obligations, when due, in lawful money of the United States, nor any of its officers or directors, shall transfer any of its property to any of its officers, directors or stockholders, directly or indirectly, for the payment of any debt, or upon any other consideration than the full value of the property paid in cash. No conveyance, assignment or transfer of any property of any such corporation by it or by any officer, director or stockholder thereof, nor any payment made, judgment suffered, lien created or security given by it or by any officer, director or stockholder when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid, except that laborers' wages for services shall be preferred claims and be entitled to payment before any other creditors out of the corporation assets in excess of valid prior liens or incumbrances. No corporation formed under or subject to the banking, insurance or railroad law shall make any assignment in contemplation of insolvency. Every person receiving by means of any such prohibited act or deed any property of the corporation shall be bound to account therefor to its creditors or stockholders or other trustees. No stockholder of any such corporation shall make any transfer or assignment of his stock therein to any person in contemplation of its insolvency. Every transfer or assignment or other act done in violation of the

foregoing provisions of this section shall be void. No conveyance, assignment or transfer of any property of a corporation formed under or subject to the banking law, exceeding in value one thousand dollars, shall be made by such corporation, or by any officer or director thereof, unless authorized by previous resolution of its board of directors, except promissory notes or other evidences of debt issued or received by the officers of the corporation in the transaction of its ordinary business, and except payments in specie or other current money or in bank bills made by such officers. No such conveyance, assignment or transfer shall be void in the hands of a purchaser for a valuable consideration without notice. Every director or officer of a corporation who shall violate or be concerned in violating any provisions of this section, shall be personally liable to the creditors and stockholders of the corporation of which he shall be director or an officer to the full extent of any loss they may respectively sustain by such violation.

Formerly L. 1890, ch. 564, § 48, as am'd by L. 1892, ch. 688; L. 1901, ch. 354.

Amendments and Effect Thereof.

The amendment of 1901, ch. 354, added the provisions that laborers' wages are entitled to payment as preferred claims out of the corporation assets, in excess of valid prior liens or incumbrances. It also added the sentence prohibiting a corporation formed under or subject to the Banking, Insurance or Railroad Law from making any assignment in contemplation of insolvency.

An inhibition against transfers of property made in contemplation of insolvency, entitles a permanent receiver, suing under this section, to recover preferential cash payments made by the corporation subsequent to the passage of chapter 564, Laws of 1890, section 48, but before the amendment of 1892 went into effect. Stiefel v. N. Y. Novelty Co., 25 Misc. 221 (1898).

Scope of the Section.

This section prohibits the following acts:

1. It prohibits officers and directors of an insolvent corporation or of one about to become insolvent, from using their knowledge of its condition and their dominant position for their individual benefit in collecting their own claims, either through a voluntary payment, or through collusive and preferential liens, to the prejudice of other creditors, not so favorably situated.

2. It prohibits a preferential general assignment by a corporation, though it does not forbid assignments without preferences.

3. It prohibits a transfer of any of the corporate assets to an officer, director or stockholder upon any other consideration than the payment of the full value of the property in cash. O'Brien v. East River Bridge Co., 161 N. Y. 539 (1900), revsg. 36 A. D. 17.

Statute Analyzed and Discussed.

The legislation leading to the enactment of the foregoing section analyzed and discussed by Justice Laughlin in Caesar v. Bernard, 156 A. D. 724, 729 et seq. (1913).

When necessary to give effect to the legislative intent, gleaned from the history of legislation, and the evil which the statute was designed to prohibit or remedy, or other object sought to be accomplished, words may be eliminated or supplied. Caesar v. Bernard, 156 A. D. 724, 732 (1913).

Statute is Remedial, Not Penal; Rule of Construction.

The rule of strict construction respecting penal statutes should not be applied to this statute which is remedial and was designed to afford a remedy to creditors and stockholders for losses actually sustained by the acts of corporate directors and officers in their official capacity, or acts in which they participated while such directors or officers. Caesar v. Bernard, 156 A. D. 724 (1913), affd., 209 N. Y. 570.

Liability of Directors and Officers May Be Enforced by Creditors and Stockholders in Their Own Right.

The liability of directors and officers created by this section is for the loss sustained by creditors through wrongful acts of such directors and officers, by which the funds of the corporation have been depleted, and instead of requiring that the action shall be brought by, or in the right of, the corporation to restore its funds, the legislature gave a cause of action to the creditors and stockholders in their own right to recover the damages sustained. Caesar v. Bernard, 156 A. D. 724 (1913), affd., 209 N. Y. 570.

Statute Intended to Prevent Unjust Discrimination and Preferences Among Creditors.

It is not necessary to allege that the corporation refused to pay any of its notes or other obligations when due, as the word "such" in the second sentence of the section does not restrict its operation to that class of corporations alone. The statute is intended to prevent those occupying confidential and fiduciary relations toward corporations from profiting, directly or indirectly, by information thereby acquired, and to prevent unjust discrimination and preferences among creditors of insolvent corporations, or those bordering on insolvency. Caesar v. Bernard, 156 A. D. 724 (1913), affd., 209 N. Y. 570.

Creditor's Action; Measure of Recovery.

This section imposes upon directors and officers, making the prohibited transfers, a personal liability to creditors not for the debts of the corporation but so far as is necessary to indemnify creditors "to the full extent of any loss" sustained through the violation of the statute, and to that extent only. The loss is measured by the amount for which an execution duly issued could not be satisfied in consequence of the disposition of property in violation of the statute. If the corporation retained sufficient assets to discharge its obligations to creditors, the latter would sustain no loss. Caesar v. Bernard, 156 A. D. 724 (1913), affd., 209 N. Y. 570.

Judgment Against Corporation; Competent Evidence Against Directors and Officers.

A judgment obtained against the corporation, without fraud or collusion, conclusively establishes the status of the plaintiffs as creditors of the corporation and the amount of their claims, and is competent evidence in an action against the directors and officers to establish the statutory liability. Caesar v. Bernard, 156 A. D. 724 (1913), and cases cited, affd., 209 N. Y. 570.

Corporate Creditor May Maintain Action Without Obtaining Judgment.

A corporate creditor may maintain an action under this section against directors and officers although his claim was not reduced to judgment at the time when the corporate property was illegally transferred. Caesar v. Bernard, 156 A. D. 724 (1913), affd., 209 N. Y. 570.

Facts Insufficient to Constitute Cause of Action.

While a corporation was insolvent the president out of its funds paid taxes and interest on mortgages upon premises which had been conveyed by her to her mother by deed dated prior to such payments and it was held, that, as the grantee was neither a creditor, a stockholder, a director nor an officer of the corporation, the transaction was not violative of the above section, and that a lien cannot be impressed upon the premises of one person by mere voluntary payments of charges thereon by another with funds of an insolvent corporation; that those who received the money of the corporation are the ones, if any, from whom it may be recovered under the statute. Kiendl v. Cochrane, 153 A. D. 802 (1912).

In an action by a creditor a complaint which does not allege any loss sustained because of violation of the statute does not state facts sufficient to constitute a cause of action. Agnelli v. Shatzin, 68 Misc. 329 (1910).

Officer Executing Illegal Conveyance.

An allegation that a defendant was a director and president of the corporation and in his official capacity voted to authorize the illegal transfers and as president executed the necessary instruments to effectuate the same is a sufficient allegation that as an officer or director he violated and was concerned in the violation of the statute. Caesar v. Bernard, 156 A. D. 724, 728 (1913), affd., 209 N. Y. 570.

Renewal of Purchase-Money Mortgage.

Where a solvent corporation acquired personal property subject to a purchase-money chattel mortgage, which contained a covenant to renew each year, a new mortgage thereafter executed by the corporation, pursuant to such covenant, while insolvent is not a transfer in violation of this section for the delivery of the new mortgage simply effectuates the contractual obligation assumed while the corporation was solvent. Black v. Ellis, 197 N. Y. 402 (1910).

Mortgages Executed in Violation of the Statute.

A corporate officer may, without acting officially, violate this section by inducing other officers to illegally transfer corporate assets, either to themselves or to another, especially where he derived a personal benefit therefrom, so where one not being a director, but as treasurer at the time of the execution of a mortgage in violation of the statute and as a stockholder signed a consent to its execution and advised, ratified, approved and assented to such mortgage and through its execution received a preferential payment, becomes liable. Caesar v. Bernard, 156 A. D. 737 (1913), affd., 209 N. Y. 570. The words "be concerned in violating," as used in this section, are equivalent to "participate" or "take part" in violating. Id.

Where a plaintiff brings suit under this section, alleging that he had recovered judgment for damages against the corporation on May 1, 1908, and that the corporation on July 18, 1907, being then insolvent, executed chattel mortgages to the defendant upon its sole assets, he must also allege

that the chattel mortgages were given for an inadequate consideration, or in payment of an antecedent debt, or that he was a corporate creditor when the mortgages were given. Ginsberg v. Automobile Coaching Co., 151 A. D. 627 (1912), cited in 156 A. D. 724, 728.

Trust Fund Doctrine Applicable.

See, also, "Trust Fund Doctrine," under section 56 of this law, ante.

Corporate assets constitute a trust fund for the payment of the corporate debts, and if two directors transfer all the corporate property to a third director for a nominal consideration, they commit a breach of duty toward creditors and become personally liable for existing claims. Cullen v. Friedland, 152 A. D. 124 (1912), on the authority of Darcy v. Bklyn. & N. Y. Ferry Co., 196 N. Y. 99. Such third director is also liable to a creditor, on the additional ground that he received, with notice and without consideration, corporate property which was impressed with a trust for the payment of corporate debts. Id.

By the enactment of this section the legislature extended the doctrine, administered by courts of chancery, that the assets of a corporation constitute a trust fund for the benefit of its creditors. Caesar v. Bernard, 156 A. D. 724 (1913), affd., 209 N. Y. 570.

The property of every corporation constitutes a trust fund for the payment of its debts, and the corporate creditors have an equitable lien thereon and the right to priority over any stockholder. Bartlett v. Drew, 57 N. Y. 587 (1874); Hastings v. Drew, 76 N. Y. 9 (1879); Darcy v. Bklyn. & N. Y. Ferry Co., 196 N. Y. 99 (1909); Trotter v. Lisman, 209 N. Y. 174, 180 (1913); Hurd v. N. Y. & Com'l Steam Laundry Co., 167 N. Y. 89 (1901); Cole v. Millerton Iron Co., 133 N. Y. 164 (1892); Ward v. City Trust Co., 192 N. Y. 61, 74 (1908); Hazard v. Wight, 201 N. Y. 399, 403 (1911); Caesar v. Bernard, 156 A. D. 724 (1913), affd., 209 N. Y. 570; Cullen v. Friedland, 152 A. D. 124 (1912); Stiefel v. N. Y. Novelty Co., 14 A. D. 371, 374 (1897); McNeal v. Hayes Machine Co., 118 A. D. 130, 138 (1907); Wilson v. Aeolian Co., etc., 64 A. D. 337, 341 (1901), affd., 170 N. Y. 618; Hatch v. Dana, 101 U. S. 205 (1879); Sanger v. Upton, 91 U. S. 56, 60 (1875). This equitable lien exists both as against stockholders and all transferees, except those purchasing in good faith and for value. 167 N. Y. 89, 95, supra; 133 N. Y. 164, 168, supra.

The assets of a corporation constitute a trust fund for the payment of its debts, and a creditor cannot be deprived of his equitable lien thereon by an agreement between the corporation and a transferee of the property that the latter shall assume and pay all the corporate debts. The consent of the creditor to accept the substituted debtor is essential to make such an agreement valid as against him. Darcy v. Bklyn. & N. Y. Ferry Co., 196 N. Y. 99 (1909), affg. 127 A. D. 167.

Intent to Create a Preference.

Where a corporation while insolvent transferred all its assets to one creditor in payment of an obligation to him, although it had other creditors, such payment as a matter of law will be held to have been made with intent of giving a preference and illegal. Montague v. Hotel Gotham Co., 208 N. Y. 442 (1913).

The intent to prefer is of the very essence of the invalidity, and to sustain the avoidance of an assignment the mere fact that the corporation is insolvent, or that its insolvency is imminent at the time is insufficient, in the absence of an intent to prefer. Dill & Collins Co. v. Morison, 159 A. D. 583 (1913).

Although a corporation transferred all its assets and discontinued business when its liabilities exceeded its assets and both its officers and those of a bank receiving the proceeds of the assets so transferred knew of the insolvency, yet a judgment creditor cannot sequester the property or compel the bank to account for the moneys received without showing that when the transfers were made the corporation or the bank knew of the existence of the plaintiff's claim, as otherwise there could have been no intent to prefer the bank over him. Abrams v. Manhattan Consumers Brewg. Co., 142 A. D. 392 (1911). Where the plaintiff's claim as a creditor was unknown both to the corporation and the creditor preferred, there could have been no intent to create a preference. Id.

By chapter 688, Laws of 1892, amending this section, the prohibited acts were restricted to such as were committed "with the intent of giving a preference to any particular creditor over other creditors of the corporation." Home Bank v. Brewster & Co., 17 Misc. 442; same case modified, 15 A. D. 338 (1897); Hilton v. Ernst, 38 A. D. 95, aff'd., 161 N. Y. 226 (1900).

An assignment of property rights to secure corporate notes is valid unless made with the "intent" of giving a preference and because insolvency existed or was in contemplation. Van Slyck v. Warner, 118 A. D. 40 (1907).

Until the passage of chapter 688, Laws of 1892, amending this section, the courts seemed uniformly to uphold acts on the part of officers of insolvent corporations which were plainly intended to facilitate the efforts of creditors to secure preferential liens by judgment. Varnum v. Hart, 119 N. Y. 101 (1890); French v. Andrews, 145 N. Y. 441 (1895). By said amendment of 1892, the suffering of a judgment, creating a lien and giving security by an insolvent corporation, with the intent of giving a preference, are brought within the prohibition of the act, the Legislature having been doubtless influenced in their action by reason of the above decisions. Olney v. Baird, 15 Misc. 385, aff'd., 7 A. D. 95 (1896).

The payment by an insolvent corporation of a debt a few days before it came due constitutes an intent to make a preference when it is shown, that at the time of such payment, debts to other persons were due and unpaid, and that the corporation did not have available assets from which to pay the other debts, although the managers of the corporation expected to get help through other persons. Baker, as Receiver of Ft. Ann Woolen Co. v. Emerson, 4 A. D. 348 (1896).

This section is intended to secure equality among creditors, and forbids all transfers that are intended to give preference or which have that effect in reality. Kingsley v. First N. Bk., 31 Hun 329; Brouer v. Harbeck, 9 N. Y. 589 (1854); Robinson v. Bk. of Attica, 21 N. Y. 406 (1860).

A corporation which makes payments of money to some creditors with the intent to hinder, delay and defraud others, violates this section. Stiefel v. N. Y. Novelty Co., 14 A. D. 371 (1897).

The first part of this section absolutely prohibits the transfer of any corporate property to an officer, director or stockholder of a corporation, which shall have refused to pay any of its obligations when due, upon any other consideration than the full value of the property paid in cash. That portion of the section contemplates the prevention of preferences to a particular creditor of a corporation which is insolvent or the insolvency of which is imminent. It does not invalidate all transfers of property on payments made to creditors of an insolvent corporation, but only such as are made with the intent of giving a preference. Milbank v. De Riesthal, 82 Hun 537 (1894).

In determining whether an insolvent corporation, or its officers, with the intent of giving a preference to a creditor, performed any act which enabled him to obtain a judgment, where the evidence is capable of an interpretation in which the absence of a wrongful act is equally consistent with the presence of such act, that meaning must be given thereto which accords with its absence. Lopez v. Campbell, 163 N. Y. 340 (1900), revsg. 18 A. D. 427.

Acts in Contemplation of Insolvency.

Proof that at the time of a transfer by a corporation it was insolvent is not conclusive evidence of a violation of this provision. The act must have been done because of existing or contemplated insolvency. Paulding v. Chrome Steel Co., 94 N. Y. 334 (1884).

One not a stockholder or judgment creditor of the corporation at the time of a transfer of its property cannot claim that such transfer was ultra vires, as in violation of the prohibition of transfers in contemplation of insolvency. Wilson v. Mechanical Orguinette Co., 68 N. Y. Supp. 173, revsd. on other grounds, 170 N. Y. 542 (1902).

The provision to the effect that no officer, director or stockholder of a corporation shall make any transfer or assignment of its property to any person in contemplation of its insolvency, applies to such a transfer or assignment made by the corporation itself. Munson v. Genesee Iron & Brass Works, 37 A. D. 203 (1899).

A bill of sale in contemplation of insolvency is void. Keiley v. M. & T. Bk., 39 St. Rep. 438, 15 N. Y. Supp. 173 (1891). It must appear that the corporation is insolvent. Everson v. Eddy, 36 St. Rep. 763 (1891), 12 N. Y. Supp. 872.

An act done by a corporation in the ordinary course of its business, uninfluenced by the state of its affairs, cannot be said to have been done in contemplation of insolvency. Dutcher v. I. & T. Nat. Bk., 59 N. Y. 5 (1873). See, also, Binns v. Williams, 88 N. Y. 660 (1882).

A mortgage is not invalid as made in contemplation of insolvency when, at the time of its execution, the officers of the corporation and its creditors whose obligations were secured by such mortgage believed it to be solvent. New Britain Nat. Bank v. A. B. Cleveland Co., 91 Hun 447 (1895).

The mere fact that a corporation, in contemplation of insolvency, has paid creditors who are its officers in property belonging to the corporation, thus preferring such creditors contrary to the provisions of the statute, in the absence of proof of actual, intentional fraud, is insufficient to justify the granting of an attachment. Lexow v. St. Lawrence Marble Co., 16 Misc. 133, affd., 5 A. D. 624 (1896).

Test of Insolvency.

The mere fact that the assets of a corporation are less than its liabilities does not necessarily constitute insolvency. The test is a general inability to pay obligations as they become due in the regular course of business; but this proceeds upon the theory that the corporation is continuing in business and, therefore, has reason to expect changed conditions which will improve its financial standing and enable it to meet its debts as they mature, an honest expectation in the exercise of reasonable intelligence, entertained sincerely and in good faith, of going on with its business and paying all of its debts. Abrams v. Manhattan Consumers Brewg. Co., 142 A. D. 392 (1911), citing Curtis v. Leavitt, 15 N. Y. 9.

Finding of Insolvency; When Justified.

Where a corporation having assets less than its liabilities transfers all its property and discontinues business a finding of insolvency is justified. Abrams v. Manhattan Consumers Brewg. Co., 142 A. D. 392 (1911).

"Insolvency" and "Obligations" Defined.

The word "obligations" does not include open running accounts for services rendered to the corporation under written contracts fixing the rate of payment where the amount due at a given time can be ascertained only by an examination of the books of the party rendering the services, and by the bills presented therefor. Munzinger v. United Press, 52 A. D. 338 (1900).

Insolvency means a general inability to answer in the course of business the liabilities existing and capable of being enforced. Brouwer v. Harbeck, 9 N. Y. 589; Joseph v. Raff, 82 A. D. 47, and cases cited, affd., 176 N. Y. 611.

Fraudulent Transfers.

An officer of a corporation, with knowledge of its insolvency, cannot by a bookkeeping entry appropriate property of the corporation to pay a debt due to him. Such attempted payment is a violation of this section. Rock Island Butter Co. v. Freeman, 83 Misc. 7 (1913).

Just prior to a general assignment by a corporation its president gave to his wife and others a portion of its assets; held, that these transactions were part of a scheme to hinder, delay and defraud creditors, and should be set aside. Home Bank v. Brewster & Co., 17 Misc. 442, modified, 15 A. D. 338 (1897).

The officers of a corporation organized under our laws must administer its affairs in accordance with the laws of this State, and the fact that the transfers of property of such corporation, in violation of the laws of this State, were made in another State does not render the act less fraudulent in law, nor relieve the officers thereof from liability therefor. McQueen v. New, 87 Hun 206 (1895); Olney v. Baird, 7 A. D. 95 (1896).

Transfers to Officers and Stockholders.

A transfer of the corporate property by the authority of the directors, to themselves, may be set aside, if it injures any public interest, or the private interest of any shareholder or creditor, even though such transfer was executed in good faith. Skinner v. Smith, 134 N. Y. 240 (1892), and cases therein cited. But this rule is not broad enough to condemn all transfers executed by a business corporation, with or to its directors, in good faith, in case no public or private interest is harmed thereby. Id. Such contracts are not void but voidable at the election of those who are affected by the fraud. Id.

A payment made when a corporation is hopelessly insolvent to a trustee for past services as general manager, and with a view to secure to him a preference, is void. Dwight v. Williams, 25 Misc. 667 (1899).

If certain of the persons, for whose benefit an assignment of accounts due the corporation was made, after the corporation had refused to pay its obligations, had ceased to be officers, directors or stockholders before the assignment, the same was not invalid as to them. The statute distinguishes between a transfer to an officer or stockholder and one to a person holding neither of such positions. Milbank v. Welch, 74 Hun 497 (1893). To a stockholder or director a transfer of corporate property is forbidden, if the corporation shall have refused to pay any of its notes or obligations when due, but to other creditors a transfer of corporate property in payment of its debts is only prohibited "when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation." Id.

A corporation may loan its credit to its president or mortgage its property for his debt, if the stockholders or the equitable owners of the stock do not object, and if no rights of creditors intervened. Quee Drug Co. v. Plaut, 55 A. D. 87 (1900); Osborn v. Montelac Park, 89 Hun 167, affd., 153 N. Y. 672 (1897).

The president, in the absence of bad faith, has the right to take obligations or security from his corporation for an actual indebtedness to himself. First Nat. Bk. v. Com'l Travelers' Home Assn., 108 A. D. 78 (1905), affd., 185 N. Y. 575; Duncomb v. N. Y., H. & N. R. R. Co., 88 N. Y. 1, (1882).

A transaction whereby directors, in good faith and in the belief that the corporation was solvent, made a loan to it and received from it an assignment of securities as collateral, pursuant to a plan to relieve it of its financial difficulties, is valid although the corporation was, in fact, insolvent at that time. Converse v. Sharpe, 161 N. Y. 571, affg. 37 A. D. 399 (1900).

There is no authority for the doctrine that a corporation cannot transfer property to a director to secure an honest and bona fide debt. Duncomb v. N. Y., H. & N. R. R. Co., 88 N. Y. 1 (1882).

There is no rule forbidding a director from loaning money to the corporation, when the money is needed, and the transaction is open and otherwise free from blame. Twin-Lick Oil Co. v. Marbury, 91 U. S. 587 (1875).

A corporation may give a mortgage to its directors, who have loaned their credit to it, to induce a continuance of the loan of that credit, at a time when the corporation, though not in fact possessed of assets equal to its indebtedness, is a going concern, and is intending and expecting to continue in business. Sandford Fork & Tool Co. v. Howe, Brown & Co., 157 U. S. 312 (1894).

Unlawful Preferences.

Assignments of book accounts, made by an insolvent corporation in contemplation of insolvency and to give the assignee a preference, will be set aside at the instance of judgment creditors of the corporation. Dudensing v. Jones, 27 Misc. 69 (1899).

This section prohibits a director of an insolvent corporation, who is also a creditor, from obtaining a preferential lien through the process of an attachment. Throop v. Hatch Lith. Co., 125 N. Y. 530 (1891), distg. Varnum v. Hart, 119 N. Y. 101.

Where officers of an insolvent corporation have assigned its accounts to creditors the latter are not entitled to retain the proceeds on the ground that such assigned accounts were to take the place of accounts which had been previously assigned as security for loans made by such creditors and which had been unlawfully collected by the corporation. Hilton v. Ernst, 38 A. D. 94, affd., 161 N. Y. 226 (1900).

Where the demand note of a corporation held by a bank is amply secured by the personal collateral security of its president, payment of said note the day before the corporation went into bankruptcy and while it was insolvent created a preference prohibited by this section. Wright v. Gansevoort Bank, 52 Misc. 214 (1906).

Payment to President for Services after Failure to Pay Rent Due.

Where a hotel corporation has failed to pay installments of rent due under its lease, a subsequent payment to its president of $5,000 for services as manager, is a violation of this section, and the amount so paid may be recovered by the receiver of the corporation. In such an action the president may be allowed a certain amount to which he was previously entitled under an agreement for services. Montague v. Hotel Gotham Co., 149 A. D. 687 (1912), revsd. on other grounds in 208 N. Y. 442.

Collusive Judgments.

Where an officer of a corporation, for the purpose of enabling a creditor to obtain judgment speedily, procured notes, aggregating $7,700, to be made for small amounts, so as to permit the creditor to obtain judgment in a city court on a short service of summons, violates this section. Rossman v. Seaver, 41 A. D. 604 (1899), affg. 22 Misc. 661.

A stockholder who was not a creditor will not be permitted to maintain a proceeding to set aside judgments against a corporation and recover property levied upon. Matter of Gardner, 86 Hun 30 (1895).

Where officers of an insolvent corporation, in consideration of a further advance in cash from a judgment creditor, agreed to give him demand notes for the entire amount of his claim and to transfer certain accounts to him as security and gave several notes for such amounts as would enable such creditor to obtain judgment in a City Court upon a short service of summons and refrained from putting the corporation into a receivership until after judgment had been taken on the notes and levies made, renders such judgments void. Rossman v. Seaver, 41 A. D. 603 (1899), affg. 22 Misc. 661.

Where a corporation suffers a judgment at the instance of a creditor who, although not a director, substantially controls the company, the judgment is void. Olney v. Baird, 7 A. D. 95 (1896), affg. 15 Misc. 385.

When, in an action brought by a receiver of a corporation, appointed in dissolution proceedings, to set aside a judgment recovered against it, by default, as violative of this section, it appears, that, although the creditor had been in the habit of selling goods to the corporation on a credit of from two to four months, he sold it goods upon the terms of immediate payment five days before the corporation admitted its insolvency, and thereafter recovered judgment by consent of the president of the corporation, such judgment will be set aside. Spellman v. Loosben, 162 N. Y. 268 (1900), revsg. 31 A. D. 94.

Judgment by Default, when Upheld.

The purpose of this section is to prevent any improper act or omission on the part of the corporation or its officers which would result in securing to a particular creditor a preference, but where a creditor has a just claim to which the corporation has no defense, and he adopts the ordinary court procedure to enforce it, which results in a judgment by default, it cannot be properly held to be within the condemnation of the statute, unless the corporation or its officers were guilty of some act besides mere non-resistance to the creditor's efforts to obtain the judgment. Lopez v. Campbell, 163 N. Y. 340 (1900), revsg. 18 A. D. 427.

An insolvent corporation is not obliged to defend a suit brought against it for a valid debt, to which there was no defense, for the sole purpose of defeating a preference. Ridgway, as Receiver of Casper & Co., v. Symons, as Receiver of Robinson & Symons, 4 A. D. 98 (1896), distgd. in Rossman v. Seaver, 22 Misc. 661, 663 (1898).

Judgment on offer of insolvent corporation is void. Braem v. Mer. Nat. Bk., 127 N. Y. 508, 40 St. Rep. 327 (1891); Nat. Broadway Bk. v. W. M. Co., 59 Hun 470 (1891); Varnum v. Hart, 119 N. Y. 101 (1890). But an insolvent corporation is not obliged to defend any suit brought to recover a valid debt. Id. It is necessary to show active procurement by an officer of the corporation. Dickson v. Mayer, 35 St. Rep. 482, 26 Abb. N. C. 257, 12 N. Y. Supp. 651 (1891). If the creditor acted in good faith in making advances to pay off incumbrances he will be protected. King v. Union Iron Co., 33 St. Rep. 545 (1890).

Transfer of Stock, when Prohibited.

The provision forbidding a stockholder of a corporation to make "any transfer or assignment of his stock to any person in contemplation of its insolvency," and

declaring such "transfer, or assignment, or other act done in violation of the foregoing provision to be void," renders a transfer by a shareholder of his shares, in contemplation of the insolvency of the corporation, void as to the persons injured by the transfer; but where there was no fraud as between the transferrer and the transferee, nor as against the corporation assenting to the transfer, the transfer must be deemed to be valid; the purpose of the prohibition being to prevent solvent shareholders from escaping from their statutory liability to those who were creditors of the corporation when the transfer was made, and further to prevent them from escaping from their contractual liability to a corporation not assenting to the transfer. Sinclair v. Dwight, 9 A. D. 297, affd., 158 N. Y. 607 (1899).

The provisions of this section, that "no stockholder of any such corporation shall make any transfer or assignment of his stock therein to any person in contemplation of its insolvency," are aimed only at transfers made for the purpose of relieving the stockholder from his statutory or contractual liability, and do not affect a bona fide sale of stock by one who is under no liability as stockholder to the corporation or its creditors at the time of the transfer. Sinclair v. Fuller, 158 N. Y. 607 (1899), affg. 9 A. D. 297.

General Assignments.

When a general assignment for the benefit of creditors is made to the president of a corporation pending a motion for appointment of a temporary receiver, such assignee, having qualified, has a right to custody of the assets until the assignment is set aside, or the court stays his control over the funds, or substitutes another for him. Rump v. Van Rensselaer Realty Co., 138 A. D. 289 (1910).

The common-law right of an insolvent corporation to make a general assignment for the benefit of creditors has been restored by the enactment of the foregoing section as amended in 1892, subject, however, to the condition that the assignment must be without preferences. Croll v. Empire State Knitting Co., 17 A. D. 282 (1897).

A stock corporation may make a general assignment without preferences. Home Bank v. Brewster, 17 Misc. 442 (1897).

This section does not prohibit a corporation, which is insolvent, and has failed to pay its notes or other obligations when due, from executing to one of its directors a general assignment without preferences, except as authorized by the statute, for the benefit of creditors. Munzinger v. United Press, 52 A. D. 338 (1900).

Assignment of property by an insolvent corporation for the purpose of paying its debts is a very different action from so disposing of its property while solvent as to make further exercise of its franchises impossible. Vanderpoel v. Gorman, 140 N. Y. 568 (1894), distg. People v. Ballard, 134 N. Y. 269, 294.

A general assignment without preferences, executed by a corporation, will not be set aside at the instance of a judgment creditor for his sole benefit, because officers of the corporation, prior to the assignment, made payments to themselves and others in discharge of existing obligations of the corporation, which payments were in violation of this section, where there is no proof that the corporation itself authorized such payments. Creteau v. Foote & Thorne Glass Co., 54 A. D. 168 (1900).

A transfer of the entire corporate property and effects, which has the effect of terminating the regular business of the corporation, and was made and accepted by the transferee with that purpose, is illegal as against creditors of the corporation. Cole v. Millerton I. Co., 133 N. Y. 164; id., 38 St. Rep. 34 (1892).

A resolution by the board of directors "that the company execute a general assignment," without expressly deputing any one to act, authorizes its president to make an assignment for the company. Rogers v. Pell, 154 N. Y. 518 (1898), revsg. 89 Hun 159.

The president of a corporation has no power to determine whether a general assignment for the benefit of creditors shall be made or to execute it unless authority be conferred upon him by the directors, and where he attempts to do so without such authority, his acts as against the stockholders and creditors are absolutely void. Schaefer v. Scott, 40 A. D. 438 (1899).

In the case of the Troy Waste Mfg. Co. v. Harrison, 73 Hun 528, it was held that a corporation cannot make, in contemplation of insolvency, a general assignment for the benefit of creditors, even without preferences, but that case is no longer an authority. Vanderpoel v. Gorman, 140 N. Y. 568 (1894); Home Bank v. Brewster & Co., 17 Misc. 442 (1897). A corporation has the right under the foregoing section to make a general assignment without preferences. Id.

It seems that a general assignment for the benefit of creditors, executed by a corporation to a director or stockholder thereof, is not repugnant to this section; a transfer contemplated by the section is one which is for the benefit of the director or stockholder, and operates in the nature of a preference. Linderman v. Hastings Card & Paper Co., 38 A. D. 488 (1899).

Assignment Where the Assignee is Neither an Officer, Director or Stockholder.

To avoid an assignment under this section where the assignee is not an officer or director or stockholder of the corporation making the assignment, it must be shown that when the assignment was made the corporation was insolvent, or its insolvency was imminent, and also that the assignment was made with the intent of giving preference to a particular creditor. Dill & Collins Co. v. Morison, 159 A. D. 583 (1913).

Preferences Declared Lawful.

Where one holding notes of a corporation subsequently adjudged a bankrupt, which were indorsed by a perfectly good indorser, in consideration of the transfer to him, by the corporation, of certain property, and having no knowledge or notice which forbade it from so doing, surrendered the notes and thereby lost the security of the indorsements, he cannot be required to return the property, even though the transfer of the property caused the insolvency of the corporation. He is within the protection of the provision that no conveyance, assignment or transfer "shall be void in the hands of a purchaser for a valuable consideration without notice." Perry v. Van Norden Trust Co., 192 N. Y. 189 (1908), revsg. 118 A. D. 288.

A chattel mortgage, which was given by a corporation that had not refused to pay any of its obligations, and which was not given with the intention of preferring a creditor, but with the honest intention of enabling the corporation to continue business, was not void under this section. Swan v. Stiles, 94 A. D. 117 (1904). Even if such chattel mortgage was executed to create a preference the purchaser at a foreclosure sale thereunder cannot be compelled to restore the property unless the purchase price is returned. Id. See, also, Gordon v. Southgate Bldg. Co., 109 A. D. 838, 840 (1905).

Where the president of a corporation, which has a deposit in a bank of which he is a director, upon learning, as a director, of the imminent insolvency of the bank, immediately informs his corporation and assists and

procures it to withdraw its deposit by means of its own check, and the bank never opened for business after the check was paid, there is no violation of this section, either upon the part of the corporation or upon the part of its president, as a director of the bank. O'Brien v. East River Bridge Co., 161 N. Y. 539 (1900), revsg. 36 A. D. 17.

A transfer by the president of a corporation of the corporate property in payment of his individual indebtedness will be upheld, provided his act has been authorized and rights of creditors are not violated. Quee Drug Co. v. Plaut, 55 A. D. 87 (1900).

When an officer of a corporation, having a valid claim against it which he could have enforced but for the fact that he was then an officer of it, and therefore within the restraint of the statute, transfers his claim to another, so that the office and title cease to rest in the same person, the claim becomes enforceable against the corporation, even though the transferee is the wife of the transferrer, provided that the transfer was an absolute one and made in good faith for a valuable consideration. Jefferson Co. Nat. Bk. v. Townley, 159 N. Y. 490 (1899), revsg. 92 Hun 172.

Creditors' Remedies.

The plaintiff in an action which is pending against a coporation at the time when the latter makes an assignment for the benefit of creditors becomes, upon subsequently recovering judgment against such corporation, a creditor thereof, and may maintain an action to set aside the assignment upon the ground of fraud. Munzinger v. United Press, 52 A. D. 338 (1900).

The fact that an officer of a corporation, who is in control thereof, is also its principal creditor does not prevent him, as a creditor, from taking measures against the corporation to enable him to secure payment of his indebtedness. Michel v. Betz, 108 A. D. 241 (1905).

A judgment creditor, whose execution has been returned unsatisfied, may maintain an action to set aside an assignment for creditors, made by the corporation after it had, with knowledge of its insolvency, already disposed of a considerable part of its property among its officers and attorneys, and may secure payment of his judgment from the corporate property by virtue of a lien created by the issuing of the execution. Koechl v. Leibinger & Oehm Brewg. Co., 26 A. D. 573 (1898). See, also, Same v. Same, 24 Misc. 298 (1898).

Mortgages executed in violation of this section may be attacked by a person who, after such mortgages were recorded, but on the same day, obtained judgment in an action against the corporation to recover for personal injuries. Munson v. Genesee Iron & Brass Works, 37 A. D. 203 (1899).

In an action by a judgment creditor under this section, on behalf of himself and all other creditors similarly situated, to set aside certain transactions and judicial proceedings undertaken by an insolvent corporation to enable a defendant, also a creditor of the corporation, to secure a preference, the fact that no other creditor of the corporation appears in the action does not entitle the plaintiff to priority over the other creditors in payment of a judgment recovered. Lodi Chemical Co. v. National Lead Co., 41 A. D. 535 (1899). See, also, Lodi Chemical Co. v. Charles H. Pleasants Co., 25 Misc. 97 (1898).

A permanent receiver of a corporation, which while insolvent, executed a bill of sale of its property, may maintain an action for conversion against the vendee, and is not obliged to bring a suit in equity to compel such vendee to account for property thus transferred. McQueen v. New, 45 A. D. 579 (1895). This section was not intended to limit the receiver's remedy to a

suit in equity for an accounting. This provision being remedial, its language should not be narrowed or limited so as to lessen remedies given by former statutes which were not repealed by it. Id.

Foreign Corporations.

See also, under section 70, post, the topical heading "Right of Action Against Directors of a Foreign Corporation Because of Unlawful Dividends; Conflict of Laws," and discussion thereunder.

Where, in a stockholder's action against a foreign corporation and its officers to set aside alleged fraudulent transfers and to prevent certain other contemplated transfers, a receiver pendente lite of the corporate property is appointed to take possession thereof to prevent unlawful waste, his powers do not include the right to maintain an action or special proceeding specified in the general corporation law, section 104. Howell v. German Theatre, Inc., 64 Misc. 110 (1909).

A general assignment for the benefit of creditors of property situated in this State made in this State by a foreign corporation doing business here is subject to the provisions of section 28 of the Debtor and Creditor Law (Cons. Laws, ch. 12, Laws 1909, ch. 17) which limits preferences to one-third of the value of the assigned estate. Matter of Halsted, 42 A. D. 101 (1899).

Where a corporation, being in financial difficulties, under agreement with another corporation, transferred to the latter its personal property and also leased to it all its real estate upon condition that the plant be operated and the personalty liquidated for the benefit of the transferor's creditors, a trust relationship is created and, upon the bankruptcy of the transferor, its trustee is entitled to an accounting and to the surplus in the hands of the transferee corporation. Gill v. Bell's Knitting Mills, 137 A. D. 553 (1910), modfg. 128 A. D. 691.

While the assignee takes title to personal property here under an assignment made pursuant to the statutes of another State, nevertheless such title will not be recognized where it conflicts with the rights of domestic creditors. Barth v. Backus, 140 N. Y. 230 (1893). An assignment, therefore, under such statute is ineffectual to transfer the title of the insolvent to property in this State as against an attaching creditor here although such creditor is himself a resident of the foreign State and although the attachment was levied after the making of the assignment. (Id.)

This section applies to such foreign stock corporations only as are engaged in transacting business in this State. Stock Corp. Law, § 70.

A foreign corporation has power to make a general assignment for the benefit of creditors under the laws of this State, provided the assignment is also valid under the law of the domicile of the corporation. Rogers v. Pell, 154 N. Y. 518 (1898), revsg. 89 Hun 159.

An assignment with preference by a foreign corporation which does not transact business within the State of New York, does not contravene the statutory law of the State of New York, prohibiting transfers of property by an insolvent corporation with an intent to give a preference, nor is it repugnant to its general policy. Matter of Hulbert Bros. & Co., 38 A. D. 323 (1899), revsd. on other grounds, 160 N. Y. 9.

Cases Superseded.

It should be borne in mind that section 70 of the Stock Corporation Law, enacted by L. 1897, ch. 384, subjects foreign stock corporations "transacting business in this state" to the provisions of this section, and supersedes the following cases arising prior to 1897, to wit:

This section does not apply to foreign corporations. Standard Nat. Bk. v. Garfield Nat. Bk., 56 A. D. 43 (1900); Vanderpoel v. Gorman, 140 N. Y. 569; Standard Nat. Bk. v. National Silk Label Co., 30 Misc. 219 (1900), affd., 70 A. D. 46; Worthington v. Pfister Bookbinding Co., 3 Misc. 418 (1893); Lane v. Wheelwright, 69 Hun 180 (1893).

A foreign corporation is not subject to this provision, and an attachment by a director was sustained. Hill v. Knickerbocker Elec. L. & P. Co., 45 St. Rep. 761, 18 N. Y. Supp. 813 (1892).

§ 67. Application to court to order issue of new in place of lost certificate of stock. The owner of a lost or destroyed certificate of stock, if the corporation shall refuse to issue a new certificate in place thereof, may apply to the supreme court, at any special term held in the district where he resides, or in which the principal business office of the corporation is located, for an order requiring the corporation to show cause why it should not be required to issue a new certificate in place of the one lost or destroyed. The application shall be by petition, duly verified by the owner, stating the name of the corporation, the number and date of the certificate, if known, or if it can be ascertained by the petitioner; the number of shares named therein, to whom issued, and as particular a statement of the circumstances attending such loss or destruction as the petitioner can give. Upon the presentation of the petition the court shall make an order requiring the corporation to show cause, at a time and place therein mentioned, why it should not issue a new certificate of stock in place of the one described in the petition. A copy of the petition and order shall be served on the president or other head of the corporation, or on the secretary or treasurer thereof, personally, at least ten days before the time for showing cause.

Formerly L. 1890, ch. 564, § 50, as am'd by L. 1892. ch. 688.

See also, provisions of Uniform Stock Transfer Act, post.

These provisions are applicable to national banks as well as other stock corporations. Matter of Hayt, 39 Misc. 356 (1902).

One who has lost his stock certificate, and finds the company unwilling to replace it, may apply to the Supreme Court for an order to show cause why a new certificate should not be given. The court may, on the hearing, proceed summarily to hear and determine the facts, and may make an order requiring the company to issue a new certificate upon receiving a bond of indemnity. Kinnan *v.* 42d St., M. & St. Nicholas Ave. R. R. Co., 140 N. Y. 183 (1893). This is not a remedy at law, but must be regarded as a cumulative, additional and summary remedy of a purely equitable character, and to be administered by an equity court. Id.

To confer upon the court jurisdiction to make an order in a proceeding instituted under this and the preceding section, it must be proved that the petitioner is the owner of the certificates and that they have been lost or destroyed and cannot after due diligence be found. Matter of Biglin v. Friendship Association, 46 Hun 224. See, also, Brisbane v. D., L. & W. R. R. Co., 25 Hun 438, affd., 94 N. Y. 204 (1883).

Stolen Certificates of Stock.

See also, "Transfers of Stock by Blank Endorsement," under section 50, ante.

If the owner of stock delivers the certificates to another for a special purpose, without intending or consenting to part with his title to the stock, then the taking and conversion of it with a felonious intent by the one having possession of it as the property of the owner for a special purpose is larceny. Bassett v. Spofford, 45 N. Y. 387, 391 (1871); Reichard v. Hutton, 158 A. D. 122 (1913); see also, Kilmer v. Hutton, 131 A. D. 625 (1909).

A purchase of stolen stock certificates either directly from the thief or from any other person although in the ordinary course of trade and in good faith, will not give a title as against the owner. Reichard v. Hutton, 158 A. D. 122 (1913), following Bassett v. Spofford, 45 N. Y. 387, 391. The purchaser for value of a stolen certificate of stock does not obtain good title. Hannahs v. Hammond Typewriter Co., 158 A. D. 620, 622 (1913).

Where certificates of stock, indorsed in blank were delivered to an employee of a brokerage firm, authorized to receive stock for them, and such employee disposed of the stock to them as his own, the brokers become liable. Reichard v. Hutton, 158 A. D. 122 (1913); see also, Kilmer v. Hutton, 131 A. D. 625 (1909).

Where one purchases a certificate of stock from a person who stole the same such purchaser acquires no better title to it than that possessed by the person from whom he received such stock, and in that case the rightful owner of the shares is entitled to recover the value thereof with interest. Anderson v. Nicholas, 28 N. Y., 600 (1863); Marden v. Dorthy, 160 N. Y. 39, 56 (1899); Cheever v. Pittsburgh, Shenango & L. E. R. R. Co., 150 N. Y. 59 (1896); see also, Jarvis v. Manhattan Beach Co., 148 N. Y. 652 (1896).

The fact that a pledgor, when he delivered the certificate of stock to the pledgee, wrote his name on the back thereof, did not, where such certificate was subsequently stolen and eventually sold by the thief, make it negotiable and confer a good title upon the purchaser where the blank power of attorney on the assignment attached to the certificate was not signed or witnessed, and the pledgor may assert title against an innocent purchaser subject only to the discharge of the original lien of the pledgee. Treadwell v. Clark, 190 N. Y. 51 (1907), affg. 114 A. D. 493.

The title of the true owner of a lost or stolen certificate of stock may be asserted against any one subsequently obtaining its possession, although the holder may be a bona fide purchaser. Knox v. Eden Musee Co., 148 N. Y. 441 (1896); Hall v. Wagner, 111 A. D. 70 (1906); Clarkson Home v. Missouri, Kansas & Texas Ry. Co., 182 N. Y. 47, 56 (1905).

Forged Assignment of Stock.

A corporation which has permitted a transfer on its books of stock upon a forged power of attorney, and has cancelled the original certificates, may be compelled to issue new certificates, or if it has no stock which it can transfer to the lawful owner, it must pay the value of the shares. Pollock v. National Bank, 7 N. Y. 274 (1852).

A certificate of stock is not a negotiable instrument. An assignment of a certificate of stock with a power of attorney indorsed upon the back thereof, although in blank, except as to signature and witness, presents such indicia of title that an innocent holder obtains good title; therefore, an agent to whom the owner has delivered a certificate of stock duly indorsed for transfer, with a limited power of disposition for a special purpose, may bind the title thereto as against the true owner by transferring it to a bona fide

transferee who has no notice of the limitations of the agent's authority, although the transfer was made for an unauthorized purpose and with the intention on the part of the agent to commit a fraud upon his principal. Talcott v. Standard Oil Co., 149 A. D. 694 (1912). If the assignment and power, though upon a separate paper, identified by description the property intended to be assigned, the same rule applies. Id.

When corporate instruments do not possess the ingredients of commercial paper, that fact is sufficient to put all persons dealing in them upon inquiry and deprives them of any protection as innocent or bona fide holders. Farmers' Loan and Trust Co. v. Carroll, 5 Barb. 613, 660 (1849).

§ 68. Order of court upon such application. Upon the return of the order, with proof of due service thereof, the court shall, in a summary manner, and in such mode as it may deem advisable, inquire into the truth of the facts stated in the petition, and hear the proofs and allegations of the parties in regard thereto, and if satisfied that the petitioner is the lawful owner of the number of shares, or any part thereof, described in the petition, and that the certificate therefor has been lost or destroyed, and can not after due diligence be found, and that no sufficient cause has been shown why a new certificate should not be issued, it shall make an order requiring the corporation, within such time as shall be therein designated, to issue and deliver to the petitioner a new certificate for the number of shares specified in the order, upon depositing such security, or filing a bond in such form and with such sureties as to the court shall appear sufficient to indemnify any person other than the petitioner who shall thereafter be found to be the lawful owner of the certificate lost or destroyed; but such provision requiring security to be deposited or bond filed is to be construed as excluding an application made by a domestic municipal corporation or by a public officer in behalf of such corporation; and the court may direct the publication of such notice, either before or after making such order as it shall deem proper. Any person claiming any rights under the certificates alleged to have been lost or destroyed shall have recourse to such indemnity, but in any application under the provisions of this chapter, in which a domestic municipal corporation or a public officer in behalf of such corporation, shall be by the foregoing provisions of this section excused from depositing security or filing a bond, such municipal corporation shall be liable for all damages that may be sustained by any person, in the same case and to the same extent as sureties to a bond or undertaking would have been, if such a bond or undertaking had been filed; and the corporation issuing

such certificate shall be discharged from all liability to such person upon compliance with such order; and obedience to the order may be enforced by attachment against the officer or officers of the corporation on proof of his or their refusal to comply with it.

Formerly L. 1890, ch. 564, § 51, as re-enacted by L. 1892, ch. 688, as am'd by L. 1905, ch. 35.

For form of bond of indemnity, see Form No. 262.

By L. 1905, ch. 35, the provisions respecting domestic municipal corporations were inserted.

The provisions of this section, relative to the issue of a new certificate of stock in place of one lost, do not affect the liability of a corporation to its creditors under the provisions of section 1917 of the Code of Civil Procedure. Rolston v. Central Park, N. & E. R. R. Co., 21 Misc. 439, affg. 20 Misc. 656 (1897).

§ 69. Financial statement to stockholders. Stockholders owning five per centum of the capital stock of any corporation other than a moneyed corporation, not exceeding one hundred thousand dollars, or three per centum where it exceeds one hundred thousand dollars, may make a written request to the treasurer or chief fiscal officer thereof, for a statement of its affairs, under oath, embracing a particular account of all its assets and liabilities, and the treasurer shall make such statement and deliver it to the person presenting the request within thirty days thereafter, and keep on file for twelve months thereafter a copy of such statement, which shall at all times during business hours be exhibited to any stockholder demanding an examination thereof; but the treasurer or such chief fiscal officer shall not be required to deliver more than one such statement in any one year. The supreme court, or any justice thereof, may upon application, for good cause shown, extend the time for making and delivering such certificate. For every neglect or refusal of the treasurer or other chief fiscal officer thereof to comply with the provisions of this section he shall forfeit and pay to the person making such request the sum of fifty dollars, and the further sum of ten dollars for every twenty-four hours thereafter until such statement shall be furnished.

Formerly L. 1890, ch. 564, § 52, as am'd by L. 1892, ch. 688.

For form of demand for statement, see Forms, post.

It may be that the Supreme Court, independently of statute, by virtue of its supervisory power, has the right to order an inspection of the books of account of a corporation by a stockholder; but such an order will not be granted by the court unless it appears that the applicant is the owner of the amount of stock specified in the foregoing section, and has made a written request to the treasurer of the corporation for a statement of its affairs, under oath, embracing a particular account of all its assets and

liabilities, and that such treasurer has not within thirty days delivered such statement. People ex rel. Clason v. Nassau Ferry Co., 86 Hun 128 (1895).

The furnishing to a stockholder by the treasurer of a stock corporation of an unverified "statement of its affairs," after a demand for a statement under oath, made by the stockholder and the refusal of the treasurer to furnish any other statement, although the defect was pointed out to him, subjects him to the statutory penalty of fifty dollars for a failure to furnish a legal statement and the further penalty of ten dollars for every day's neglect, up to the time when an action for the penalty is begun, notwithstanding the stockholder's delay in bringing his action. St. John v. Eberlin, 23 Misc. 585 (1898), 5 Ann. Cases 247.

When a proper demand for a financial statement has been made, but the corporation had been dissolved before the expiration of the thirty days, no statement need be made, as a defunct corporation no longer has a treasurer and cannot be called upon to render such a statement. Osborne v. Gilliams, 33 Misc. 312, affd., 65 A. D. 614 (1901); McCrea v. Bedell, 9 Misc. 372 (1894).

Where a stockholder owning more than five per cent. of the capital stock makes a written request for a financial statement and the treasurer neglects to deliver the same within thirty days, the fact that he had resigned before the expiration of such period is no defense. Osborne v. Gilliams, 33 Misc. 312, affd., 65 A. D. 614 (1901).

A detailed statement of the assets and liabilities of the corporation is sufficient; the business transactions of the corporation are not required to be stated. French v. McMillian, 43 Hun 188 (1887). Omission to demand sworn statement merely waives verification. McCrea v. Bedell, 9 Misc. 372 (1894).

Director Who is Also a Stockholder May Demand Statement.

A stockholder owning the required amount of stock may, under this section, compel the treasurer or other chief fiscal officer of the corporation to furnish a statement under oath. The statute applies to a stockholder who is a director as well as to a stockholder who is not a director. Townsend v. Davis, 153 A. D. 599 (1912).

Pledgee of Stock Not Entitled to Statement.

Where pledgees of stock, having authority in case of default to sell the same at public or private sale, delivered the stock to the secretary of the corporation with instructions to issue new certificates in their names, a demand made by the pledgees upon the treasurer for a statement upon the day following the surrender of the stock and before, so far as appeared, the transfer of the stock had been made upon the stock book, will not support an action for the penalty, especially where it does not appear that the treasurer had any knowledge of the surrender of the pledged stock when the demand was made. Pray v. Todd, 71 A. D. 391 (1902).

Statute is Highly Penal.

This statute is highly penal: it was enacted for the benefit of stockholders and concerns them only; in order to enforce the penalty against the treasurer of a corporation they must bring themselves within the terms of the statute. Pray v. Todd, 71 A. D. 391 (1902).

Although this section is highly penal in its character, there is no reason why the language employed should not be given its ordinary meaning and force. Townsend v. Davis, 153 A. D. 599, 602 (1912).

Action Against Treasurer to Recover Penalty; Pleading.

In an action by a stockholder to recover a penalty under this section the plaintiff must allege and show that: (1) The corporation is embraced within the terms of the statute; (2) he holds sufficient stock to give him a standing to maintain the action; (3) the defendant is its treasurer; (4) due demand has been made and refused; (5) that the treasurer has not furnished such a statement of the affairs of the corporation to any stockholder within the year. Troughton v. Grace, 151 A. D. 655 (1912). A violation of the statute is not shown by alleging a demand and failure to comply therewith. A complaint which fails to allege that the defendant has not delivered a financial statement to the plaintiff, or to some other stockholder, during the fiscal year within which the demand was made, is demurrable. Id.

Requirements of Demand.

The request should include only a demand for a particular account of the corporate assets and liabilities, and must not embrace subjects not within the statute. Troughton v. Grace, 84 Misc. 577 (1914). The request must be delivered to the treasurer in person, not by mail, and it is the duty of the treasurer to deliver the statement personally to the applicant. Id.

§ 70. Liabilities of officers, directors and stockholders of foreign corporations. Except as otherwise provided in this chapter the officers, directors and stockholders of a foreign stock corporation transacting business in this state, except moneyed and railroad corporations, shall be liable under the provisions of this chapter, in the same manner and to the same extent as the officers, directors and stockholders of a domestic corporation, for:

1. The making of unauthorized dividends;
2. Unlawful loans to stockholders;
3. Making false certificates, reports or public notices;
4. An illegal transfer of the stock and property of such corporation, when it is insolvent or its insolvency is threatened;
5. The failure to file an annual report.

Such liabilities may be enforced in the courts of this state, in the same manner as similar liabilities imposed by law upon the officers, directors and stockholders of domestic corporations.

Formerly § 60, as added by L. 1897, ch. 384.

Former subd. 2 of this section relating to a liability for the creation of unauthorized and excessive indebtedness was repealed by the Consolidated Laws of 1909. There is no longer any liability of this nature upon officers of domestic corporations (see note to § 34) and liabilities upon officers of foreign corporations are by the terms of the section intended to be the same as domestic. Otherwise the section is re-enacted without change, except change of number from 60 to 70, and place in article changed so as to follow in logical sequence.

For other provisions affecting foreign corporations, see references thereto in the index under the heading "Foreign Corporations."

This section applies to foreign corporations in those cases only where the act complained of violates the law of the domicile of the corporation. Hutchinson v. Stadler, 85 A. D. 424 (1903).

The courts of one State will not enforce the penal laws of other States, or allow a recovery for a penalty imposed upon a corporation or its officers by the State in which the corporation was created. Hutchinson v. Stadler, 85 A. D. 424, 430 (1903).

Right of Action Against Directors of a Foreign Corporation Because of Unlawful Dividends; Conflict of Laws.

The only right intended to be given or liability to be imposed by sections 28 and 70 of this law upon the directors of a foreign corporation for making unauthorized dividends is the same liability or obligation as that imposed by the statute of the State in which the corporation was created; hence an action by a stockholder of a New Jersey corporation on behalf of himself and other stockholders similarly situated, to recover damages in the name of the corporation for the payment of unauthorized dividends, not being authorized by the statute of that State cannot be maintained in this State. De Raismes v. U. S. Lithograph Co., 161 A. D. 781 (1914). Judges Ingraham and Scott dissented on the ground that when the foreign corporation obtained permission to transact business in this State and established its executive offices here, it acquired the rights and benefits that accrue to a domestic corporation, and subjected itself to the provisions of the laws of this State in relation to the regulation of its corporate affairs and to the obligations imposed upon such a foreign corporation: that thereby the directors and officers subjected themselves to the liabilities imposed for a violation of the laws of this State. The liability for an unauthorized dividend depends upon the law of this State and not upon the law of the State of New Jersey. As to what is and is not an authorized dividend recourse must be had to the statutes of New Jersey. If the dividend declared by the directors of a New Jersey corporation doing business in this State is prohibited by the statute of that State, it is an unauthorized dividend and the law of this State says that, if the directors of this corporation have declared an unauthorized dividend, they shall be liable, not as provided by the laws of the State of New Jersey, but in the same manner and to the same extent as the officers and directors of a domestic corporation, and such liability may be enforced in this State in the same manner as a similar liability imposed upon the directors of a domestic corporation. It should be borne in mind that the statute of New Jersey, as amended in 1904, gives the right of action to the stockholders and not to the corporation, while the statute of New York State gives the right to the corporation and to its creditors, but not to the stockholders.

*ARTICLE 5

Laws Repealed; When to Take Effect

SECTION 80. Laws repealed.
81. When to take effect.

§ 80. Laws repealed. Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

§ 81. When to take effect. This chapter shall take effect immediately.

SCHEDULE OF LAWS REPEALED.

Laws of	Chapter	Section
1814....	12....	All (38th Sess.)
1825....	325....	1–3, 12
1828....	20....	15, ¶¶ 17, 18 (2d Meet.)
1828....	21....	1, ¶ 180 (2d Meet.)
1830....	71....	All
1848....	145....	All
1853....	176....	All
1853....	425....	All
1853....	460....	All
1869....	742....	7
1875....	392....	8
1884....	434....	All
1889....	57....	All
1890....	564....	All
1892....	337....	All
1892....	688....	All
1893....	196....	All
1893....	638....	All
1893....	700....	All
1894....	346....	All
1896....	929....	All
1896....	932....	1, pt. adding § 58 to L. 1892, ch. 688
1897....	384....	All
1899....	354....	All
1899....	696....	All
1900....	128....	All
1900....	164....	All
1900....	476....	All
1901....	130....	All
1901....	354....	All
1902....	80....	All
1902....	98....	All
1902....	286....	All
1902....	601....	All
1903....	320....	All
1904....	123....	All
1904....	307....	All
1904....	706....	All
1905....	35....	All
1905....	415....	All
1905....	489....	All
1905....	745....	All
1905....	750....	All
1905....	751....	All
1906....	238....	All

*CONSOLIDATORS' NOTE.— The Stock Corporation Law, as originally enacted in 1890, contained its own separate schedule of laws repealed, but upon the revision in 1892, the schedule was incorporated into the schedule of the General Corporation Law, as was that of the Business Corporations Law. This article is made necessary by change in the form of the present corporation laws to conform to the scheme of consolidation which requires each general law to have its own repealing schedule.

BUSINESS CORPORATIONS LAW

Laws of 1909, Chapter 12, Entitled: "An Act Relating to Business Corporations, Constituting Chapter Four of the Consolidated Laws," as Amended to the Commencement of the Legislative Session of 1915.

CHAPTER 4 OF THE CONSOLIDATED LAWS

*Business Corporations Law

Article 1. Short title (§ 1).
2. General provisions (§§ 2–16).
† 3. Co-operative corporations (§§ 25–38).
4. Laws repealed; when to take effect (§§ 50, 51).

ARTICLE 1

Short Title

Section 1. Short title.

§ 1. Short title. This chapter shall be known as the "Business Corporations Law."

Former § 1, ch. 567, L. 1890, as am'd by L. 1892, ch. 691, and L. 1895, ch. 671.

In addition to the provisions of this law, which are applicable only to business corporations, other provisions regulating the affairs of such corporations are contained in the General Corporation Law and the Stock Corporation Law. See, also, the comments on pages 1 and 318, respectively. If there should be any provision in this law in conflict with any provisions of the General Corporation Law or of the Stock Corporation Law, the provisions of this law so conflicting shall prevail and the provision of the other law with which it conflicts shall not apply in such case. Gen. Corp. Law, § 321.

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*This law was passed February 17, 1909, and took effect immediately. It supersedes and repeals the Business Corporations Law of 1890 (ch. 567), which took effect May 1, 1891, and which was revised and entirely re-enacted by the Laws of 1892, ch. 691.

† The provisions of article 3 are new, added by Laws of 1913, chapter 454, in effect May 9, 1913. By the same act former article 3, §§ 25 and 26, were renumbered, respectively, as article, 4, §§ 50 and 51. Such amendment automatically amends the above table of contents so as to include a reference to the additional sections, pursuant to the General Construction Law, section 81, post.

"Since October 1, 1923, when the new Stock Corporation Law took effect, all New York business corporations must be organized under the Stock Corporation Law and not under the Business Corporations Law as formerly ....." Arnold, Annual Guide. 9th ed., 1924.

ARTICLE 2

General Provisions

SECTION 2. Incorporation.
2-a. Incorporating for the purpose of conducting law business, et cetera, prohibited.
3. Restrictions upon commencement of business.
4. Reorganization of existing corporations.
5. Payment of capital stock.
6. Full liability corporations.
7. Consolidation of corporations.
8. Submission of consolidation agreement to stockholders.
9. Powers of consolidated corporations.
10. Transfer of property of old corporations to consolidated corporations.
11. Rights of creditors of old corporations.
12. District steam corporations.
13. Examination of meters by agent of district steam corporations.
14. Entry by agent of district steam corporation to cut off steam.
15. Water companies.
16. Improvement corporations; right of condemnation.

§ 2. Incorporation. Except as provided in section two-a of this chapter, three or more persons may become a stock corporation for any lawful business purpose or purposes other than a moneyed corporation, or a corporation provided for by the banking, the insurance, the railroad and the transportation corporations laws, or an educational institution or corporation which may be incorporated as provided in the education law, by making, signing, acknowledging and filing a certificate which shall contain:

1. The name of the proposed corporation.
2. The purpose or purposes for which it is to be formed.
3. The amount of the capital stock, and if any portion be preferred stock, the preferences thereof.
4. The number of shares of which the capital stock shall consist, each of which shall not be less than five nor more than one hundred dollars, and the amount of capital not less than five hundred dollars, with which said corporation will begin business.
5. The city, village or town in which its principal business office is to be located. If it is to be located in the city of New York, the borough therein in which it is to be located.
6. Its duration.
7. The number of its directors, not less than three.

8. The names and post-office addresses of the directors for the first year.

9. The names and post-office addresses of the subscribers to the certificate, and a statement of the number of shares of stock which each agrees to take in the corporation.

Any certificate of incorporation filed, prior to April twenty-second, eighteen hundred and ninety-six, under the provisions of the business corporations law theretofore in force which shall contain the names and post-office addresses, either of the subscribers to the stock or of the subscribers to the certificate, and a statement of the number of shares of stock which each agrees to take in the corporation, shall be deemed to have complied with the requirements of section two, subdivision nine of said law.

If meetings of the board of directors are to be held only within the state the certificate or by-laws must so provide.

L. 1909, ch. 12, § 2, as am'd by L. 1909, ch. 484.

Formerly § 2, L. 1890, ch. 567, as am'd by L. 1892, ch. 691; L. 1895, ch. 671; L. 1896, ch. 396; L. 1896, ch. 460; L. 1901, ch. 520; L. 1903, ch. 525; L. 1904, ch. 446; L. 1907, ch. 646.

For forms of certificates of incorporation under this law, see Forms Nos. 1–7, *post.*

For precedent of certificate of incorporation for formation of a corporation with shares of stock without par value, see Form No. 7.

For forms of minutes of first meeting of incorporators, minutes of first meeting of directors, waivers of notice, by-laws, proposal to sell property, bill of sale, etc., see Forms Nos. 204–216.

For forms of specific object clauses, see Forms Nos. 30-203, *post.*

For forms of general object and regulating clauses, see Forms Nos. 9–29.

For forms of clauses for the regulation of the business and the affairs of the corporation, and limitations upon the powers of directors and stockholders, pursuant to section 10 *of the General Corporation Law, see Forms Nos.* 9–29, *and Nos.* 291–294, 312, 313.

For examples of stock preferences, see Forms Nos. 262–273.

For form of statement of preferred and common stock of different par values, see Form No. 274.

For forms restricting or depriving preferred stock of voting power, see Forms Nos. 275–277.

For forms of classification of directors, see Forms Nos. 287–289.

For forms in mandamus proceedings to compel Secretary of State to file certificate of incorporation, see Forms Nos. 467–471.

For form of certificate for filing with State Comptroller, pursuant to Tax Law, § 275-*a, see Form No.* 478.

The words "Except as provided in section two-a of this chapter," in the first paragraph of this section, were inserted by L. 1909, ch. 484, to take effect May 25, 1909. For section two-a see page 562.

The last paragraph but one is a re-enactment of ch. 369, L. 1896, which was apparently re-enacted to ratify and confirm the rights of certain corporations whose certificates, previously filed, were deemed to be informal.

The last sentence in the foregoing section, relative to directors' meetings, was added by ch. 446, L. 1904.

Provisions inserted in this section in 1903, permitting a corporation to insert in its certificate of incorporation any limitation upon its powers, and upon the powers of its directors and stockholders which does not exempt them from obligations and duties imposed by law, were omitted by L. 1909, ch. 12, because duplicate provisions were contained in Gen. Corp. L. § 10.

Prior to the amendment of 1901, ch. 520, the maximum number of directors for a corporation under this law was thirteen, but this limitation was stricken out by said amendment, so that now there is no maximum; however, the certificate must definitely fix the number of directors the corporation is to have, not less than three, and name those who are to serve for the first year.

The words "or an educational institution or corporation which may be incorporated as provided in the education law," were inserted in the introductory paragraph of the foregoing section by an amendment of 1907, ch. 646, thereby excluding educational corporations from organization under this law.

By the amendment of 1901, subdivision 9 was changed by inserting the words "of the certificate," so that the names and post-office addresses of the incorporators are to be set forth in the certificate, with a statement of the number of shares of stock which each agrees to take in the corporation, instead of setting forth the complete subscription list of the persons who agree to take stock in the proposed corporation.

By the amendment of 1895 the provisions respecting the purposes for which corporations may be formed under this law were changed in phraseology and transferred from section 1 to section 2.

Incorporators.

There must be at least three incorporators, all of full age; at least two-thirds of them must be citizens of the United States, and at least one of them a resident of the State of New York. Gen. Corp. Law, § 4. Only natural persons can become incorporators. Id. Corporations, copartnerships and persons acting in a representative capacity, are, therefore, excluded from acting as incorporators; however, after the formation of the corporation, copartnerships may become stockholders, as may executors, administrators, guardians or trustees. Stock Corp. Law, § 58. And other stock corporations, both domestic and foreign. Stock Corp. Law, § 52.

Attorney in Fact May Not Act for His Principal as Incorporator.

An incorporator must both sign and acknowledge the certificate of incorporation in person. The execution of a certificate of incorporation by a person acting under a power of attorney is unauthorized. Opinion of Atty. Genl., June 4, 1914.

Corporate Name.

The name must clearly indicate that it is a corporation as distinguished from a natural person, firm or copartnership. See General Corporation Law, section 6, and notes thereunder. Unless the name begins with the word "Corporation," as for instance, "Corporation of John Smith," or terminates with the word "Corporation" it should end with the word "Incorporated" or the abbreviation "Inc."

The corporate name must be in the English language and must not conflict with that of any other domestic corporation, or of any foreign corporation authorized to do business in this State, and it must not contain the word trust,

bank, banking, insurance, assurance, indemnity, guarantee, guaranty, title, casualty, surety, fidelity, savings, investment, loan or benefit. Gen. Corp. Law, § 6. In selecting a corporate title, if desired, an individual name, or the name of a copartnership, to whose business the new corporation succeeds, may be used. At any time after incorporation the name may be changed by act of the Legislature, or by a special proceeding in the Supreme Court. Gen. Corp. Law, §§ 60–65. The word limited should not be used as part of the corporate name. It can serve no good purpose, and would be misleading by creating an impression that the corporation had been organized under ch. 611, L. 1875, which was repealed in 1890. See comments under "Liability of Stockholders," page 489.

Objects.

For decisions and rulings respecting various proposed purposes, see post, pages 557–560.

A stock corporation may be formed under this law to carry on any one or more kinds of business that may be lawfully conducted by an individual, except as limited in the first paragraph of section 2, and by section 2-a. If found desirable, after organization, the purposes, powers or provisions set forth in the certificate of incorporation may be altered or extended by an amended certificate. Stock Corp. Law, § 18. The only classes of stock corporations that are excluded from organization under the provisions of the Business Corporations Law are such as are provided for by other corporate laws, to wit: Railroad corporations, which must be formed under the Railroad Law; ferry, navigation, stage coach, tramway, pipe-line, gas and electric light, water works, telegraph and telephone, turnpike, plank-road and bridge corporations, all of which must be formed under the Transportation Corporations Law; banks, savings banks, trust companies, building and mutual loan corporations, co-operative loan associations, mortgage, loan and investment corporations, safe deposit companies and certain associations for loaning money on personal property, all of which may be incorporated under the Banking Law; insurance companies, which are provided for in the Insurance Law; educational institutions, which may be incorporated as provided in the Education Law. Although corporations for the purpose of producing and selling artificial gas must be organized under the Transportation Corporations Law, yet a company for the purpose of boring natural gas wells and piping and delivering the gas to consumers for hire may properly incorporate under the Business Corporations Law. Wilson v. Tennent, 32 Misc. 273, affd., 61 A. D. 100, affd., 179 N. Y. 546 (1902). Notwithstanding the provisions in the Transportation Corporations Law for the organization of water works corporations thereunder, certain water companies are permitted to incorporate under this law. See notes under section 15 of this law.

Persons seeking to form a corporation under the Business Corporations Law have a reasonable latitude as to what they may insert in their certificate of incorporation, in addition to the matters required by law. They may insert other provisions not inconsistent with law or public policy which are germane to the purposes of the corporation, and necessary, convenient or appropriate to the accomplishment of such purpose. Peo. ex rel. Fairchild v. Preston, 140 N. Y. 552. But if a certificate of incorporation contains provisions repugnant to the statute the Secretary of State is not required to file it. Peo. ex rel. Barney v. Whalen, 104 N. Y. Supp. 555, 119 A. D. 749, affd., 189 N. Y. 560 (1907); Peo. ex rel. Blossom v. Nelson, 46 N. Y. 477 (1871).

The purposes stated in the certificate of incorporation and the statutory powers determine the status of a corporation. The fact that it is exercising only a portion of its powers does not affect the question. Matter of White, 118 A. D. 869 (1907).

A corporation may engage in the business of plumbing in the city of New York where it actually carries on the work through certified and registered plumbers. William Messer & Co. v. Rothstein et al., 129 A. D. 215 (1908).

A corporation organized under L. 1848, ch. 40 (now Business Corporations Law), which advertises to practice medicine may be convicted under L. 1907, ch. 344, § 15, providing that "any person not registered as a physician who shall advertise to practice medicine, shall be guilty of a misdemeanor." Peo. v. Woodbury Dermatological Inst., 192 N. Y. 454 (1908), affg. 124 A. D. 877.

Capital Stock.

The amount of the capital stock must be definitely stated, and if any portion is to be preferred stock the amount thereof and the nature of the preferences must be set forth. Corporations are permitted to issue both preferred and common stock, and different classes of preferred stock, if the certificate of incorporation so provides, or to make preferred issues after incorporation. Stock Corp. Law, § 61. No limitations as to the amount of capital stock are prescribed, except that it shall not be less than $500; for it is to be noted, that the certificate of incorporation must state the amount of capital (but not less than $500), with which the corporation will begin business, and the amount so stated must be paid in money or property before the corporation is permitted to incur debts. See § 3, post. One-half of the capital stock is required to be paid in within one year. See § 5, post, and notes thereunder. But failure to pay in half the capital stock within the statutory time merely creates a liability for a forfeiture of corporate rights. Proceedings must be taken to accomplish an actual dissolution. Peo. v. Buffalo Stone & Cement Co., 131 N. Y. 140 (1892); id., 42 St. Rep. 753; Peo. v. U. & D. R. R. Co., 128 N. Y. 240 (1891); Denike v. N. Y., etc., Lime Co., 80 N. Y. 599; Matter of Brooklyn El. R. R. Co., 125 N. Y. 434 (1891). The amount of capital stock may be increased or reduced after incorporation. Stock Corp. Law, §§ 62, 63 and 64. Stock may be issued for money, services or property, and when issued for property "in the absence of fraud in the transaction the judgment of the directors as to the value of the property purchased shall be conclusive." Stock Corp. Law, § 55. The certificate of incorporation may provide for partly paid stock. Stock Corp. Law, § 60.

There being no statute to the contrary, a certificate of incorporation which classifies stock into common and preferred, may provide that one class of stock shall be deprived of voting power. Such a provision is but an arrangement between different classes of stockholders, which does not concern the public and does not violate any rule of the common law or any rule of public policy. The legislature did not intend to compel every class of stockholders to be endowed with the right to vote, nor to prohibit the formation of a corporation which deprived one class of stockholders of the voting power. Peo. ex rel. Browne v. Koenig, 133 A. D. 756 (1909), 118 Supp. 136; citing with approval, State ex rel. Frank v. Swanger, 190 Mo. 561.

See under section 55 of the Stock Corporation Law, the following topics, respectively, and collection of authorities relative thereto, to wit:

Overvaluation of Property Through Error of Judgment;
Presumption of Validity of Issue of Stock;
Fraudulent Overvaluation of Property;
Cancellation of Excessive Stock Issues;
Stock Issued in Payment for Services.

Shares of Stock and Transfers Thereof.

The par value of the shares of stock must not be less than $5 nor more than $100 each. The par value of the shares may be increased or reduced after incorporation, without changing the amount of the capital stock. See Stock Corp. L., § 65. The stock is represented by certificates prepared by the directors and signed by the president or vice-president and by the secretary or treasurer, and sealed with the corporate seal. Stock Corp. L., § 50. Shares are not transferable until all previous calls thereon shall have been fully paid. Id. Every transfer of stock made by a stockholder in contemplation of its insolvency is void. Stock Corp. L., § 66. The legal title to shares may be transferred by delivery of the certificate of stock with a blank power of attorney indorsed thereon signed by the owner of the shares named in such certificate. Knox v. Eden Musee Am. Co., 148 N. Y. 441 (1896); McNeil v. Tenth Nat'l Bk., 46 N. Y. 325 (1871). A person who has sold his shares of stock has a right to have his transfer thereof recorded on the corporate books, and a court will compel a transferee of the stock to record the transfer. Webster v. Upton, 91 U. S. 65. A corporate officer is guilty of contempt if he disobeys a court order requiring him to make certain transfers of stock upon the surrender of the old certificates. King v. Barnes, 113 N. Y. 476, 655 (1889). The title of the true owner of a lost or stolen certificate of stock prevails against any one subsequently obtaining its possession, although the holder may be a bona fide purchaser. Knox v. Eden Musee Am. Co., supra. A stamp tax of two cents on each $100 of face value or fraction thereof must be paid on all sales, or agreements to sell, or memoranda of sales or deliveries or transfers of shares or certificates of stock in any domestic or foreign association, company or corporation. Tax Law, § 270. There is no stamp tax on the original issue of the shares of stock by the corporation and the delivery thereof to its stockholders. Peo. v. Duffy-McInnerney Co., 122 A. D. 336, affd., 193 N. Y. 636 (1908).

The law taxing shares under $100 face value at the rate of two cents per share was declared unconstitutional. Peo. ex rel. Farrington v. Mensching, 187 N. Y. 8 (1907), affg. 115 A. D. 893.

See, also, War Revenue Tax Law, page 314, ante.

Shares of Stock Without Par Value.

Provisions authorizing the formation of corporations having capital stock divided into shares without the assignment to such shares of any nominal or par value, are contained in sections 19-23 of the Stock Corporation Law, under which also may be found a discussion of the subject.

Shares of Preferred and Common Stock of Different Par Values.

Respecting the right to provide in the certificate of incorporation, wherein both common and preferred stock are authorized, that such issues of stock shall be of different par values, see the discussion under section 50 of the Stock Corporation Law.

For form of statement of preferred and common shares of different par values, see Form No. 274.

Principal Office.

On motion for change of venue, a corporation is a resident of the county where it has its principal office. Finch School v. Finch, 144 A. D. 687 (1911).

The name of the city, village or town in which the principal office of the corporation is to be located must be stated in the certificate, and if in the

city of New York the name of the borough must be stated. The street and number are not required to be given. The location may be changed at any time. Stock Corp. Law, § 13. Under the definition in section 3 of the General Corporation Law the terms "principal office" and "principal place of business" are synonymous. Peo. ex rel. Knickerbocker Press v. Barker, 87 Hun 341, affd., 147 N. Y. 715 (1895). The location of the principal office in the certificate of incorporation is, as against the corporation, conclusive evidence of its residence, unless it has been legally changed. Peo. ex rel. Knickerbocker Press v. Barker, 87 Hun 341, affd., 147 N. Y. 715 (1895); Peo. ex rel. Edison Electric Light Co. v. Barker, 91 Hun 594 (1895).

A corporation is deemed a resident of the county where its principal business office is located. Conroe v. Nat'l Pro. Ins. Co., 10 How. Pr. 405 (1855); Rossie Iron Works v. Westbrook, 36 St. Rep. 555 (1891).

There is a dictum in a tax case to the effect that the statement of the location of its principal office or place of business is a condition precedent to the organization of a business corporation, and, should it appear that the location of its principal office was willfully misstated in the certificate, or in case the corporation should change its principal place of business, without effecting a legal change of residence, for the purpose of evading taxation, it might present a case under the foregoing section for the attention of the Attorney-General. Peo. ex rel. Knickerbocker Press v. Barker, 87 Hun 341 (1895), affd. on op. below, 147 N. Y. 715. At the time this proceeding was instituted section 3 of the General Corporation Law provided that "the office of a stock corporation shall be in the county, town or city in which its business is principally carried on," which provision has been eliminated from said statute by the amendment of 1895, ch. 672.

The designation, in the certificate of incorporation, of the location of the principal office is conclusive as to the taxation of the personal property of a corporation. Union Steamboat Co. v. Buffalo, 82 N. Y. 351 (1880); Western Transp. Co. v. Scheu, 19 N. Y. 408 (1859); Oswego Starch Factory v. Dolloway, 21 N. Y. 449 (1860). In the Union Steamboat Co. case, supra, the business of the corporation was the transportation of freight and passengers on the great lakes, all the other business of the company being conducted at the city of Buffalo, except the annual meetings, which were held in Rockland county, and it was urged, therefore, that the purpose for which the principal office of the plaintiff was located in the county of Rockland was to avoid taxation. The court held that to be immaterial, that it had nothing to do with the motive, and could deal only with the fact, and that if such an evil existed, another authority must provide for its correction.

Duration.

The period of existence must be stated, but there is no limitation as to the length of the term, and it may be perpetual if the certificate so states. Corporate existence fixed for a term of years may be extended at any time before the expiration thereof, and, in certain cases, may be revived after its expiration. Gen. Corp. L. §§ 37–40. The corporate life begins at the time of filing the certificate of incorporation. If the term of existence is limited and it is desired that the consent of stockholders owning a greater percentage than two-thirds of the capital stock shall be requisite to effect an extension the certificate may so provide. Gen. Corp. L., § 37.

A lease executed by a corporation for a longer period than its corporate life is not invalid nor will it cease upon the termination of such corporate life. Tate v. Neary, 52 A. D. 78 (1900).

Though corporate existence may be limited it does not result in inability to acquire unlimited property rights. Matter of Consolidated Gas Co., 56 Misc. 49, aff'd., 124 A. D. 401 (1908).

Commencement of Corporate Business.

Restrictions upon. See section 3, post, and notes thereunder.

Business must be commenced within two years from the date of incorporation. See Gen. Corp. Law, § 36, ante, and authorities there cited.

Directors.

The minimum number of directors is three, but the maximum limitation of thirteen existing prior thereto was eliminated by Laws of 1901, chapter 520. At least one director must be a resident of the State. Gen. Corp. L., § 34. Each director is to be a stockholder unless otherwise provided in the certificate, or in a by-law adopted at a stockholders' meeting. Stock Corp. L. § 25. The board of directors may be classified so that only one-fourth of the number need to be elected annually, thereby preventing any sudden change of management. Stock Corp. L., § 25. Vacancies in the board are to be filled in the manner prescribed in the by-laws. Stock Corp. L. § 25. In case of failure to elect directors at the time fixed for the annual meeting of stockholders, directors continue to hold office until their successors have been elected. Gen. Corp. L., § 28. If desirable, after incorporation, the number of directors may be changed. Stock Corp. L., § 26. The certificate may provide for cumulative voting at elections of directors. Gen. Corp. L., § 24. Any limitation upon the powers of directors may be inserted in the certificate which does not exempt them from obligations or duties imposed by law. Gen. Corp. L., § 10. If meetings of directors are to be held only within the State the certificate or by-laws must so provide. Bus. Corp. L., § 2. The subscribers to the certificate of incorporation may be named as directors for the first year; however, it is not necessary that the persons so named as directors be incorporators. The original directors named in the certificate of incorporation become such by direct command of the statute, and not through an election by stockholders; therefore, after the filing of the certificate, they have full power to act as directors and authority to make any contract in behalf of the corporation that it is capable of making. The corporate authority of such an organization must, from necessity, be coincident with the inception of its corporate existence, and ante-dates acquisition by it of property or the issue of stock certificates. Hamilton Trust Co. v. Clemes, 163 N. Y. 423, affg. 17 A. D. 152 (1900); McDowall v. Sheehan, 129 N. Y. 207 (1891); Davidson v. Westchester Gas Lt. Co., 99 N. Y. 558 (1885); Welch v. Importers & Traders' Nat. Bk., 122 N. Y 177, 187 (1890).

Where a corporation consists of a small number of persons, it may transact ordinary business without the formality of resolutions; it may be transacted by conversation, without formal votes. Hall v. Herter Bros., 83 Hun 19 (1894).

Where the president of a corporation has full personal charge of its business, he represents the corporation, and prima facie has power to do any act which its directors could authorize or ratify. Oakes v. Cattaraugus Water Co., 143 N. Y. 430 (1894).

The board of directors may appoint an executive committee of their own number to transact the corporate business during the intervals between the meetings of the board. Sheridan Elec. Lt. Co. v. Chatham Nat. Bk., 127 N. Y. 517 (1891); Olcott v. Tioga R. R. Co., 27 N. Y. 546 (1863); First Nat. Bk. v. Com'l Travelers' Home Assn., 108 A. D. 78 (1905), aff'd., 185 N. Y. 575.

Powers, Duties and Liabilities of Directors.

For collection of authorities relative to the powers, duties and liabilities of directors, see the General Corporation Law, section 34, ante, under numerous topical headings.

Directors De Jure and De Facto.

For collection of authorities on the above subject, see the Stock Corporation Law, section 25, ante.

Subscribers to the Certificate.

The names and post-office addresses of the subscribers to the certificate are required to be set forth, and a definite statement of the number of shares of stock each agrees to take in the corporation. There is no provision requiring any fixed proportion of the stock to be subscribed for at the time of forming the corporation, but the certificate must state the amount of the capital, not less than $500, with which the corporation will begin business. Bus. Corp. L. § 2. subd. 4.

Certificate of Incorporation as Stock Subscription Agreement.

A certificate of incorporation containing a statement of the number of shares of stock which each subscriber thereto agreed to take constitutes a valid subscription for the stock, which takes effect upon the filing of the certificate, and creates a legal liability on the part of each subscriber to pay for the number of shares stated in the certificate. Rathbone v. Ayer, 121 A. D. 355 (1907); Phoenix Warehousing Co. v. Badger, 67 N. Y. 294 (1876); Powers v. Knapp, 71 Hun 371, 375 (1893).

The certificate of incorporation, when filed, becomes binding on the subscribers, and their liability is fixed by their subscription without the formal issuance of stock to them. Stevens v. Episcopal Church History Co., 140 A. D. 570, 582 (1910); United Growers Co. v. Eisner, 22 A. D. 1.

The relation of shareholder in a corporation is created by the subscription agreement, and it is not essential to such relation that a certificate of stock be actually issued. Beals v. Buf. Expanded Metal Const. Co., 49 A. D. 589 (1900).

A certificate of incorporation, which is signed by the only stockholders, and which specifies the number of shares each agrees to take, constitutes a legal liability on the part of each to pay the corporation for the number of shares specified. Rathbone v. Ayer, 121 A. D. 355 (1907).

Limitation in Certificate of Incorporation of Stockholder's Right to Subscribe for New Stock.

See clause for such purpose, Form No. 27.

Clause in Certificate of Incorporation Authorizing Contracts Between Corporations Having Identical Directors.

For such clause, see Form No. 29.

Discussion of Non-Voting Clauses in Certificate of Incorporation and Effect Thereof.

See the above topical heading under section 23 of the General Corporation Law.

Certificate of Incorporation; Validity of Provisions Therein as Distinguished from Provisions in the By-Laws.

See section 10 of the General Corporation Law for discussion of this subject.

Testamentary Provision for Formation of Corporation and Management Thereof.

See the above topic under section 34 of the General Corporation Law, and authorities there cited.

Issue of Corporate Charter.

Upon the filing in the office of the Secretary of State of a certificate of incorporation that official does not issue any document that may be termed a charter, since there is nothing in the statute providing for any instrument under such a denomination. That official does, however, upon request and payment of statutory fees therefor, issue a certified copy of the certificate of incorporation or a certificate of the filing thereof, which latter certificate merely sets forth the name of the corporation and the date of the filing and recording of the certificate of incorporation.

Additional Provisions and Powers.

The certificate of incorporation may authorize the company to acquire, hold and dispose of the stocks, bonds and other obligations of any other corporation, domestic or foreign, with power to issue in exchange its own securities therefor. Stock Corp. L. § 52. The right to issue preferred stock of one or more classes may be provided for. Stock Corp. L., § 61. Provisions may be inserted for the issue of partly paid stock. Stock Corp. L. § 60. The certificate may provide for cumulative voting at elections of directors. Gen. Corp. L., § 24. A provision to the effect that directors are not required to be stockholders may be inserted. Stock Corp. L., § 25. A provision in subdivision 9, section 2, which permitted a corporation to insert in its certificate of incorporation any limitation upon its powers, and upon the powers of its directors and stockholders which does not exempt them from obligations and duties imposed by law, was stricken out by the consolidation act, Laws of 1909, chapter 12, because like provisions are contained in the Gen. Corp. Law, § 10.

The certificate may not, however, contain provisions repugnant to the statute, and a provision that the directors may, with the consent of two-thirds of the stock, sell or otherwise dispose of the entire property of the corporation except its franchises to any person or corporation, domestic or foreign, was properly rejected by the Secretary of State as contrary to section 33 (now 16) of the Stock Corp. Law. Peo. ex rel. Barney v. Whalen, 119 A. D. 749 (1907), affd., 189 N. Y. 560; Same v. Same, 56 Misc. 278.

Whether the exercise by a manufacturing corporation of the franchises granted by the State to a transportation corporation would be ultra vires is a question between such corporation and the State. N. Y. Cement Co. v. Cons. Rosendale Cement Co., 178 N. Y. 167, revsg. 84 A. D. 635.

Although a certificate provides that no debt exceeding $100 shall be incurred except in writing and under the corporate seal, yet, where a contract, involving a larger sum, has been discussed by all the directors and the matter has been left in the hands of the president, the vendor is entitled to recover the amount. Globe Gas Lt. Co. v. Met. Inv. Co., 10 A. D. 342 (1896).

A certificate of incorporation drawn under the Business Corporations Law which contains a provision that the stockholders, both present and future, will sell and deliver to the corporation all milk produced upon their farms is not a lawful provision regulating the business or relating to the conduct or affairs of the corporation. Opinion of Atty. Genl. (1911), Vol. 2, p. 600.

Liability of Stockholders.

The liability of a stockholder is limited to the payment of the amount remaining unpaid upon his stock. Stock Corp. L., § 56. Such corporations constitute what were formerly termed "limited liability companies," without making a statement to that effect in the certificate, and without using the word "limited" as a part of the corporate title. A full liability corporation may be formed under this law only by stating affirmatively that it is to be such. See section 6 of this law. Stock issued for property necessary for the corporation is full-paid, and in the absence of fraud in the transaction, the judgment of the directors as to the value of the property purchased is conclusive. Stock Corp. L., § 55.

Incidental and Implied Powers.

See, also, section 10 of the General Corporation Law for more extended discussion of this subject.

The powers of corporations are those enumerated in the statutes under which they are incorporated, also in the general statutes, in the certificate of incorporation, and like instruments executed pursuant to the statutes, and they also possess such powers as flow from or are incidental and necessary to the exercise of the enumerated powers. Nat. Park Bk. v. German-Am. Mutual Warehousing & Security Co., 116 N. Y. 281, 292 (1889).

The board of estimate and apportionment of the city of New York has no authority to grant to the proprietors of a department store a permit to lay down private railroad tracks in front of their premises and operate express cars thereon for the conveyance of goods to their store from street railroads pursuant to the city charter. Hatfield v. Straus, 189 N. Y. 208 (1907), affg. 117 A. D. 671.

Acknowledgment.

For various statutes relative to acknowledgments and affidavits, see the General Construction Law, post.

A notary public, who is a stockholder, director, officer or employee of a corporation may take the acknowledgment of any party to a written instrument executed to or by such corporation, or administer an oath to any other stockholder, director, officer, employee or agent of such corporation; but a notary public shall not take the acknowledgment of an instrument by or to a corporation of which he is a stockholder, director, officer or employee, if such notary be a party executing such instrument either individually or as representative of such corporation. Executive Law, § 105-a, added by L. 1913, ch. 334, as am'd by L. 1914, ch. 410. For full text of said section, see Gen. Const. Law, post.

Where a certificate of incorporation is to be filed in a county other than the one in which the acknowledgment of the incorporators was taken a certificate of the county clerk authenticating the act of the notary public must be attached. Opinion of Atty. Genl. (1911), p. 26.

An incorporator who acknowledges a certificate cannot make proof, as a subscribing witness, of the execution of the certificate by other incorporators who did not acknowledge the execution of the instrument, where such incorporator did not, in addition to signing the certificate as a party, also sign it as a subscribing witness. Peo. ex rel. Long Island R. R. Co. v. Railroad Comrs., 75 A. D. 106 (1902).

The Attorney-General has held that the Secretary of State is not authorized to file a certificate of incorporation where the execution of the certificate by the incorporators is proved by a subscribing witness, and not by acknowledg-

ment. He says that the corporation may be formed (using the statutory language) "by making, signing, acknowledging and filing the certificate;" that the acknowledgment is not required for the purpose of perfecting the instrument so that it may be recorded in the Secretary of State's office, but is necessary for the creation of the corporation. Opinion of Atty. Genl. (1911), Vol. 2, p. 651. In view of this opinion, the Secretary of State would probably reject a certificate of incorporation, the execution of which was proved by a subscribing witness; however, in a case decided in 1889 (Riker v. Cornwell, 113 N. Y. 115, 124), and prior to the enactment of sections 10 and 11 of the General Construction Law, referred to in the Attorney-General's opinion, it was held that proof of the execution of a certificate by a subscribing witness was a sufficient compliance with the provisions of a statute, which provided that those desiring to form a corporation, "may make, sign and acknowledge before any officer authorized to take the acknowledgment of deeds in the State, and file in the office of the secretary of state," etc. The Attorney-General apparently has given no force or effect to the provisions of section 10 of the General Construction Law, which, although vague and ambiguous, seemingly are intended to mean that the term acknowledgment, when used with reference to the execution of instruments, other than deeds, include proof by subscribing witness. For text of the two above mentioned sections, see the General Construction Law, post.

An incorporator has no power, in his capacity as notary public, to take the acknowledgment of another incorporator to the certificate of incorporation, and an acknowledgment so taken is a nullity. Peo. ex rel. Erie R. R. Co. v. Bd. of R. R. Comrs., 105 A. D. 273 (1905). There is also authority for holding that a party to an instrument cannot be a subscribing witness unless expressly authorized by statute. Peo. ex rel. Long Isl. R. R. Co. v. Bd. of R. R. Comrs., 75 A. D. 106 (1902).

The acknowledgment may be taken before any officer authorized to take the acknowledgment or proof of the execution of a deed of real property to entitle it to be recorded in a county clerk's office, and shall be made and certified in the same manner as such acknowledgment or proof of such deed. Gen. Construction L., § 11.

The Secretary of State does not require a county clerk's certificate authenticating the act of a notary public or other officer taking an acknowledgment within the State of the execution of a corporation certificate to be filed in his office, but, where an acknowledgment is taken in one county and the duplicate original certificate is to be filed in the office of the clerk of another county, there should be a certificate of the clerk of the county in which the acknowledgment is taken authenticating the act of the officer taking such acknowledgment. Real Prop. L., § 310.

An acknowledgment to an instrument in which the notary certifies, "Personally appeared before me the within named ————, to me known and acknowledged the above letter of attorney to be his act and deed," is insufficient to entitle it to be recorded because it fails to show that the notary knew the person who so appeared before him to be the person described in and who executed the instrument. Freedman v. Oppenheim, 80 A. D. 487 (1903).

A certificate of authentication in which the clerk of a court in the State in which the acknowledgment was taken, instead of certifying, according to statute, that he is well acquainted with the notary's handwriting, and verily believes his signature is genuine, merely certifies that the notary is "duly commissioned and qualified, and that full faith and credit are due his acts as such," is defective. Freedman v. Oppenheim, 80 A. D. 487 (1903).

Filing and Recording.

The certificate of incorporation must be filed and recorded in the office of the Secretary of State, and a copy duly certified by the Secretary of State, or a duplicate original, must be filed and recorded in the office of the clerk of the county in which the office of the corporation is to be located. Gen. Corp. Law, § 5. If, instead of a certified copy, a duplicate original certificate is to be filed and recorded in a county other than the one where it is executed, the county clerk's certificate should be attached, authenticating the act of the notary, justice of the peace or commissioner of deeds taking the acknowledgment. The Secretary of State does not require such county clerk's certificate as to an acknowledgment taken within the State before a person duly authorized to take the same, but an acknowledgment or affidavit taken by a notary public in another State must be properly authenticated. If an acknowledgment or affidavit is taken out of the State by a commissioner of deeds for the State of New York appointed to act in such State, no authentication by a court clerk, or other official, is required.

Copartnership Liability Upon Failure to File Certificate.

See the above topic under section 5 of the General Corporation Law, ante.

Denial of Corporate Existence; Estoppel.

See the above topic under section 5 of the General Corporation Law, ante.

De Facto Corporations.

See, also this topic under section 5 of the General Corporation Law, ante, and authorities there cited.

Where the incorporators did not sign a certificate of incorporation at the end thereof but did sign it above the attestation clause and their acknowledgment of the execution thereof was duly attested and such certificate was filed as required by law, there was at least a de facto corporation. A stockholder cannot question the legal existence of such a corporation in order to escape liability to creditors upon stock not fully paid. Lyell Ave. Lumber Co. v. Lighthouse, 137 A. D. 422 (1910).

Fees and Organization Tax.

The fees in the office of the Secretary of State are: Filing, $10; recording, fifteen cents a folio; fees in the county clerk's office: Filing, six cents; recording, ten cents per folio. In addition, an organization tax of one-twentieth of one per cent. upon the capital stock must be paid to the State Treasurer before the certificates can be filed. For text of the statutes regulating payments, and information relative to remittances, see pages 293–297. This tax is fifty cents on each $1,000 of capital stock.

Directors' Meetings Without the State.

The holding of directors' meetings without the State is impliedly authorized by the provision inserted in section 2 of this law by an amendment of 1904, ch. 446, as follows: "If meetings of the board of directors are to be held only within the State the certificate or by-laws must so provide." This amendment was enacted so as to supersede an opinion of the Attorney-General which was based upon the decision in Ormsby v. Vermont Copper Mining Co., 56 N. Y. 623 (1874).

Correction of Informalities.

In case of any informality in the certificate of incorporation, or in a supplemental certificate, the same may be corrected by an amended certificate. Gen. Corp. Law, § 7.

Repeal of Charter.

The charter of every corporation is subject to alteration, suspension and repeal, in the discretion of the Legislature. Gen. Corp. Law, § 320. The repeal of a charter does not, however, destroy vested property rights. Peo. v. O'Brien, 111 N. Y. 1 (1888); City of New York v. Bryan, 130 A. D. 658 (1909).

Defective Certificate.

Defects or informalities in the certificate of incorporation may be corrected by filing an amended certificate as provided by statute. Gen. Corp. Law, § 7.

By-laws.

By-laws are the permanent rules for the regulation of the corporate affairs, ranking next to the charter in authority, importance and permanence. For statutory provisions as to what may be regulated by by-law, see Gen. Corp. Law, § 11, subd. 5, and cases cited thereunder.

By-laws duly adopted at a meeting of the members of the corporation control the action of the directors. Gen. Corp. Law, § 11, and notes thereunder. If the members do not adopt by-laws for the corporation the directors may do so. Gen. Corp. Law, § 34.

By-Laws as Part of Subscription Contract.

See the above topic under Stock Corporation Law, section 54, ante.

By-laws must be reasonable and adapted to the purposes of the corporation. If not, they are void. Peo. v. Medical Society of Erie, 24 Barb. 570 (1857); Kent v. Quicksilver Mining Co., 78 N. Y. 159 (1879).

By-laws are effective as to third persons only when they have knowledge of their provisions. Oakes v. Cattaraugus Water Co., 143 N. Y. 430 (1894).

Power of Promoter to Bind Corporation.

See also, "Promoters," page 10, ante.

When a promoter's contract has been adopted, or its benefits, with knowledge of such contract, have been accepted by the corporation, the latter becomes liable. Seymour v. Spring Forest Cem. Assn., 144 N. Y. 333 (1895); Rogers v. N. Y. & Texas Land Co., 134 N. Y. 197 (1892); Oakes v. Cattaraugus Water Co., 143 N. Y. 430 (1894); Hall v. Herter Bros., 83 Hun 19 (1894); Bommer v. American Spiral Spring Co., 81 N. Y. 468 (1880); Burden v. Burden, 159 N. Y. 287 (1889); Harrison v. Vermont Manganese Co., 1 Misc. 402 (1893); Mesinger v. Mesinger Bicycle Saddle Co., 44 A. D. 26 (1899); King v. Barnes, 109 N. Y. 267 (1888).

Promoters of a corporation are bound to the exercise of good faith toward all the stockholders, to disclose all the facts relating to the property, and to select competent persons as directors, who will act honestly in the interest of the shareholders, and are precluded from taking a secret advantage of other shareholders. Dickerman v. Northern Trust Company, 176 U. S. 181 (1900).

An agreement by a promoter with a person to enter the employ of a corporation about to be formed is binding on the corporation, where the former became its president and failed to give notice of any disavowal of the agreement, and the

employee began work. Mesinger v. Mesinger Bicycle Saddle Co., 44 A. D. 26 (1899).

A corporation is liable for services rendered before organization under an agreement with the promoter who became its president and controlled the corporation. Oakes v. Cattaraugus Water Co., 143 N. Y. 430 (1894).

A preliminary agreement is binding when made by promoters and the incorporators who thereafter become stockholders and directors of the corporation. Burden v. Burden, 159 N. Y. 287 (1899), affg. 8 A. D. 160.

By accepting the benefits of a plan adopted by its promoters, the corporation becomes subject to its terms. Rogers v. N. Y. & Texas Land Co., 134 N. Y. 197 (1892).

Promoters of a corporation may agree as to the management thereof before incorporation. King v. Barnes, 109 N. Y. 267 (1888).

Promises made by the chief promoter of a corporation, without its authority, in relation to stock, are not binding upon it. Dillon v. Com'l Cable Co., 87 Hun 444 (1895).

While a corporation is not bound by engagements made on its behalf by its promoters before organization, it may, after organization, adopt such engagements, and less evidence is required to show adoption where the officers were also the promoters than where they were different persons. Hall v. Herter Bros., 83 Hun 19 (1894).

An agreement with parties carrying on a business, which afterward is incorporated under the same name, that the corporation will pay royalties on a patent, is enforceable against the corporation when it has acted on the contract. Bommer v. American Spiral Spring Co., 81 N. Y. 468 (1880).

Where incorporators accept a promoter's services for the benefit of a corporation formed by them the corporation is liable. Harrison v. Vermont Manganese Co., 1 Misc. 402 (1893).

Liability of Promoters.

If a promoter owns property at the time of forming a corporation, and after selling it to the corporation at a profit induces persons to subscribe for stock by stating that he made no profit thereby, he is liable for the injury they have sustained. Getty v. Devlin, 54 N. Y. 403, 70 N. Y. 504 (1877).

Promoters of a corporation occupy, before its organization, a position of trust and confidence and are liable for damages if they make material misrepresentations, or conceal material facts, to the injury of those whom they or their agents induce to invest. Brewster v. Hatch, 122 N. Y. 349 (1890); Walker v. Anglo-Am. M. & T. Co., 72 Hun 334 (1893); Sage v. Culver, 147 N. Y. 247 (1895); Smith v. Ogilvie, 127 N. Y. 148 (1891); Colton Impmt. Co. v. Richter, 26 Misc. 26 (1893); Morgan v. Skiddy, 62 N. Y. 319 (1875); Getty v. Devlin, 54 N. Y. 403, 70 N. Y. 504 (1877); Benedict v. Guardian Trust Co., 58 A. D. 302 (1901). If the parties stand merely in the relation of vendor and vendee of stock after incorporation and there is no fiduciary relation between them no liability would exist. Brewster v. Hatch, supra; Walker v. Anglo-Am. M. & T. Co., supra.

Promoters are individually liable for work and materials furnished on their order for a corporation that was never organized. Hub Pubg. Co. v. Richardson, 37 St. Rep. 541, 13 N. Y. Supp. 665 (1891).

Each member of a firm, engaged under the firm name in organizing a corporation, is liable for misrepresentations and concealments of the others committed in promoting it. Walker v. Anglo-Am. M. & T. Co., 72 Hun 334 (1893). A purchaser of shares from a stockholder in an existing corporation has no interest in the application of the purchase money, but it is different with one who agrees to subscribe for shares in a proposed corporation. Id.

Subscriptions for Stock.

See, also, the above topic and cases there cited under the Stock Corporation Law, section 50, ante; also cases cited under Stock Corporation Law, section 53, ante.

A holder of stock not fully paid is liable to creditors where he signed a preliminary subscription agreement, providing for the organization of the company, although he did not sign the certificate itself, and although the certificate gives wider powers to the corporation than those originally contemplated, if he held himself out as a stockholder and issued a proxy as such. Lyell Ave. Lumber Co. v. Lighthouse, 137 A. D. 422 (1910). The legal effect of such subscription is not altered by an oral agreement. Id.

The law is fairly well settled that where parties propose to form a corporation and become shareholders, and intend to become such without further act upon their part, upon the incorporation of the company, if the agreement remains open and is unrevoked, when the corporation is formed pursuant to it, and thereafter accepts subscriptions, the subscription is binding. Buffalo & Jamestown R. R. Co. v. Clark, 22 Hun 359; s. c. sub nom. Buffalo & Jamestown R. R. Co. v. Gifford, 87 N. Y. 294 (1882). These decisions recognize that such an agreement is not binding when made, as the company is then incapable of contracting. When the company is organized and acts upon the offer by an acceptance it becomes a valid binding agreement. In the Clark and Gifford cases there was the element of ratification by the subscribers by payment of calls upon the stock after the corporation was organized. We do not understand, however, that the doctrine of these cases makes recognition by the subscriber an essential prerequisite. The contract becomes in force when the proposal remains open and the corporation accepts the same. Athol Music Hall Co. v. Carey, 116 Mass. 473; The Buffalo & Pittsburgh R. R. Co. v. Hatch, 20 N. Y. 161 (1859); Non-Electric Fibre Mfg. Co. v. Peabody, 21 A. D. 247 (1897); Morawetz Corp. § 47; Yonkers Gazette Co. v. Taylor, 30 A. D. 334 (1898); Woods M. V. Co. v. Brady. 39 Misc. 79, affd., 90 A. D. 610, revsd. on other grounds, 181 N. Y. 146 (1905).

The statement in a certificate of incorporation of the number of shares which the incorporators agree to take constitutes a valid subscription. Rathbone v. Ayer, 121 A. D. 355 (1907).

Where defendants subscribe for stock in a corporation to be thereafter organized, it was not essential that the corporation should be organized by the parties to the agreement or their representatives. Avon Spring Sanitarium Co. v. Weed, 119 A. D. 560 (1907). A subscription for stock in a corporation before it was formed may be enforced by it after coming into existence. Id.

For other cases respecting subscriptions for stock, see Stock Corp. Law, §§ 51 and 53.

There are agreements of a somewhat similar character which do not admit of enforcement, and are not binding as a common-law agreement. It is easy to confuse the two classes, although there is a clear distinction between them. In the first class the agreement is to form a corporation and subscribe for stock. The latter class are mutual agreements to subscribe for stock in a corporation to be formed thereafter. In the first the agreement is unconditional and absolute to form the corporation and take the stock, and when acted upon by the corporation is binding. Such contracts contemplate no further act upon the part of the individual. In the second class the agreement is to subscribe for shares when the company shall be organized. This clearly contemplates something more to be done, i. e., the actual subscription. The agreement is to take shares when the corporation is formed which in-

volves a subsequent act, that of formally subscribing for stock. Illustrations of such contracts are found in Lake Ontario Shore R. R. Co. v. Curtiss, 80 N. Y. 219 (1880); 1 Morawetz on Corporations, § 49; Yonkers Gazette Co. v. Taylor, 30 App. Div. 334 (1898).

A subscription to the certificate of incorporation, with a statement of the number of shares opposite the name, is a binding subscription and takes effect upon the filing of the certificate. Phœnix W. Co. v. Badger, 67 N. Y. 294 (1876); Powers v. Knapp, 71 Hun 371 (1893).

Subscriptions for Stock Induced by Fraud.

See "Purchases of Stock Induced by Fraud," under the Stock Corporation Law, section 50, ante.

Rescission of Stock Subscriptions.

See "Purchases of Stock Induced by Fraud," under the Stock Corporation Law, section 50, ante.

Mercantile Reporting Agency; Contracts of; Not Insurance.

A business corporation, organized for the purpose of conducting a mercantile reporting agency and supplying merchants with financial reports as to the responsibility of customers at the date of such report, is entitled to amend its certificate of incorporation so as to assume a responsibility to its clients for the accuracy of its reports and to provide the measure of damages in case of any loss by reason of the inaccuracy of such information, the said damages not to exceed the amount of loss actually sustained by the client. Peo. ex rel. Daily Credit Service Corpn. v. May, 162 A. D. 215 (1914), affd., 212 N. Y. 561. Such amendment does not contemplate insurance so as to bring the corporation within the Insurance Law, section 170, subdivision 2, because the corporation merely agrees with its clients as to the measure of damages recoverable if it be guilty of negligence, for which it is liable at common law. Id.

For the form of statement of objects involved in the foregoing case, see post, Form No. 148.

Incorporating for the Purpose of Conducting Law Business Prohibited.

See the provisions of section 2-a of this law, post; also, immediately following the same, the provisions of the Penal Law (§ 280), and cases applicable to both of such provisions.

Mortgage, Loan and Investment Corporations.

Chapter 452 of the Laws of 1896, amending the Banking Law, provided for the formation under said law of corporations to engage in the mortgage, loan or investment business, and, after the enactment of said amendment, corporations were precluded from organizing under the Business Corporations Law for the purpose of selling, offering for sale or negotiating bonds or notes secured by deeds of trust or mortgages on real property or choses in action owned, issued, negotiated or guaranteed by it, or for the purpose of receiving any money or property either from its own members or from other persons, and entering into any contract, engagement or undertaking with them for the withdrawal of such money or property at any time with any increase thereof, or for the payment to them or to any person of any sum of money at any time, either fixed or uncertain. Opinion of Atty. Genl., Feb. 26, 1914. Any corporation formed under the Business Corporations Law since such

amendment would be exercising a privilege or franchise not conferred upon it by law and should be dissolved, and any corporation previously organized for such purposes would be subject to the supervision and control of the superintendent of banks. Id.

Certificates Entitling Holder to Portion of Corporate Profits.

Certificates which provided that in consideration of the payment thereon of certain fixed monthly installments the corporation would, at the expiration of ten years, pay a certain sum to the owner of a certificate, and in addition such portion of the corporate profits as the directors may consider just and equitable, represent a loan, and do not sustain the contention that such corporation was conducting a banking business. The issuance of such certificates is within the powers of a business corporation. Jacobs v. Monaton Realty Inv. Corpn., 212 N. Y. 48 (1914).

Educational Corporations; Private Schools.

Although the Business Corporations Law does not permit the creation thereunder of a corporation for purposes for which an incorporation might be effected under the Education Law, yet it is not the intention of the statute to prevent absolutely the creation of corporations which have the power to give instruction in elementary branches or in so-called business courses; therefore, a corporation may be formed under this law for purposes as follows: the establishment, maintenance and conduct of private schools for the teaching of stenography, penmanship, bookkeeping, English and other branches of learning, except higher education. Opinion of Atty. Genl. (1908), p. 161.

Freight Terminal Business.

This law does not authorize the formation thereunder of a corporation which, among other things, proposes to carry on business as a freight terminal corporation, because corporations of that character must be organized in compliance with article 10-a of the Transportation Corporations Law. Opinion of Atty. Genl. (1913), p. 73.

Operating Barges, Tugs, etc.

A corporation may not be organized under the Business Corporations Law to engage in the business of operating, chartering and letting scows, barges, tugs and vessels of all kinds and descriptions in the general freight lighterage business inland, coastwise and international, for such objects are provided for in the Transportation Corporations Law and are limited to a corporation incorporated thereunder. Opinion of Atty. Genl. (1913), p. 73.

"Any Lawful Business," too Vague as a Statement of Objects.

A certificate of incorporation which sets forth certain specific purposes for which the corporation is to be formed and, in addition thereto, states that it proposes also "to carry on any lawful business which a company organized under the Business Corporations Law may lawfully transact," should not be filed by the Secretary of State until the quoted clause has been eliminated, as it does not disclose the purposes or nature of "any lawful business." The statute requires a statement of purposes in such a manner that a mere examination of the certificate would disclose the same. Opinion of Atty. Genl. (1911), Vol. 2, p. 69.

Practice of Medicine Regulated.

A corporation organized under Laws of 1848, chapter 40 (now Business Corporations Law), which advertises to practice medicine, may be convicted under the provisions of Laws of 1907, chapter 344, section 15 (now Public Health Law, section 174), providing that "any person not registered as a physician who shall advertise to practice medicine, shall be guilty of a misdemeanor." Peo. v. Woodbury Dermatological Inst., 192 N. Y. 454 (1908), affg. 124 A. D. 877.

Practice of Dentistry.

Although it is beyond the powers of a business corporation to engage in the practice of dentistry, yet if it does conduct such a practice it is estopped from denying the agency of the person in charge of such business and is liable for the unskillful work of such person. Hannon v. Siegel-Cooper, 167 N. Y. 244 (1901).

A corporation will not be permitted to organize under this law for the purpose of engaging in the practice of dentistry and dental surgery. Opinion of Atty. Genl. (1911), Vol. 2, p. 567.

Conducting a Cemetery.

A stock corporation organized under this law cannot exercise the rights of a cemetery corporation. In order to exercise such rights it must be organized under the Membership Corporations Law. Grace v. Repose Mausoleums, Inc., 78 Misc. 213 (1912).

Private Sanitarium.

This law does not authorize the formation thereunder of a corporation for the purpose of conducting a private sanitarium or hospital for the treatment of medical and surgical cases. If it is proposed to conduct a hospital and to practice medicine in the sense of furnishing medical and surgical treatment to its patients, the corporation must be formed under the Membership Corporations Law, in which event its members would not be allowed to make a profit from the enterprise. On the other hand, if a corporation were formed for the mere purpose of maintaining a sanitarium in which persons could obtain accommodations for rest and hygienic treatment, and which would not, in fact, practice medicine, a different question would be presented. Opinion of Atty. Genl. (1909), p. 517.

For form of statement for conducting a sanitarium, which is deemed unobjectionable, see Form No. 178.

Certifying Titles to Real Property.

A corporation may not be organized under the Business Corporations Law to engage in the business of examining and certifying the titles to real property, for the reason that such power is expressly conferred upon corporations formed pursuant to section 170 of the Insurance Law. Opinion of Atty. Genl. (1912), p. 345.

Storing Records, Documents and Papers.

A corporation desiring to organize for the purpose of storing "old records, documents and papers," this being one of the purposes for which a safe deposit company may be organized pursuant to section 300 of the Banking Law, cannot be organized under this chapter. Rept. of Atty. Genl., June 3, 1910.

Power to Transfer or Register Stock.

The power to transfer or register certificates of stock of other corporations is expressly conferred upon trust companies by section 186 of the Banking Law, and, therefore, cannot be lawfully exercised by a business corporation. Rept. of Atty. Genl. (1912), Vol. 2, p. 187.

Issuance of Collateral Trust Income Bonds.

The Attorney-General has held that where a business corporation proposes, in addition to doing a general real estate business, to engage in the business of issuing collateral trust income bonds, to be secured by real property which the corporation owns and which it will deed to a trustee under a trust agreement, that such business is an infringement upon the powers expressly given to a mortgage, loan and investment corporation organized under the Banking Law. Opinion of Atty. Genl. (1912), p. 188. Although this opinion may be sound when applied to the facts in the particular case under consideration, yet it is elementary that corporations have the right to borrow money for corporate purposes and evidence the amount so borrowed by the issuance of bonds secured by mortgage. This is a common law right, and the statute on the subject, section 6 of the Stock Corporation Law, is merely declaratory of the right, which corporations have always been permitted to exercise.

Scope of This Law; How Determined.

In determining the purpose for which a business corporation may be organized it is necessary to proceed by a process of elimination, whereby any purpose for which a corporation may be organized under some other general law would be excluded. Opinion of Atty. Genl. (1907), p. 566.

Decisions Generally.

Where the certificate of incorporation of a business corporation contains no limitations upon the powers of its executive officers, the right of a person employed by the president to recover for services, cannot be defeated by limitations upon the president's powers contained in the by-laws, unless he had express notice of them. Powers v. Schlicht Heat, Light & Power Co., 23 A. D. 380 (1897), affd., 165 N. Y. 662.

An agreement to sell stock in a corporation, to be incorporated, is sufficient consideration for the promise to purchase stock. Van Dam v. Tapscott, 40 A. D. 36 (1899).

The Secretary of State will not be compelled to file the certificate of incorporation of a company to be formed as a social organization, when its purposes are in reality those of a business corporation. Peo. ex rel. Davenport v. Rice, 22 N. Y. Supp. 631; id., 68 Hun 24 (1893).

A colorable compliance with the requirements of a statute, under which a company might lawfully have been incorporated, but omission to comply with a particular requirement followed by many years user of corporate rights and franchises created a corporation de facto. Lamming v. Galusha, 81 Hun 247, affd., 151 N. Y. 648 (1896).

When the organization of a corporation is apparently for objects not necessarily of an illegal nature, it must be presumed that they were within that legitimate class of objects for which corporations may be formed. U. S. Vinegar Co. v. Foehrenbach, 148 N. Y. 58 (1895).

The transfer by an insolvent firm of all tangible property to a corporation, formed by its members made without consideration except in exchange for the stock of the corporation, and without the assumption by the corporation

of any of the firm's debts, is a transaction clearly indicating an intent to hinder firm creditors, and, before it will be sustained, requires a satisfactory explanation. Buell v. Rope & Co., 6 A. D. 113 (1896), distg. First Nat. Bk. of Champlain v. Wood, 86 Hun 491.

When an authorized transfer by the president is made of the corporate property in payment of his individual indebtedness, it will be upheld. Quee Drug Co. v. Plaut, 55 A. D. 87 (1900).

There is nothing malum in se or malum prohibitum in a corporation lending its credit to its president, or in mortgaging its property for his debt. If stockholders do not assail its validity, and no rights of creditors intervene, there can be no legal objection to the mortgage. Osborn v. Montelac Park, 89 Hun 167, affd., 153 N. Y. 672 (1897).

Unless the complaint in an action to dissolve a corporation shows the jurisdictional facts, the court has no power to act, its decree is void and the corporation still exists. Osborn v. Montelac Park, 89 Hun 167, affd., 153 N. Y. 672 (1897).

Evidence that a New York corporation, without intent to defraud creditors, organized a foreign corporation under a different name, to which its assets were transferred, and which was managed in the same way as the former company, by the same persons, in the same place, and that the new company proposed to continue a contract made by the former company, but reached no agreement in respect thereto, is insufficient to render the new company liable under such contract. Goldmark v. Magnolia Metal Co., 44 A. D. 35, affd., 170 N. Y. 579 (1902).

An instrument which, after referring to a plan to form a corporation, states that "the undersigned hereby subscribe for the number of shares set opposite our names," is absolute and unconditional, and is binding when it is acted upon by the corporation. The fact that the corporation was incorporated under a different name because of the decision of the Secretary of State that the name first selected violated section 6 of the General Corporation Law, is immaterial. Yonkers Gazette Co. v. Taylor, 30 A. D. 334 (1898).

The payment of ten per cent. when the agreement to incorporate is made is not essential to its validity, as such payment is required only of those who subscribe after the organization of the corporation. Yonkers Gazette Co. v. Taylor, 30 A. D. 334 (1898). And, by the terms of section 53 of the Stock Corporation Law, it is only the subscribers whose subscriptions are payable in money who are required to pay ten per cent. in cash.

Where a resolution recites and accepts an offer to transfer to the corporation a manufacturing business, tools, etc., for a specified amount of stock, parol evidence establishing an agreement by which, as part of the consideration, two persons were to be employed by the corporation, is competent, when the resolution contains no provision as to such employment, and the evidence shows that the whole agreement was by parol, and the resolution was merely a step in carrying it out. Rochester Folding Box Co. v. Browne, 55 A. D. 444, affd., 179 N. Y. 542 (1904).

A business corporation exceeds its power if it accepts funds on deposit; such statute contains none of the safeguards required of corporations authorized to do a banking business or the receiving of the money of others on deposit for safe-keeping or investment. Chapman v. Lynch, 156 N. Y. 551 (1898).

The disqualification of a director to vote upon a resolution which provides for the assumption of a contract of another director to purchase property from the former as an individual, though it may make the resolution voidable,

at the election of the corporation, will not make it invalid as to these directors, so as to give either of them a right of action against the other. Munson v. Magee, 161 N. Y. 182, affg. 22 A. D. 333 (1900).

The inability of the president, because of his fiduciary relation, to enforce against the company a contract by which it assumes the obligations of a contract of a third person to purchase property from him as an individual, after he has accepted, by novation, a substitution of the corporation in lieu of the original purchaser, will not entitle him to hold the latter liable on the original agreement. Munson v. Magee, 161 N. Y. 182, affg. 22 A. D. 333 (1900).

§ 2-a. Incorporating for the purpose of conducting law business, et cetera, prohibited. No corporation shall be organized or created under the provisions of this chapter for the purpose or purposes of conducting any branch of the practice of law or of retaining or employing an attorney or attorneys to furnish legal advice, draw legal papers or perform legal services of any kind or description, either directly for the person, persons or corporation for whose use such services are rendered, or for the corporation retaining such attorney in compliance with any contract of employment of the corporation or of the attorney made by the corporation with any other person, persons or corporation. The statement of the purpose or purposes of a corporation, in any certificate filed under the provisions of this chapter, in whatsoever language the same may be set forth, shall not be held or construed to confer on the corporation the power to transact any business specified in this section as a purpose for which the creation of a corporation under this chapter is prohibited; and particularly when the stated objects of a corporation include the collection of debts or accounts, in words or substance, they shall not be construed to include the employment or furnishing of attorneys to prosecute any action or pursue any legal or equitable remedy in aid of such collections.

New; added by L. 1909, ch. 484.

Penal Law Provision.

In addition to the above section the Penal Law, section 280, added by Laws 1909, chapter 483, and amended by Laws 1911, chapter 317, provides as follows:

§ 280. Corporations and voluntary associations not to practice law. It shall be unlawful for any corporation or voluntary association to practice or appear as an attorney-at-law for any person other than itself in any court in this state or before any judicial body, or to make it a business to practice as an attorney-at-law, for any person other than itself, in any of said courts or to hold itself out to the public as being entitled to practice law, or render or furnish legal services or advice, or to furnish attorneys or counsel or to

render legal services of any kind in actions or proceedings of any nature or in any other way or manner, or in any other manner to assume to be entitled to practice law or to assume, use or advertise the title of lawyer or attorney, attorney-at-law, or equivalent terms in any language in such manner as to convey the impression that it is entitled to practice law, or to furnish legal advice, services or counsel, or to advertise that either alone or together with or by or through any person whether a duly and regularly admitted attorney-at-law, or not, it has, owns, conducts or maintains a law office or an office for the practice of law, or for furnishing legal advice, services or counsel. It shall be unlawful further for any corporation or voluntary association to solicit itself or by or through its officers, agents or employees any claim or demand for the purpose of bringing an action thereon or of representing as attorney-at-law, or for furnishing legal advice, services or counsel to a person sued or about to be sued in any action or proceeding or against whom an action or proceeding has been or is about to be brought, or who may be affected by any action or proceeding which has been or may be instituted in any court or before any judicial body, or for the purpose of so representing any person in the pursuit of any civil remedy. Any corporation or voluntary association violating the provisions of this section shall be liable to a fine of not more than five thousand dollars and every officer, trustee, director, agent or employee of such corporation or voluntary association who directly or indirectly engages in any of the acts herein prohibited or assists such corporation or voluntary association to do such prohibited acts is guilty of a misdemeanor. The fact that such officer, trustee, director, agent or employee shall be a duly and regularly admitted attorney-at-law, shall not be held to permit or allow any such corporation or voluntary association to do the acts prohibited herein nor shall such fact be a defense upon the trial of any of the persons mentioned herein for a violation of the provisions of this section. This section shall not apply to any corporation or voluntary association lawfully engaged in a business authorized by the provisions of any existing statute, nor to a corporation or voluntary association lawfully engaged in the examination and insuring of titles to real property, nor shall it prohibit a corporation or voluntary association from employing an attorney or attorneys in and about its own immediate affairs or in any litigation to which it is or may be a party, nor shall it apply to organizations organized for benevolent or charitable purposes, or for the purpose of assisting persons without means in the pursuit of any civil remedy, whose existence, organization or incorporation may be approved by the appellate division of the supreme court of the department in which the principal office of said corporation or voluntary association may be located.

Corporations Prohibited from Practicing Law Either Directly or Indirectly.

The practice of law is not a business open to all, but a personal right, limited to a few persons of good moral character, with special qualifications ascertained and certified after a long course of study, both general and professional, and a thorough examination by a State board appointed for the purpose. The right to practice law is in the nature of a franchise from the State conferred only for merit; nor is the practice of law a lawful business, except for members of the bar who have complied with all the conditions required by statute and the rules of the courts. As these conditions cannot be performed by a corporation, it follows that the practice of law is not a lawful business for a corporation to engage in. As it cannot practice law directly, it cannot indirectly by employing competent lawyers to practice

for it, as that would be an evasion which the law will not tolerate. In re Co-operative Law Co., 198 N. Y. 479 (1910), affg. 136 A. D. 901.

The Business Corporations Law does not authorize the formation thereunder of a corporation, the objects of which are "to furnish to its subscribers legal advice and service; to operate in connection with the above a department of law and collections for the use and benefit of the subscribers of the company only, and to accomplish these objects said company proposes to employ and maintain a staff of competent attorneys and counsellors at law to give such advice; and to prosecute or defend, through such counsel, any claim or suit entrusted to its care by subscribers." In re Co-operative Law Co., 198 N. Y. 479 (1910), affg. 136 A. D. 901; In re The Associated Lawyers' Co., 134 A. D. 350 (1909).

A corporation, although formed prior to enactment of this statute for the purpose of practicing law, is not one lawfully "engaged in a business authorized by the provisions of any existing statute" and is not one whose existence can be approved as provided in this section. Matter of Co-operative Law Co., 198 N. Y. 479 (1910); Matter of Associated Lawyers' Co., 134 A. D. 350 (1909).

A corporation cannot practice law directly or indirectly and its contract to furnish such legal services in condemnation proceedings as may be necessary, is void. Employing an attorney to do the work does not make such contract valid. Matter of City of New York, 144 A. D. 107 (1911).

Authority of Appellate Division.

The Appellate Division is only authorized to approve the right of a corporation to practice law where it is organized for charitable purposes or to assist persons without means. It cannot authorize a stock corporation organized by lawyers to do a general law and collection business. In re Associated Lawyers' Co., 134 A. D. 350 (1909). A corporation which confines its business to collecting claims without legal proceedings is not within the section. Id.; see, also, 136 A. D. 901; id., 918.

Prohibition Not Applicable to Mutual Protective Associations.

Where the purpose of a membership corporation is to protect the members, who are merchants, in preventing and exposing the commission of frauds and collusive bankruptcy proceedings by dishonest methods of debtors with whom its members are trading or may do business, it is not seeking to obtain power to practice law. Matter of Creditor's Audit & Adjustment Assn., 72 Misc. 461 (1911).

§ 3. Restrictions upon commencement of business. No such corporation shall incur any debts until the amount of capital specified in its certificate of incorporation, as the amount of capital with which it will begin business, shall have been paid in in money or property.

Formerly L. 1890, ch. 567, § 3, as am'd by L. 1892, ch. 691; L. 1895, ch. 671.

A provision requiring the filing of by-laws with the Secretary of State was stricken from this section by amendment in 1895, chapter 671, and by the same amendment there was eliminated a provision which prohibited a corporation formed under this law from transacting business until it had

filed a certificate to the effect that half the capital stock had been subscribed. As thus modified, and again re-enacted without change, by chapter 12, Laws of 1909, this section does not require the filing of by-laws or any certificate whatsoever, but in lieu thereof it merely prohibits the corporation from incurring debts until the amount of capital with which it intends to begin business, as stated in its certificate of incorporation, shall have been paid in in money or property. No penalty is prescribed in case debts are incurred prior to payment of the required amount, but it would seem that if directors do permit debts to be incurred in violation of this section they become individually liable therefor to creditors of the corporation.

One-half of the capital stock of a corporation organized under this law must be paid in within one year from its incorporation and a certificate of such payment filed. See section 5, and notes thereunder.

By omitting to perform a duty imposed by its charter, or to comply with its provisions a corporation does not ipso facto lose its corporate character or cease to be a corporation but simply exposes itself to the hazard of being deprived of its corporate character and franchises by the judgment of the court. Bklyn. S. T. Co. v. Brooklyn, 78 N. Y. 524 (1879).

The omission of a duty imposed upon a corporation is a cause of forfeiture, and its performance is in the nature of a condition, and in case of failure the sovereign may insist on resuming his grant for the breach of the condition. Peo. v. Buffalo Stone & Cement Co., 131 N. Y. 146 (1892).

§ 4. Reorganization of existing corporations. Any stock corporation heretofore organized, except a moneyed or transportation corporation, or a corporation the business of which partakes of the nature of banking or insurance, may reincorporate under this chapter in the following manner: The directors of the corporation shall call a meeting of the stockholders thereof by publishing a notice, stating the time, place and object of the meeting, signed by at least a majority of them, in a newspaper of the county in which its principal business office is situated, once a week, for at least three successive weeks, and by serving upon each stockholder, at least three weeks before the meeting, a copy of such notice either personally or by depositing it in the post-office, postage prepaid, addressed to him at his last known post-office address. The stockholders shall meet at the time and place specified in the notice and organize by choosing one of the directors chairman, and a suitable secretary, and shall then take a vote of those present in person or by proxy upon the proposition to reincorporate under this chapter, and if votes representing a majority of all the stock of the corporation shall be cast in favor of the proposition, the officers of the meeting shall execute and acknowledge a certificate of the proceedings, which certificate shall also contain the statements required by section two of this chapter, and shall be filed in the offices where certificates of in-

corporation under this chapter are required to be filed. From the time of such filing such corporation shall be deemed to be a corporation organized under this chapter, and if originally organized or incorporated under a general law of this state, it shall have and exercise all such rights and franchises as it has heretofore had and exercised under the laws pursuant to which it was originally incorporated, and such reorganization shall not in any way affect, change or diminish the existing liabilities of the corporation.

Formerly L. 1890, ch. 567, § 4, as am'd by L. 1892, ch. 691, and L. 1895, ch. 671.

For form of certificate, see post, Form No. 364.

In 1895 provisions in this section requiring the filing of by-laws, regulating the manner of adopting them, and to a certain extent the terms of the same were stricken out.

The business corporation act of 1875, ch. 611, now repealed, contained provisions substantially the same as the foregoing.

For the mode of procedure in reorganizing when the property and franchises of a domestic stock corporation have been sold by virtue of a mortgage or judgment, see Stock Corp. L., §§ 9, 10, 11, 12.

A corporation reorganized under the provisions of this section is not required to pay an organization tax. In re Consolidated Kansas City S. & R. Co., 13 A. D. 50 (1897). The foregoing case overrules the special term decision In re N. Y. & Sub. Inv. Co., 16 N. Y. Supp. 213; Id., 40 St. Rep. 139, in which it was held that the tax is payable.

It is difficult to conceive of a case where any advantage would accrue to any existing corporation by reorganization under this section. Corporations formed under laws now repealed are not compelled to reorganize, being governed by the new laws, into which the corporation laws repealed are merged. Close v. Potter, 2 Misc. 1 (1892). The language of this section is permissive; it is optional with the stockholders whether they will reorganize or not. Id.

A corporation cannot accomplish an extension of the term of its existence, or an alteration or extension of its purposes or powers, or a change in the number of its shares of stock, by reincorporation under the provision of this section. Peo. ex rel. Haberman v. James, 5 A. D. 412 (1896). It was not the purpose of such section to give to a corporation, upon its reincorporation, any rights or franchises other than those which it had, and which it had exercised, under the laws pursuant to which it was incorporated. Id. If a corporation desires to make any changes it must do so under and pursuant to the provisions of the General Corporation Law, and the Stock Corporation Law expressly providing therefor. Id.

§ 5. Payment of capital stock. One-half of the capital stock of every such corporation shall be paid in within one year from its incorporation, or the corporation shall be dissolved, and the directors within thirty days after such payment shall make a certificate of the fact of such payment, which shall be signed and acknowledged by a majority of the directors, and verified by the

president or vice-president and secretary or treasurer, and filed in the offices where the certificates of incorporation are filed. The dissolution of any such corporation for any cause shall not take away or impair any remedy against it, its stockholders or officers, for any liabilities incurred previous to its dissolution.

Formerly L. 1890, ch. 567, § 6, as am'd by L. 1892, ch. 691, § 5.

For form of certificate, see Form No. 217.

The certificate of incorporation under section 2 of this law, and the certificate of payment of half of the capital stock, required by the foregoing section, are frequently presented simultaneously at the office of the Secretary of State for filing and recording. In such cases the last mentioned certificate has been rejected because there could be no corporation and consequently no president, vice-president, treasurer or secretary of a corporation, to properly execute said certificate, until after the filing of a certificate of incorporation, pursuant to said section 2.

Certificate of Half Payment.

This section provides that when half of the capital stock has been paid in a certificate to that effect shall be filed. No penalty is provided for failure to file the certificate. The certificate of full payment of capital stock, required by the laws in force prior to the revision of 1890, is no longer necessary, and, since said revision, the statute has contained no provision limiting the time within which the entire capital stock shall be paid in; but every holder of capital stock not fully paid is individually liable for debts of the corporation to the extent of the amount unpaid on the stock held by him. Stock Corp. Law, § 56, and notes thereunder. The board of directors may fix the time for the payment of subscriptions to the capital stock. Stock Corp. Law, § 54.

As there is no provision requiring the filing of a certificate of half payment when the capital stock is increased it has been the practice in some cases, when a corporation with a large capitalization is contemplated, to organize with a small capital stock, file the certificate of half payment required by the foregoing section, and thereafter increase the amount of capital stock to any extent required.

When a corporation has filed in the public offices a certificate verified by its president that all its stock was full paid and issued for property it will not be permitted to contradict its own declaration. Dickerson v. Appleton, 123 A. D. 903 (1907).

Verification and Acknowledgment.

The certificate must be sworn to as well as acknowledged. An acknowledgment without verification is not sufficient. Hardman v. Sage, 124 N. Y. 25 (1891); Vedder v. Mudgett, 95 N. Y. 295 (1884); Brown v. Smith, 13 Hun 408, affd., 80 N. Y. 650 (1880).

It has been held, where a statute requires verification by the oath of the president or vice-president and the treasurer or secretary, and it is made by one person who is both vice-president and treasurer, it is a literal compliance. Manhattan Co. v. Kaldenberg, 165 N. Y. 1 (1900), revsg. 27 A. D. 31; Novelty Mfg. Co. v. Connell, 88 Hun 254, 257 (1895).

Dissolution, How Effected.

Failure to pay in half the capital stock within the statutory time merely creates a liability for a forfeiture of corporate rights. Proceedings must be taken to accomplish an actual dissolution. Peo. v. Buffalo Stone & Cement Co., 131 N. Y. 140 (1892); Id., 42 St. Rep. 753; Peo. v. Ulster & D. R. R. Co., 128 N. Y. 240 (1891); Denike v. N. Y., etc., Lime Co., 80 N. Y. 599 (1880); Matter of Brooklyn El. R. R. Co., 125 N. Y. 434 (1891).

When it is claimed that this provision of the statute has been violated, the Attorney-General may exercise his discretion, based upon all the facts in the case, whether the public interests require that he should commence an action; and when he applies to the court for leave to commence it, it may exercise its discretion in the same way. But if he and the court determine that an action ought to be commenced, and it has been commenced, and it is proved that the cause of forfeiture continues to exist, then the statute is imperative that the corporation shall be dissolved. Peo. v. Buffalo Stone & Cement Co., supra; Peo. v. Ulster & D. R. R. Co., supra.

By omitting to perform a duty imposed by its charter or to comply with its provisions, a corporation does not ipso facto lose its corporate character or cease to be a corporation but simply exposes itself to the hazard of being deprived of its corporate character and franchises by the judgment of the court. Brklyn. S. T. Co. v. Brooklyn, 78 N. Y. 524 (1879).

Effect of Dissolution on Liabilities.

Although the last sentence of the foregoing section was inserted in connection with a provision made for the event of a failure to pay in capital stock, yet it cannot be qualified by what precedes it and reaches beyond the contingency of the particular dissolution previously referred to, and applies to every case of corporate dissolution; therefore, a cause of action against a business corporation for injuries caused by its negligence survives its dissolution, and an action thereon is maintainable against the trustees holding the property for distribution. Marstaller v. Mills, 143 N. Y. 398 (1894).

The provision declaring that the dissolution of a corporation shall not take away or impair any remedy given against it, its stockholders or officers, for any liability incurred previous to its dissolution, merely saves or continues a liability established before and existing at the time of the termination of the corporate existence of the company. Gold v. Clyne, 134 N. Y. 262 (1892).

An action for tort survives dissolution and should be brought against the corporation. Cunningham v. Glauber, 61 Misc. 443, affd., 117 N. Y. Supp. 866 (1909).

A cause of action for tort does not survive the subsequent dissolution of a corporation and the appointment of a receiver unless the corporation was formed under an act containing provisions similar to section 5 of the Business Corp. Law. Matter of Yuengling Brewing Co., 24 A. D. 223 (1897), distg. Marstaller v. Mills, supra.

§ 6. Full liability corporations. Every corporation formed under this chapter may be or become a full liability corporation by inserting a statement in the certificate of incorporation, that the corporation thereby formed is intended to be a full liability corporation; and in case of an existing corporation, which

is not a full liability corporation, it may become such by filing in the offices where certificates of incorporation are required to be filed, a supplemental certificate stating that thereafter the corporation intends to be a full liability corporation, which certificate shall be executed and acknowledged by the president and treasurer of the corporation or by the board of directors, and shall have annexed thereto a copy of a resolution, adopted by a two-thirds vote of the board of directors, and the written consent of all the stockholders of the corporation, authorizing and consenting to the change of the corporation to a full liability corporation. If the corporation is formed as or becomes a full liability corporation all the stockholders of the corporation shall be severally individually liable to its creditors for all its debts and liabilities, and may be joined as defendants in any action against it. No execution shall issue against any stockholder individually until execution has been issued against the corporation and returned unsatisfied, and all the stockholders shall contribute a proportionate share, according to the number of shares of stock owned by each, of the amount paid by any stockholder on a judgment recovered against him individually for a debt of the corporation, and he may recover from the other stockholders in the corporation in a joint or several action the proper portion due by them and each of them, of the amount paid by him on any such judgment.

Formerly L. 1890, ch. 567, § 7, as am'd by L. 1892, ch. 691, § 6.

For form of certificate of incorporation of full liability corporation, see post, Form No. 368.

For form of supplemental certificate by an existing business corporation to become a full liability corporation, see post, Form No. 369.

It rarely happens that persons desire to enter into a corporate enterprise in which each stockholder becomes personally liable for the indebtedness of the corporation, therefore, very few full liability companies have been incorporated in this State.

The liability imposed by this section is not penal but is in the nature of a contract obligation. It survives the death of the stockholder and may be continued against his personal representatives. Cochran v. Wiechers, 119 N. Y. 399 (1890); Bailey v. Hollister, 26 N. Y. 112 (1862); Lowry v. Inman, 46 N. Y. 119 (1871); Wiles v. Suydam, 64 N. Y. 173 (1876).

An action may be commenced against a stockholder before the return of an execution against the corporation unsatisfied. But execution cannot issue until the return of an execution against the corporation unsatisfied. Walton v. Coe, 110 N. Y. 109 (1888); Adams v. Wallace, 82 A. D. 121 (1903).

The provision in this section that all the stockholders may be joined as defendants in any action against it, is permissive and not imperative. Walton v. Coe, 110 N. Y. 109 (1888).

A judgment against a corporation is not conclusive against stockholders. Lawyer v. Rosebrook, 48 Hun 453 (1888).

Statute of Limitations.

The liability imposed upon stockholders by this section is modified and restricted by the Statute of Limitations contained in section 55 (now § 59) of the Stock Corporation Law, which declares that no action shall be brought to enforce the liability of a stockholder for the debts of a corporation unless an action shall have been brought against the corporation within two years after the debt became due. Adams v. Slingerland, 87 A. D. 312 (1903); Adams v. Wallace, 82 A. D. 117 (1903); Sanford v. Rhoads, 113 A. D. 782 (1906).

The Statute of Limitations begins to run only when the debt becomes payable; hence when a full liability corporation assumes leases of ten and twenty years duration, on which the annual rent is payable quarterly in advance, the stockholders are personally liable for all rent payable within two years of the time the action to recover the same is brought. Sanford v. Rhoads, supra.

Under this section a stockholder may be sued before an action against the corporation is carried on to judgment, the creditor's right to execution being suspended until that process has been returned unsatisfied against the corporation. Adams v. Wallace, 82 A. D. 117 (1903); Walton v. Coe, 110 N. Y. 109 (1888).

Consolidation and Merger: Syr. L. Rev., May 1929.

§ 7. Consolidation of corporations. Any two or more corporations organized under the laws of this state for the purpose of carrying on any kind of business of the same or of a similar nature, which a corporation organized under this chapter might carry on, may consolidate such corporations into a single corporation, as follows: The respective corporations may enter into and make an agreement signed by a majority of their respective boards of directors and under their respective corporate seals, for the consolidation of such corporation, prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation, the number of directors who shall manage its affairs, not less than three, the names and post-office addresses of the directors for the first year, the term of its existence, not exceeding fifty years, the name of the town or towns, county or counties, in which its operations are to be carried on, the name of the town or city and county in this state in which its principal place of business is to be situated, the amount of its capital stock, which shall not be larger in amount than the fair aggregate value of the property, franchises and rights of such corporations, and the number of shares into which the same is to be divided, the manner of distributing such capital stock among the holders thereof, and if such corporations, or either of them, shall have been organized for the purpose of carrying on any part

of its business in any place out of this state, the agreement shall so state, with such other particulars as they may deem necessary.

Formerly L. 1890, ch. 567, § 13, as am'd by L. 1892, ch. 691, § 7; L. 1895, ch. 671; L. 1901, ch. 520.

For form of papers, see post, Form No. 370.

By the amendment of 1901 the words "nor more than thirteen" were stricken out.

As to organization tax and amount of fees payable upon filing and recording the consolidated papers, see the notes to Form No. 298, above referred to.

For method of proving consolidation in court, see Gen. Corp. Law, § 9, subd. 3.

Organization Tax.

The law imposing a tax for the privilege of organizing a corporation was originally enacted in 1886, chapter 143. Under the provisions of that act it was held that such tax was payable upon the consolidation of two or more corporations. Peo. ex rel. N. Y. Phonograph Co. v. Rice, 57 Hun 486 (1890), affd., 128 N. Y. 591. But in 1892, ch. 668, amended the law by providing that upon the consolidation of "two" corporations the tax should be payable only upon the amount of capital stock in excess of the aggregate capitalization of the constituent corporations. Under this amendment it was held that "two or more" corporations might consolidate without paying an organization tax, except upon the capital stock in excess of the total of the constituent corporations. Peo. ex rel. Eickemeyer Field Co. v. Rice, 66 Hun, 130 (1892), affd., 138 N. Y. 614. Thereafter the provisions of the law were amended to conform to the last-mentioned decision.

Companies which have paid the tax have no greater rights than those which were incorporated before 1886, and, therefore, paid no tax. Peo. ex rel. N. Y. Phonograph Co. v. Rice, 57 Hun 486 (1890), affd., 128 N. Y. 591.

The tax imposed by section 180 not being a property tax the power of the State to subject corporations to any conditions the Legislature may see fit to impose, cannot be questioned. Peo. v. N. Y., C. & St. L. R. R. Co., 129 N. Y. 476 (1892).

Power to Consolidate.

The provisions of a statute, permitting the merger of two corporations against the dissent of a portion of the stockholders of such corporations, are not unconstitutional as depriving the dissenting stockholders of their property without due process of law. Colby v. Equitable Trust Co., 192 N. Y. 535 (1908), affg. 124 A. D. 262, revsg. 55 Misc. 355.

Consolidations under these provisions can only be affected by corporations organized under the laws of this State for the purpose of carrying on business of the same or a similar nature, and such business must be of a kind that corporations are authorized to carry on under the Business Corporations Law. See Cameron v. N. Y. & Mt. Vernon Water Co., 133 N. Y. 336 (1892), 62 Hun 269; Young v. Rondout & Kingston Gas Lt. Co., 129 N. Y. 57 (1891); id., 39 St. Rep. 602. See, also, People v. North River Sugar Ref'g Co., 121 N. Y. 582 (1890); Cole v. Millerton I. Co., 133 N. Y. 164 (1892).

Proceedings for consolidation, begun under a law which was repealed during the pendency of such proceedings, are not affected by such repeal and may be perfected under the law repealed. Cameron v. N. Y. & Mt. V. W. Co., above.

Consolidation Creates New Corporation.

Upon consolidation the constituent corporations cease to exist and an entirely new corporation comes into existence. Peo. ex rel. N. Y. Phonograph Co. v. Rice, 57 Hun 486 (1890), affd., 128 N. Y. 591; Shields v. Ohio, 95 U. S. 319 (1877); Railroad v. Georgia, 98 U. S. 359 (1878); Railroad v. Maine, 96 U. S. 499 (1877). But, when a domestic and a foreign corporation are consolidated, see Peo. v. N. Y., C. & St. L. R. R. Co., 129 N. Y. 476 (1892); Peo. v. Fitchburg R. R. Co., 129 N. Y. 654.

Voidable Contracts.

A contract made by the directors of one corporation with another corporation, of which they are also directors, is voidable by the corporation, but a contract entered into between two corporations, voidable because of their having common directors, cannot be disaffirmed by a minority of the stockholders of either corporation. Hart v. Ogdensburg & Lake Champlain R. R. Co., 89 Hun 316 (1895).

A contract between two corporations is not vitiated by the fact that some of the officers were directors in both corporations, in the absence of fraud or bad faith on their part. Genesee Valley & Wyoming Ry. Co. v. Retsof Mining Co., 15 Misc. 187 (1895).

Par Value of Shares, Contract Involving.

Where, for a valuable consideration, defendant agreed to transfer twenty-five shares of stock of a corporation capitalized at $2,500, divided into $100 shares, and, after merger with another company, the total stock became $50,000, divided into $10 shares, and defendant's offer of only twenty-five shares of the new stock in fulfillment of the contract was refused, it is error to refuse to allow plaintiff to cross-examine defendant to show details of such change of stock. Choate v. Bebee, 131 A. D. 535 (1909).

§ 8. Submission of consolidation agreement to stockholders. Such agreement shall be submitted to the stockholders of each of such corporations, at a meeting thereof to be called upon notice of at least two weeks, specifying the time, place and object thereof, and addressed to each at his last known post-office address, and deposited in the post-office, postage prepaid, and published for at least two successive weeks in one of the newspapers in each of the counties of this state in which either of such corporations shall have its place of business, and if such agreement shall be approved at each of such meetings of the respective stockholders separately, by the vote by ballot of the stockholders owning at least two-thirds of the stock, the same shall be the agreement of such corporations, and a sworn copy of the proceedings of such meetings, made by the secretaries thereof, respectively, and attached thereto, shall be presumptive evidence of the holding and action of such meetings. Such agreement and verified copy of proceedings of such meetings shall be made in duplicate, one of which shall be filed in the office of the secretary

of state, and the other in the office of the clerk of the county where the principal business office of the new corporation is to be situated in this state, and thereupon such corporation shall be merged into the new corporation specified in such agreement, to be kown by the corporate name therein mentioned, and the provisions of such agreement shall be carried into effect as therein provided. If any stockholder, not voting in favor of such agreement to consolidate, shall at such meeting, or within twenty days thereafter, object to such consolidation and demand payment for his stock, such stockholder or such new corporation, if the consolidation takes effect at any time thereafter, may at any time within sixty days after such meeting apply to the supreme court at any special term thereof held in the district in which any county is situated in which such new corporation may have its place of business, upon at least eight days' notice to the new corporation, for the appointment of three persons to appraise the value of such stock, and the court shall appoint three such appraisers and designate the time and place of their first meeting, with such directions in regard to their proceedings as shall be deemed proper, and also direct the manner in which payment for such stock shall be made to such stockholder. The court may fill any vacancy in the board of appraisers occurring by refusal or neglect to serve or otherwise. The appraisers shall meet at the time and place designated, and they or any two of them, after being duly sworn honestly and faithfully to discharge their duties, shall estimate and certify the value of such stock at the time of such dissent, and deliver one copy to such new corporation, and another to such stockholder if demanded; the charges and expenses of the appraisers shall be paid by the new corporation. When the new corporation shall have paid the amount of such appraisal, as directed by the court, such stockholder shall cease to have any interest in such stock and in the corporate property of such corporation, and such stock may be held or disposed of by such new corporation. Where any consolidation has been heretofore or shall be hereafter effected pursuant to the laws of this state, and the holders of ninety per centum of the capital stock of each of such corporations have voted in favor of such agreement to consolidate, if any stockholder not voting in favor of such consolidation shall fail to exchange his stock for stock of such new corporation within sixty days after this act shall go into effect, or, in case of a consolidation hereafter effected, within sixty days after he shall have become entitled to

make such exchange, such new corporation may, at any time thereafter, upon at least eight days' notice to such stockholder, to be given personally, within the state, if possible, and if not, then in such manner as the court shall direct, apply to the court, as hereinbefore provided, for the appointment of three persons to appraise the value of such stock at the time of the expiration of such sixty days. Upon the completion of the appraisal in the manner hereinbefore provided for, and the payment by such new corporation of the amount of such appraisal, as directed by the court, such stockholder shall cease to have any interest in such stock, and in the corporate property of such corporation, and such stock may be held or disposed of by such new corporation.

Formerly L. 1890, ch. 567, § 14, as am'd by L. 1892, ch. 691, § 9; L. 1892, ch. 438.

The section number was changed to 8 by the Consolidated Laws of 1909, ch. 12.

§ 9. Powers of consolidated corporations. Such new corporation in addition to the general powers of corporations shall enjoy the rights, franchises and privileges possessed by each of the corporations so consolidated, subject to the restrictions, liabilities, duties and provisions contained in this chapter so far as the same may be applicable to the purposes for which it shall have been organized and expressed in the agreement for consolidation, and may prosecute or carry on any kind of business which each of the consolidating corporations was authorized by law to conduct.

Formerly L. 1890, ch. 567, § 15, as am'd by L. 1892, ch. 691, § 10. The section number was changed to 9, by L. 1909, ch. 12 (Consolidated Laws).

§ 10. Transfer of property of old corporations to consolidated corporations. Upon the consummation of such act of consolidation, all the rights, privileges, franchises and interests of each of the corporations, parties to the same, and all the property, real, personal and mixed, and all the debts due on whatever account to either of them, as well as all stock subscriptions and other things in action belonging to either of them, shall be taken and deemed to be transferred to and vested in such new corporation, without further act or deed; and all claims, demands, property and every other interest shall be as effectually the property of the new corporation as they were of the former corporations, parties to such agreement and act; and the title to all real estate, taken by deed or otherwise, under the laws of this state, vested in

either of such corporations, parties to such agreement and act, shall not be deemed to revert or be in any way impaired by reason of this chapter, or anything done by virtue thereof, but shall be vested in the new corporation by virtue of such act of consolidation; and all the rights, privileges, franchises and property of the corporations, parties to any consolidation heretofore made under this chapter, shall vest as fully in the new corporation thereby created as they were vested in the corporations, parties to such consolidations.

Formerly L. 1890, ch. 567, § 16, as am'd by L. 1892, ch. 691, § 11; L. 1902, ch. 457. The section number was changed to 10 by L. 1909, ch. 12 (Consolidated Laws).

By the amendment of 1902, ch. 457, it was provided that upon consolidation the properties of the constituent corporations are vested in the new corporation without being mentioned in the consolidation agreement, and the title of properties of corporations consolidated previous to that amendment are also vested in the new corporation the same as though this provision were then in force.

§ 11. Rights of creditors of old corporations. The rights of creditors of any corporation that shall be so consolidated shall not in any manner be impaired, nor any liability or obligation for the payment of any money due or to become due to any person or persons, or any claim or demand for any cause existing against any such corporation or against any stockholder thereof be released or impaired by any such consolidation; but such new corporation shall succeed to and be held liable to pay and discharge all such debts and liabilities of each of the corporations consolidated in the same manner as if such new corporation had itself incurred the obligation or liability to pay such debt or damages and the stockholders of the respective corporations consolidated shall continue, subject to all the liabilities, claims and demands existing against them as such, at or before the consolidation; and no action or proceeding then pending before any court or tribunal in which any corporation that may be so consolidated is a party, or in which any such stockholder is a party, shall abate or be discontinued by reason of such consolidation, but may be prosecuted to final judgment, as though no consolidation had been entered into; or such new corporation may be substituted as a party in place of any corporation so consolidated, by order of the court in which such action or proceeding may be pending.

Formerly L. 1890, ch. 567, § 17, as am'd by L. 1892, ch. 691, § 12. The section number was changed to 11 by L. 1909, ch. 12.

The remedy of a person who is entitled to recover moneys from a corporation is not impaired by the fact that such corporation has transferred its assets to another company formed by the consolidation of itself and another corporation. Wilson v. Mechanical Orguinette Co., 170 N. Y. 542 (1902), revsg. 57 A. D. 158.

An action can be maintained against the old corporation for debts existing at the time of consolidation. Gale v. T. & B. R. R. Co., 51 Hun 470.

The statutory liability of a consolidated corporation for the debts and liabilities of its constituent corporations is not impaired by an agreement between the corporations as to creditors who have neither joined in nor assented to the agreement. Matter of Utica Nat. Brewing Co., 154 N. Y. 268 (1897), affg. 19 A. D. 627.

Where a corporation, after being sued, is consolidated with another corporation, the latter should be substituted as defendant, but where this has not been done, and the successor corporation answers an amended complaint, and the answer is accepted, the plaintiff cannot have judgment against the original defendant because of its failure to interpose an answer. Klein v. East River Elec. Lt. Co., 37 Misc. 490 (1902), revsd. on other grounds, 182 N. Y. 27.

A provision in a consolidation agreement, under the statute, signed by the stockholders, that the consolidated corporation shall owe no debts on account of the constituent corporations cannot affect the rights of outside creditors, but is a bar to the claim of a signing stockholder to payment from the assets of the consolidated corporation, in case of its insolvency, of an obligation of a constituent corporation held by him. Matter of Utica Nat. Brewing Co., 154 N. Y. 268 (1897), affg. 19 A. D. 627.

Where a corporation has entered into a consolidation the pursuit, by a creditor, of a remedy against his original debtor, a constituent corporation, presents no obstacle to a collection of his debt from the consolidated corporation. Matter of Utica Nat. Brewing Co., 154 N. Y. 268 (1897), affg. 19 A. D. 627.

A transfer by a consolidated corporation of all its assets, not made in the ordinary course of business, effecting a termination of its regular business, accepted as such by the corporation with which it was consolidated, and followed by a division of the stock of the latter among the stockholders of the former in payment of the assets transferred, is void as against creditors of the corporation making the transfer. Hurd v. N. Y. & Commercial Steam Laundry Co., 29 Misc. 183 (1899), affd., 167 N. Y. 89 (1901), revsg. 52 A. D. 467.

An injunction pendente lite will be granted to restrain a corporation from consolidation where such consolidation may be unlawful, and render final judgment ineffectual. Young v. Rondout & Kingston Gas Lt. Co., 129 N. Y. 57 (1891).

§ 12. District steam corporations. Any corporation now or hereafter incorporated for the purpose of supplying steam to consumers from a central station or stations through pipes laid in the public streets, shall be known as a district steam corporation and upon the application in writing of the owner or occupant of any building or premises, within one hundred feet of any street main laid down by any such corporation, and payment by

him of all money due from him to it, such corporation shall supply steam as may be required for heating such building or premises, notwithstanding there may be rent or compensation in arrears for steam supplied, or for meter, pipe or fittings furnished to a former occupant thereof, unless such owner or occupant shall have undertaken or agreed with the former occupant to pay or to exonerate him from the payment of such arrears, and shall refuse or neglect to pay the same; and if, for the space of twenty days after such application, and the deposit, if required, of a reasonable sum to cover the cost of connection and two months' steam supply, the corporation shall refuse or neglect to supply steam as required, it shall forfeit to such applicant the sum of ten dollars and the further sum of five dollars for every day thereafter during which such refusal or neglect shall continue; but no such corporation shall be required to lay a service pipe for the purpose of supplying steam to any applicant where the ground in which such pipe is required to be laid shall be frozen, or otherwise present serious obstacles to laying the same, nor unless the applicant, if required, shall deposit in advance with the corporation a sum of money sufficient to pay for two months' steam supply and the costs of the necessary connections and of the erection of a meter and such other special apparatus as are required for use in connection with such steam supply, nor unless the applicant shall provide the space and right of way necessary for the erection, maintenance and use of such connections and apparatus, and signify his assent in writing to the reasonable regulations of the corporation with reference to the supply of steam to consumers.

Formerly L. 1890, ch. 567, § 18, as am'd by L. 1892, ch. 691, § 13. Section number changed to 12 by L. 1909, ch. 12.

The logical place for the provisions of sections 12, 13 and 14 would seem to be in the Transportation Corporations Law, where corporations of similar character are grouped.

§ 13. Examination of meters by agent of district steam corporations. Any such corporation may make an agreement with any of its customers, by which any of its officers or agents shall be authorized at all reasonable times to enter any dwelling, store, building, room or place, supplied with steam by such corporation and occupied by such customer, for the purpose of inspecting and examining the meters, devices, pipes, fittings and appliances for supplying or regulating the supply of steam, and for ascertain-

ing the quantity of steam consumed, or the quantity of water resulting from the condensation of steam consumed. Every such agreement shall further provide that such officer or agent shall exhibit his written authority if requested by the occupant of such dwelling, store, building, room or place. Any person who shall directly or indirectly prevent or hinder such officer or agent from entering such dwelling, store, building, room or place, or from making such inspection or examination, in violation of such agreement, shall forfeit to the corporation the sum of twenty-five dollars for each offense.

Formerly L. 1890, ch. 567, § 19, as am'd by L. 1892, ch. 691, § 14. Section number changed to 13 by L. 1909, ch. 12.

§ 14. Entry by agent of district steam corporation to cut off steam. If any person or persons, corporation or association supplied with steam by any such corporation, shall neglect or refuse to pay the rent or remuneration for such steam, or for the meter, device, pipes, fittings or appliances, let by such corporation for supplying steam, or for ascertaining the quantity of steam consumed, or the quantity of water resulting from the condensation of the steam consumed, agreed upon or due for the same. as required by his, their or its contract with such corporation, the latter may thereupon stop and prevent the steam from entering the premises of such person, persons, corporation or association, so neglecting or refusing to pay such rent or remuneration, and may also in any case, in which a person is liable to pay a forfeiture, or to a fine or imprisonment, by reason of any act to or towards such corporation or its property for which such forfeiture, fine or penalty is imposed by law, stop and prevent the steam from entering the premises of the person so liable, or if such person be an officer or agent of any corporation or association, stop and prevent the steam from entering the premises of such corporation or association. In all cases in which such corporation is authorized to stop and prevent the steam from entering any premises, it may, by its officers, agents or workmen, enter into or on such premises between the hours of eight o'clock in the forenoon and six o'clock in the afternoon and cut off, disconnect, separate and carry away any meter, device, pipe, fitting or other property of the corporation; and may cut off, disconnect and separate any meter, device, pipe or fitting, whether the property of the corporation or not, from the mains or pipes of such corporation.

Formerly L. 1890, ch. 567, § 20, as am'd by L. 1892, ch. 691, § 15. Section number changed to 14 by L. 1909, ch. 12.

§ 15. Water companies. No corporation shall be formed under this chapter for the purpose of accumulating, storing, conducting, furnishing or supplying water for domestic, manufacturing or municipal purposes in the city of New York.

Any corporation formed for the purpose of supplying any other city of the state with water, if unable to agree with the owners of any real property required for the purpose of the corporation for the purchase thereof may acquire title thereto by condemnation.

Formerly L. 1890, ch. 567, added by L. 1892, ch. 691, as am'd by L. 1909, ch. 240. The only amendment made by the latter act was the insertion, after the word "domestic," of a comma, which had been omitted by the Consolidated Law of 1909, ch. 12.

For provisions of the Condemnation Law, see post.

In the foregoing section, implied authority appears to be given for forming corporations under this law "for the purpose of accumulating, storing, conducting, furnishing or supplying water for domestic, manufacturing or municipal purposes," except in the city of New York. It should be observed, however, that the second section of this law, page 350, prohibits the formation, under the Business Corporations Law, of any kind of corporation that may be formed under any other general law of the State, and that this prohibition would apply to a certain class of water corporations specially provided for in the Transportation Corporations Law, section 80, to wit: Corporations "for the purpose of supplying water to any of the cities, towns or villages, and the inhabitants thereof in this State." It would seem, therefore, that water companies for other purposes may incorporate under the Business Corporations Law, provided their operations are not to be conducted in New York city. In the Matter of the New York & White Plains Suburban Water Company, a certificate of incorporation drawn under the Business Corporations Law, stated the objects of the proposed corporation to be "to acquire water by purchase, development or otherwise; to construct reservoirs or water towers, erect pumping machinery, laying of water mains, pipes, gates, valves and hydrants; to furnish and sell water to manufactories, private corporations and individuals for fire protection, manufacturing and domestic use, and collect payment or rentals for the same." The certificate was referred to the Attorney-General, Hon. Simon W. Rosendale. In his opinion, dated April 17, 1893, he held as follows: " * * * It (the Transportation Corporations Law) makes no provision for furnishing water for manufacturing or hydraulic purposes, I am of the opinion that under said Business Corporations Law, corporations may be formed for such purposes and the purposes set forth in this certificate. This opinion is strengthened by the implied authority given in section 16 (now 15) of the Business Corporations Law."

For form of statement of purposes in compliance with this section, see Form No. 201.

§ 16. Improvement corporations; right of condemnation. Any corporation formed for the purpose of developing or improving real property, which lays out for public use roads, streets, avenues or highways, upon or through its lands, if unable to agree

with the owners of any real property required for the purpose of extending, continuing or connecting such roads, streets, avenues or highways, for the purchase thereof, may acquire title thereto by condemnation in the manner prescribed by law; provided such corporation has the consents of the owners of not less than one-half of all of the land which adjoins or abuts upon, or which will adjoin or abut upon, such roads, streets, avenues or highways, or their extensions, continuations or connections, when completed; and such corporation may lay out and establish such roads, streets, avenues or highways, and the extensions, continuations or connections thereof, and may construct drains or sewers, and such bridges or culverts as may be necessary to maintain the grades of, or for the extension, continuation or connection of, the roads, streets, avenues or highways, so laid out; and may connect such roads, streets, avenues or highways, with or across roads, streets, avenues or highways, belonging to any other corporation or person, but may not disturb the established grades thereof. All lands so taken by condemnation shall be deemed to be acquired for a public use.

Formerly § 17, added by L. 1900, ch. 518.

ARTICLE 3*

Co-operative Corporations

SECTION 25. Definition.
26. Incorporation.
27. Application of corporate law.
28. Directors; officers.
29. Amendment of certificate.
30. Stock and stockholders.
31. Written vote of stockholders.
32. Subscription of stock in other corporations.
33. Purchasing business of other corporations or persons.
34. Earnings; dividends.
35. Dissolution.
36. Annual report.
37. Existing co-operative corporations or associations.
38. Corporate name.

§ 25. Definition. For the purposes of this article, the words "corporation," "company," "association," "exchange," "society" or "union" shall be synonymous.

Added by L. 1913, ch. 454.

* The provisions of this article are new, added by Laws of 1913, chapter 454, in effect May 9, 1913. By the same act former article 3, §§ 25 and 26, were re-numbered, respectively, as article 4, §§ 50 and 51.

§ 26. Incorporation. Five or more persons may become a co-operative corporation, company, association, exchange, society or union for the purpose of conducting a general producing, manufacturing and merchandising business, on the co-operative plan as limited in this article, in articles of common use, including farm products, food supplies, farm machinery and supplies and articles of domestic and personal use, by making, signing, acknowledging and filing a certificate in the form and manner prescribed by article two of this chapter.

Added by L. 1913, ch. 454.

§ 27. Application of corporate law. The provisions of the business corporations law, the general corporation law and the stock corporation law shall apply to co-operative corporations formed under this article, except where such provisions are in conflict with this article.

Added by L. 1913, ch. 454.

§ 28. Directors; officers. Every such corporation shall be managed by a board of not less than five directors. The directors shall be elected by and from the stockholders at such time and for such term as the by-laws may prescribe, and shall hold office until their successors are elected, and shall enter upon the discharge of their duties. The officers of every such corporation shall be a president, one or more vice-presidents, a secretary and a treasurer, who shall be elected annually by the directors, and each of whom must be a director. The office of secretary and treasurer may be combined. A majority of the stockholders may, at any regular or special meeting, duly called, remove any director or officer for cause, and fill the vacancy.

Added by L. 1913, ch. 454.

§ 29. Amendment of certificate. The stockholders of any such corporation may, by a three-fourths vote, at any regular meeting, or at any special meeting called for that purpose on ten days' notice to the stockholders, amend its certificate of incorporation. The power to amend shall include the power to increase or diminish the amount of capital stock and the number of shares; but such amount shall not be diminished below the amount of paid-up capital at the time the amendment is adopted. The certificate of the action of such meeting shall be executed and filed in the

manner prescribed by section sixty-four of the stock corporation law.

Added by L. 1913, ch. 454.

§ 30. Stock and stockholders. The capital stock of any such corporation shall be divided into shares of the par value of five dollars each. A stockholder in any such corporation shall not own shares of a greater aggregate par value than five thousand dollars, except as hereinafter provided. A stockholder shall be entitled to but one vote, without regard to the amount of stock held by him. Certificates of stock shall not be issued to any subscriber until fully paid, but the by-laws of the corporation may allow subscribers to vote as stockholders, if part of the stock subscribed for has been paid for in cash. No stock shall be transferred without the written consent of the corporation indorsed on the certificate of stock. The corporation shall have the first right to purchase at par any stock of a stockholder offered for transfer or the stock of any deceased or retiring stockholder, or of any stockholder who shall have purchased of or sold to the corporation goods of the value of less than one hundred dollars in any one corporation year.

Added by L. 1913, ch. 454.

§ 31. Written vote of stockholders. At any regularly called general or special meeting of the stockholders the written vote of an absent stockholder signed by him shall be received and counted, provided he shall have been previously notified, in writing, of the exact motion or resolution upon which such vote is taken and a copy of the same is forwarded with and attached to his written vote.

Added by L. 1913, ch. 454.

§ 32. Subscription of stock in other corporations. At any duly called regular or special meeting at which at least a majority of the stockholders may be present or represented a co-operative corporation may, by a majority vote of the stockholders present or represented, subscribe for shares and invest its reserve fund to an amount not to exceed twenty-five per centum of its capital, in the capital stock of any other co-operative corporation.

Added by L. 1913, ch. 454.

§ 33. Purchasing business of other corporations or persons. Whenever a co-operative corporation shall purchase the business

of another corporation, person or persons, it may pay for the same wholly or partly by the issue of shares of its capital stock to an amount which at par value would equal the fair market value of the business so purchased; and the transfer to the corporation of such business at such valuation shall be equivalent to payment in cash for the shares of the stock so purchased. No such purchase shall be made until the proposal therefor shall have been submitted by the directors to a meeting of the stockholders, together with an itemized inventory of assets and liabilities of the vendor, including the value of the good will as a separate item, and such proposal shall have been ratified by a vote of at least two-thirds of the total number of stockholders. If the cash value of such purchased business exceed one thousand dollars, the directors may hold the shares in excess of one thousand dollars in trust for the vendor and dispose of the same to such persons, and within such times, as may be agreed upon, and pay the proceeds thereof as received from time to time to the former owner of such business.

Added by L. 1913, ch. 454.

§ 34. Earnings; dividends. The directors, subject to revision by the stockholders at any general or special meeting, shall apportion the net earnings by first paying dividends on the paid-up capital stock at a rate not exceeding six per centum per annum. They shall set aside not less than ten per centum of the net earnings for a reserve fund until the reserve fund shall equal thirty per centum of the paid-up capital stock. They shall also annually set aside five per centum of the net earnings for an educational fund to be used in teaching co-operation. The remainder of the net earnings shall be distributed by uniform dividend to members of the first class and members of the second class. Members of the first class shall include stockholders and employees. Members of the second class shall include non-stockholders who shall during any fiscal year do business with the corporation amounting to not less than one hundred dollars. Dividends shall be paid on purchases amounting to one hundred dollars and over from or by members and on the amount earned by each employee during the fiscal year. Members of the first class and employees shall be entitled to dividends at double the rate of dividends to which members of the second class shall be entitled. Dividends to non-shareholders may be credited on account of such non-shareholders, in the purchase of capital stock of the corporation. In productive

corporations, including creameries, canneries, elevators, factories, and the like, dividends shall be calculated on raw material delivered instead of on goods purchased. If the corporation be both a selling and a productive concern, the dividends may be on both raw material delivered and on goods purchased.

The net earnings of such corporation shall be distributed at such times as the by-laws shall prescribe, but such distribution shall be made at least once every twelve months.

Added by L. 1913, ch. 454.

§ 35. **Dissolution.** If any such corporation, for five consecutive years, shall fail to declare a dividend upon the shares of its paid-up capital stock, five or more stockholders may present a petition to the supreme court of a county in which the principal office of the corporation is situated, praying for its dissolution upon such ground. If upon the hearing the allegations of the petition are found to be true, the court may adjudge such corporation dissolved.

Added by L. 1913, ch. 454.

§ 36. **Annual report.** Every co-operative corporation shall, annually, on or before the thirty-first day of October, make a report to the secretary of state, containing the name of the corporation, its principal place of business, and generally a statement as to its business, showing the total amount of business transacted, the number of stockholders, the amount of capital stock subscribed for and paid in, the total expenses of operation, the amount of indebtedness or liabilities, and its profits and losses.

Added by L. 1913, ch. 454.

§ 37. **Existing co-operative corporations and associations.** An existing co-operative corporation, company or association heretofore organized and doing business in this state may file with the secretary of state a written certificate signed and sworn to by the president and secretary to the fact that such corporation has, by a majority vote of its stockholders, decided to accept the provisions of this article, and thereupon such corporation shall be deemed to have abandoned its certificate filed under any other law and be subject to the provisions of this article.

Added by L. 1913, ch. 454.

§ 38. Corporate name. No corporation shall be formed under this article unless there be affixed or prefixed to the name thereof, as required by section six of the general corporation law, such word or words or abbreviation as will indicate that it is a corporation as distinguished from a natural person, firm or copartnership. No corporation hereafter organized under any general law other than this article shall use the term "co-operative" or any other derivative of the term "co-operate" as part of its corporate name.

Added by L. 1913, ch. 454.

The provisions of article 3 of this law, including the foregoing section, took effect May 9, 1913; therefore, the word "hereafter," as used in the last sentence, refers to corporations organized subsequent to said date.

*ARTICLE 4

Laws Repealed; When to Take Effect

SECTION 50. Laws repealed.
51. When to take effect.

§ 50. Laws repealed. Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

§ 51. When to take effect. This chapter shall take effect immediately.

SCHEDULE OF LAWS REPEALED.

Laws of	Chapter	Section	Laws of	Chapter	Section
1868....	161....	All	1896....	460....	All
1871....	820....	All	1900....	518....	All
1876....	363....	All	1901....	520....	All
1887....	561....	All	1902....	438....	All
1890....	567....	All	1902....	457....	All
1892....	691....	All	1903....	525....	All
1895....	671....	All	1904....	446....	All
1896....	369....	All	1907....	646....	All

POWERS OF HEATING COMPANIES.

L. 1879, Ch. 317.—"An act to authorize the laying of pipes in the streets, avenues, and public places in the various cities, and villages of this state, for heating and other purposes."

Municipal authorities to carry out act.— § 1. The municipal authorities of the cities, towns, and villages of the state of New

*Re-numbered as article 4, §§ 50, 51, by Laws of 1913, chapter 454, in effect May 9, 1913. See footnote at the beginning of this law.

York are hereby authorized and empowered to carry out the provisions of this act.

Powers of heating corporations.— § 2. Any corporation or association formed or organized under the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February seventeenth, eighteen hundred and forty-eight, or under any of the amendments to said act, or under the "Act to provide for the organization and regulation of certain business corporations," passed June twenty-first, eighteen hundred and seventy-five, shall have full power to manufacture, furnish, and sell such quantities of hot water, hot air, or steam as may be required in the city, town, or village where the same shall be located; and such corporation shall have power to lay pipes or conductors for conducting hot water, hot air, or steam through the streets, avenues, lanes, alleys, squares, and highways in such city, village, or town, with the consent of the municipal authorities of said city, town, or village, and under such reasonable regulations and conditions as they may prescribe; and whenever any such permission shall be granted, it shall only be upon the condition that reasonable compensation shall be paid therefor, and upon a further condition that a satisfactory bond shall be given to secure the city, town, or village, against all damages in the use of said pipes. The amount of the compensation, and the manner of its payment, and the amount of the bond shall be first fixed and determined by said municipal authorities, before any pipes, as provided for by this act, shall be laid in any city, town, or village, of this State, and that all such permissions heretofore given by any of said municipal authorities, where the above terms have been complied with, are hereby confirmed.

The acts above referred to are L. 1848, ch. 40, and L. 1875, ch. 611.

Chapter 317, Laws of 1879, printed in its entirety above was neither embodied into any of the Consolidated Laws of 1909, nor was it repealed by said laws. It is therefore an existing statute, although not contained in any other book purporting to contain the laws of New York State relating to corporations.

NATURAL GAS COMPANIES.

L. 1889, Ch. 422, entitled: "An act to provide for the organization and regulation of natural gas companies, being 'An act supplemental to chapter six hundred and eleven of the laws of one thousand eight hundred and seventy-five, entitled "An act to provide for the organization and regulation of certain business corporations." ' "

Section 1. It shall be lawful for any corporation organized under chapter six hundred and eleven of the laws of one thousand eight hundred and seventy-five, and acts amendatory thereto, for the purpose of boring, drilling, digging or mining for natural gas, and conveying and distributing the same in pipes, and vending said gas to the consumers thereof; to purchase, lease, secure and convey such real estate, and such only, as may be necessary for the convenient transaction of their business; and to effectually carry on the operations of such corporation.

§ 2. Such corporation is authorized to dig and trench for, and lay their pipes along or under any of the public roads or highways, or through or under any of the waters within the limits of this State: provided the same shall not be so done as to incommode the public use of said highways, or interrupt the navigation of said waters. Provided, however, that no pipe-line for the purpose aforesaid shall be constructed across, along, or upon any public highway, without the consent of the commissioners of highways of the town in which such highway is located, upon such terms as may be agreed upon with such commissioners; or upon the order of the general term of the supreme court of the department in which such highways are situated, made upon petition, and notice to the commissioners of highways of such town, according to the practice, or order of the court, or an order to show cause; and in such manner, and upon such terms as shall be ordered by the court.

§ 3. No pipe-line shall be constructed into or through any incorporated city or village in this State, unless the same be sanctioned by a majority of the common council of such city, or trustees of such village, by a resolution adopted at a regular meeting of such common council, or board of trustees, which resolution shall prescribe the terms upon which consent is granted. Nothing in this or the preceding section shall be construed or held to confer

any other right than the relinquishment of the public rights, and the consent of the people to the construction of such pipe-line, and shall not affect any private right.

§ 4. When any corporation formed as aforesaid has fully completed its organization, the said corporation, its agents or employees shall be authorized to enter upon any lands for the purpose of making surveys, and to agree with the owner of the property as to the amount of compensation to be paid such owner for the right of laying and maintaining pipes for conveying natural gas on or beneath the surface of said lands.

§ 5. Before entering upon or using any lands, for the purpose of conveying natural gas as aforesaid; the said corporation shall cause a survey and map to be made, of the proposed route of said pipe-line, by, and on which the lands of each owner and occupant through which the same may run shall be designated, which map shall be signed by the president of said corporation and its secretary; and be filed in the office of the county clerk of the county in which the lands are situated; and the said corporation, by any of its officers, agents and servants, may enter upon any lands for the purpose of making such survey and map.

§ 6. In all cases where the said corporation shall be unable to agree with the person owning, or having an interest in any lands, for the right to lay gas pipes through the same, the supreme court, at any special term thereof, held in the judicial district in which the lands are situated, shall, on application of the said corporation, after ten days' written notice, personally served on such person, or where such notice cannot be personally served within this State, or such persons shall be incapacitated from receiving personal notice, then by service in such manner as the court shall direct, appoint three disinterested citizens of the county in which such lands are situated, who shall be freeholders, as commissioners, to determine the damage sustained by each of said persons, by reason of the use of his or her lands, for the purpose above recited. Such commissioners shall take the oath required by the Constitution of public officers, and shall personally examine each parcel of land proposed to be used, and shall estimate and report to said court at any term thereof held in said judicial district, on ten days' notice served as aforesaid, on the parties in interest, the several sums which they shall decide to be just compensation to such owners, or person interested, for the use of such property as afore-

said. Such commissioners may examine witnesses upon hearing before them, and shall have power to administer oaths to such witnesses, and all the evidence they shall take shall accompany their report to the court. On the presentation of such report the said court may confirm or amend, or appoint new commissioners who shall proceed in like manner as the first commissioners, and whose reports, subject to amendment as aforesaid, shall be final, and shall be confirmed by said court. Said commissioners shall receive from the said corporation the sum of three dollars per day each, for the time employed by them in the performance of their duties, together with the amount which they shall certify, on their oaths as correct, in their said report, for incidental expenses connected with their work, including the preparation of said report.

§ 7. Whenever any report of such commissioners shall have been confirmed by the said supreme court, the said corporation may deposit, as the court directs, or pay to the said owners or persons, as court directs, the sum mentioned in said report, in full compensation for the right or easement so required and thereupon the said corporation shall be seized of said easement and discharged from all claim by reason of such appropriation and use.

Chapter 422, Laws 1889, printed in its entirety above was neither consolidated nor repealed by the laws of 1909. It is therefore an existing statute, although not found in any other book purporting to contain the laws of New York State relating to corporations.

TRANSPORTATION CORPORATIONS LAW

Laws of 1909, Chapter 219, Entitled, "An Act in Relation to Transportation Corporations, Excepting Railroads, Constituting Chapter Sixty-three of the Consolidated Laws," as Amended.

CHAPTER 63 OF THE CONSOLIDATED LAWS

Transportation Corporations Law

Article 1. Short title (§ 1).
2. Ferry corporations (§§ 2–6).
3. Navigation corporations (§§ 10–14).
4. Stage-coach corporations (§§ 20–25).
5. Tramway corporations (§§ 30–33).
6. Pipe line corporations (§§ 40–54).
7. Gas and electric light corporations (§§ 60–66).
8. Water-works corporations (§§ 80–85).
9. Telegraph and telephone corporations (§§ 100–106).
10. Turnpike, plank-road and bridge corporations (§§ 120–152).
*10-a. Freight terminal corporations (§§ 153–159).
11. Laws repealed; when to take effect (§§ 160, 161).

ARTICLE 1

Short Title

Section 1. Short title.

§ 1. Short title. This chapter shall be known as the "Transportation Corporations Law."

In addition to the provisions of the Transportation Corporations Law, which particularly relate to corporations formed thereunder, other provisions applicable to such corporations are contained in the General Corporation Law and the Stock Corporation Law, respectively, pages 1 to 538.

ARTICLE 2

Ferry Corporations

Section 2. Incorporation.
3. Half of capital to be paid in before commencing business.
4. Powers.
5. Effect of failure to pay in capital stock.
6. Must post schedule of rates.

§ 2. Incorporation. Three or more persons may become a corporation for conducting and managing a ferry, by executing,

* New article, added by Laws of 1911, chapter 778, in effect July 25, 1911.

acknowledging and filing a certificate, stating the name of the corporation, the places from and to which the ferry established or to be established shall run; the term not exceeding fifty years for which the corporation is to exist, the amount and number of shares of its capital stock; the number of directors thereof, not less than three nor more than fifteen, and the names of the directors for the first year.

Formerly L. 1890, ch. 566, § 2.

For form of certificate of incorporation, see Form No. 371.

A carrier exclusively on water by means of tugs and boats, although a common carrier as that term is defined by the common law, is not a common carried as defined by the Public Service Commissions Law, and is not subject to the jurisdiction of the Public Service Commission. In Matter of Murray's Line v. D. & H. Co. Opinion by Pub. Serv. Com., 2d Dist., July 8, 1909.

Incorporators.— All incorporators must be of full age, and at least two-thirds of them citizens of the United States, and at least one of them a resident of the State of New York. Gen. Corp. Law, § 4. Only natural persons can become incorporators. Id. Corporations, copartnerships and persons acting in a representative capacity, are, therefore, excluded from acting as incorporators. After the formation of the corporation, copartnerships may become stockholders, so also may executors, administrators, guardians or trustees. Stock Corp. Law, § 58. Any stock corporation may acquire, hold and dispose of the stock of any corporation in conformity with the provisions of the Stock Corp. Law, § 52.

Corporate name.— The name must not be the same nor similar to that of any other domestic corporation or of any foreign corporation authorized to do business in this State. Gen. Corp. Law, § 6. At any time after incorporation the name may be changed by proper proceedings. See Gen. Corp. Law, §§ 60–65. In the formation of corporations under this law the word "limited" should not be used as a part of the corporate title, as it can serve no good purpose and, if used, would create a misleading impression that the corporation had been organized under chapter 611, Laws of 1875, which was repealed in 1890. See, also, comments under "Liability of Stockholders," page 551.

Objects.— The objects stated in the certificate must be within the scope of this article of the law.

Term of existence.— The duration of the corporation cannot be for a longer term than fifty years. The corporate existence may, however, be extended. Gen. Corp. Law, §§ 37–41.

Capital stock.— The amount of capital stock must be definitely stated. The statutes contain express provisions permitting stock corporations to have preferred as well as common stock, and different classes of preferred stock, if the certificate of incorporation so provides, or to make preferred issues after organization. Stock Corp. Law, § 61. The amount of capital stock may be increased or reduced after incorporation, whenever necessary. Stock Corp. Law, §§ 62–64. Partly paid stock may be issued if provided for in the certificate of incorporation. Stock Corp. Law, § 60.

Shares of stock.— Under the foregoing provisions of section 2 there is no maximum or minimum limit as to the par value of shares, therefore the capital stock may be divided into such number of shares as the incorporators may elect, but the number of shares must be stated in the certificate of in-

corporation. The par value of the shares may be increased or reduced after incorporation, if deemed desirable, without changing the amount of the capital stock. Stock Corp. Law, § 65.

Directors.— The number of directors must be definitely stated in the certificate of incorporation, and the number so stated must be within the maximum and minimum limits fixed by law. Whenever desirable after incorporation, the number of directors may be changed. Stock Corp. Law, § 26. Vacancies in the board of directors are to be filled in the manner prescribed in the by-laws. Stock Corp. Law, § 25. At least one of the directors must be a resident of the State of New York. Gen. Corp. Law, § 34. Directors need not be stockholders, if the certificate of incorporation or a by-law of stockholders so provides. Stock Corp. Law, § 25.

Additional powers.— If desired, the certificate of incorporation may provide for cumulative voting at elections of directors. Gen. Corp. Law, § 24; and may reserve the right to acquire, hold and dispose of the stocks and bonds of any other corporation. Stock Corp. Law, § 52.

Liability of stockholders.— The liability of stockholders of corporations formed under this article is regulated by the Stock Corp. Law, §§ 56–59. It will thus be seen that such corporations are what have been popularly termed "limited liability companies," without making any statement to that effect in the certificate, and without using the word "limited" as a part of the corporate title.

Filing and recording.— The certificate of incorporation must be filed and recorded in the office of the Secretary of State, and a copy thereof duly certified by the Secretary of State, or a duplicate original certificate, must be filed and recorded in the office of the clerk of the county in which the office of the corporation is to be located. Gen. Corp. Law, § 5. If a certificate is to be recorded in a county other than the one where it is executed, the county clerk's certificate should be attached, authenticating the act of the notary, justice of the peace, or commissioner of deeds taking the acknowledgment. The Secretary of State does not require such county clerk's certificate as to an acknowledgment taken within the State before a person duly authorized to take the same, but an acknowledgment or affidavit taken by a notary public in another State must be authenticated by the county clerk.

Fees.— In the office of the Secretary of State: Filing, ten dollars; recording, fifteen cents a folio. In the county clerk's office: Filing, six cents; recording, ten cents a folio. In addition, an organization tax of one-twentieth of one per cent. upon the capital stock must be paid to the State Treasurer before the certificate can be filed. For text of statutes regulating these payments, and information relative to remittances, see pages 293–297.

In the absence of proof of bad faith, a sale of ferry franchise by municipal officers is not necessarily illegal by reason of the fact that a minimum rate of ferriage is not fixed by the terms of sale, and that thereby a connecting railroad may, because of its powers to prorate a joint charge of ferriage and railroad fare, obtain an advantage over other bidders. Robinson v. Gilroy, 10 Misc. 205 (1894).

§ 3. Half of capital to be paid in before commencing business. No ferry corporation shall be authorized to commence business until at least one-half its capital shall have been actually paid in, nor until affidavits of such payment, sworn to by a

majority of the directors, shall have been filed, in each of the offices in which the certificate of incorporation is required to be filed.

Formerly L. 1890, ch. 566, § 3.

For form of affidavit, see post, Form No. 372.

§ 4. **Powers.** In addition to the powers conferred by the general and stock corporation laws, any such corporation shall have power to take by grant from any authority entitled by the laws of this state to make such grant, or by assignment, the franchise or right to establish and maintain ferries, at the place specified in the certificate of incorporation, and to hold and exercise such franchise or right and carry on the business appertaining thereto, subject to the rights of the mayor, aldermen and commonalty of the city of New York, or any other municipal corporation, or of the owner or owners of any legally existing ferry, or the vested rights of any other corporation whatever.

Formerly L. 1890, ch. 566, § 4.

For the provisions of the Highway Law relative to licenses, etc., for keeping ferries, see next succeeding page.

If a ferry company conducts its business with such care and skill as will make entrance upon its boats safe for persons of ordinary prudence, it meets the requirements of the law. Race v. Union Ferry Co., 138 N. Y. 644 (1893), revsg. 46 St. Rep. 325.

§ 5. **Effect of failure to pay in capital stock.** The capital stock of every such corporation shall all be paid in, one-half thereof within one year and the other half thereof within two years from its incorporation, or such corporation shall be dissolved.

Formerly L. 1890, ch. 566, § 5.

Mere failure to pay in the capital stock within the statutory time does not work a dissolution ipso facto; when the words of forfeiture are "such corporation shall be dissolved," liability for forfeiture of corporate rights is created, but proceedings are necessary to accomplish actual dissolution. People v. Buffalo Stone & Cement Co., 131 N. Y. 140 (1892); People v. U. & D. R. R. Co., 128 N. Y. 240 (1891); Denike v. N. Y., etc., Lime Co., 80 N. Y. 599 (1880); Matter of Brooklyn El. R. R. Co., 125 N. Y. 434 (1891); Matter of N. Y. & L. I. Bridge Co. v. Smith, 148 N. Y. 540 (1896).

§ 6. **Must post schedule of rates.** Every corporation operating any ferry in this state, or between this state and any other state, and from or to a city of five hundred thousand inhabitants or over, shall post in a conspicuous and accessible place in each of its ferryhouses, in plain view of the passengers, a schedule plainly printed in the English language, of the rates of ferriage

charged and authorized by law to be charged for ferriage over such ferry.

Formerly L. 1890, ch. 566, § 6.

Relative to posting schedule of rates, see, also, Highway Law, § 274, post, page 595.

The County Law (L. 1909, ch. 16), § 72, empowers boards of supervisors to alter and reduce ferry rates. For full text of said section, see page 658, post.

SECTION 1. The rate of ferriage to be charged for foot passengers by any ferry now or hereafter in operation between the city of New York and any point or points on the shores of the county of Richmond in the State of New York, shall not exceed five cents for the first six miles traversed and one cent in addition thereto for each mile or fraction thereof in excess of six. Laws of 1897, ch. 328.

ADDITIONAL PROVISIONS.

In addition to the foregoing article of the Transportation Corporations Law, other provisions in relation to ferries in the Highway Law, are as follows, to wit:

§ 270. **Licenses.**— The county court in each of the counties of this state or the city court of a city, may grant licenses for keeping ferries in their respective counties and cities, to such persons as the court may deem proper, for a term not exceeding five years. No license shall be granted to a person, other than the owner of the land through which that part of the highway adjoining to the ferry shall run, unless the owner is not a suitable person or shall neglect to apply after being served with eight days' written notice from such person of the time and place at which he will apply for such license, or having obtained such license, shall neglect to comply with the conditions of the license or maintain the ferry. Every license shall be entered in the book of minutes of the court by the clerk; and a certified copy thereof shall be delivered to the person licensed. When the waters over which any ferry may be used shall divide two counties or cities, or a county and city, a license obtained in either of the counties or cities shall be sufficient to authorize transportation of persons, goods, wares and merchandise, to and from either side of such waters. Highway Law (L. 1909, ch. 30), § 270; formerly L. 1890, ch. 568, § 170.

For forms of application, notice, proof of service of notice, license and clerk's certificate, see post, Forms Nos. 373–378.

§ 271. **Undertaking.**— Every person applying for such license shall, before the same is granted, execute and file with the clerk of the court his undertaking with one or more sureties, approved by the court, to the effect that he will attend such ferry with sufficient and safe boats and other implements, and so many men to work the same as shall be necessary during the several hours in each day, and at such rates as the court shall direct. Highway Law (L. 1909, ch. 30), § 271; formerly L. 1890, ch. 568, § 171.

For form of undertaking, see post, Forms Nos. 379, 380.

§ 272. **Appendages for rope ferries.**—Any person licensed to keep a ferry may, with the written consent of the town superintendent of the town where such ferry may be, erect and maintain within the limits of the highway, at such point as shall be designated in such consent, a post or posts, with

all necessary braces and appendages for a rope ferry. Highway Law (L. 1909, ch. 30), § 272; formerly L. 1890, ch. 568, § 172.

§ 273. **Superintendent of public works may lease right of passage.**—The superintendent of public works, may, where ferries are now maintained at tide-water, lease the right of passage for foot passengers across state lands adjoining tide-water for a period not exceeding ten years, on such conditions as he may deem advantageous to the state. Highway Law (L. 1909, ch. 30), § 273; formerly L. 1890, ch. 568, § 173.

§ 274. **When schedules to be posted.**—Every person licensed to operate or control any ferry in this state, or between this state and any other state, operating from or to a city of fifty thousand inhabitants or over, shall post in a conspicuous and accessible position outside and adjacent to each entrance to such ferry, and in at least four accessible places, in plain view of the passengers upon each of the boats used on such ferry; a schedule plainly printed in the English language of the rates of ferriage charges thereon, and authorized by law to be charged for ferriage over such ferry. If any such person shall fail to comply with the provisions of this section, or shall post a false schedule, he shall forfeit the sum of fifty dollars for each day's neglect or refusal to post such schedule or any of them, to be recovered by any person who shall sue therefor in any court of competent jurisdiction. Highway Law (L. 1909, ch. 30), § 274; formerly L. 1890, ch. 568, § 174, as am'd by L. 1900, ch. 313.

See, also, the provision as to posting schedule of rates contained in the Transportation Corporations Law, § 6.

ARTICLE 3

Navigation Corporations

SECTION 10. Formation of corporation.
11. Navigation between additional ports.
12. Payment of capital stock.
13. Ferries unauthorized.
14. Bicycles to be transported as baggage by steamboats.

§ 10. Formation of corporation. Seven or more persons may become a corporation, for the purpose of building for their own use, equipping, furnishing, fitting, purchasing, chartering, navigating or owning steam, sail or other boats, ships, vessels or other property to be used in any lawful business, trade, commerce or navigation upon the ocean, or any seas, sounds, lakes, rivers, canals or other waterways, and for the carriage, transportation or storing of lading, freight, mails, property or passengers thereon by making, signing, acknowledging and filing a certificate, stating the name of the corporation, the specific objects for which it is formed, the waters to be navigated, and in case of ocean steamers, the ports between which such vessels are intended to be navigated, the amount of its capital stock, which shall not be less than five

thousand, nor more than four million dollars, the term of its existence, not to exceed fifty years, the number of shares of which the capital stock shall consist, the number of directors thereof, not less than five nor more than thirteen, the names of the directors for the first year, and the name of the city, village or town and county in which its principal office is to be situated, the number of shares of stock which each subscriber of the certificate agrees to take, which must in the aggregate equal ten per centum of the capital and at least ten per centum of which must be paid in cash. Such certificate shall have attached thereto as a part thereof, the affidavit of at least three of such directors, to the effect that ten per centum of such capital stock has been in good faith subscribed, and at least ten per centum of such subscription has been paid in cash. No railroad corporation shall have, own or hold any stock in any such corporation.

Formerly L. 1890, ch. 566, § 10, as am'd by L. 1896, ch. 935; L. 1901, ch. 483.

For form of certificate of incorporation, see post, Form No. 382.

A carrier exclusively on water by means of tugs and boats, although a common carrier as that term is defined by the common law, is not a common carrier as defined by the Public Service Commissions Law, and is not subject to the jurisdiction of the Public Service Commission. In Matter of Murray's Line v. D. & H. Co. Opinion by Pub. Serv. Com., 2d Dist., July 8, 1909.

By chapter 483, Laws of 1901, the foregoing section was amended by striking out a provision which read as follows: "No corporation organized under this act, and designed to navigate any of the canals of the state, shall have a capital stock exceeding fifty thousand dollars."

For provisions exempting certain navigation companies from taxation for State and local purposes, see the Tax Law.

See comments under "Incorporators," "Corporate Name," "Objects," "Capital Stock," "Shares of Stock," "Directors," "Additional Powers," "Liability of Stockholders," "Filing and Recording," and "Fees," on pages 591, 592, all of which are applicable to corporations organized under this article.

The rigid common law rule of an innkeeper's responsibility for the guest's effects, is applicable between a steamboat company and passengers to whom it furnishes rooms and entertainment. Adams v. N. J. Steamboat Co., 151 N. Y. 163 (1896), affg. 9 Misc. 25.

Where a carrier sells tickets over a connecting line, and assumes to secure accommodations, it is liable for the failure to furnish proper accommodations, even when the ticket states that the company acts as agent and is not responsible beyond its own line. Bussman v. Western Transit Co., 9 Misc. 410 (1894), and cases cited.

Corporations Authorized under This Section May Not Organize under Business Corporations Law.

A corporation may not be organized under the Business Corporations Law to engage in the business of operating, chartering and letting scows, barges,

tugs and vessels in the lighterage business, for such objects are provided for in this section of the Transportation Corporations Law, and are limited to corporations formed thereunder. Opinion of Atty. Genl. (1913), Vol. 2, p. 73.

§ 11. Navigation between additional ports. Any such corporation desiring or intending to navigate boats, ships or vessels, upon any other waters, or in case of ocean steamers between any other or additional ports than those named in its original certificate, may from time to time file a further certificate, in the same manner as is prescribed by law for the filing of the original certificate, in which shall be stated such additional waters or ports upon or between which such corporation desires to navigate vessels, and thereafter such corporation may navigate its vessels upon such waters and between such ports, with the like effect as if they had been named in the original certificate.

Formerly L. 1890, ch. 566, § 11.

§ 12. Payment of capital stock. The capital stock of such corporation shall be paid in, at least one-half thereof, within one year, and the remainder within two years from its incorporation, or the corporation shall be dissolved. Within thirty days after the payment of the last instalment, a certificate stating that the whole amount of such capital stock has been paid in shall be made, signed and sworn to by the president and a majority of the directors of the corporation, and filed and recorded in the offices where the original certificates of incorporation were filed.

Formerly L. 1890, ch. 566, § 12.

For form of certificate, see post, Form No. 383.

The provision imposing the penalty of dissolution for failure to pay in the capital stock within the statutory time merely creates a liability for a forfeiture of corporate rights. Proceedings must be taken to accomplish an actual dissolution. Peo. v. U. & D. R. Co., 128 N. Y. 240 (1891); In re Brooklyn Elevated R. R. Co., 125 N. Y. 434 (1891); Denike v. N. Y., etc., Lime Co., 80 N. Y. 599 (1880).

§ 13. Ferries unauthorized. This article shall not authorize the formation of any ferry corporation to ply between the city of New York and any other point.

Formerly L. 1890, ch. 566, § 13.

§ 14. Bicycles to be transported as baggage by steamboats. It is hereby made the duty of the owners or lessees of any steamboat, or line of steamboats, except ferry boats navigating the Hudson river, or any other waters within the jurisdiction of this state, to receive and transport the bicycle of any passenger as ordinary baggage. A check, of convenient size and form, plainly

stamped with numbers, and furnished with a convenient strap, shall be affixed to such bicycle when so taken for transportation for a passenger by the agent or employee of such owners or lessees and a duplicate thereof given to the passenger or person delivering the same to him. Such bicycle shall be transported as baggage and subject to the same liabilities, and no such passenger shall be required to crate, cover or otherwise protect any such bicycle. Such bicycle shall be delivered without unnecessary delay, to the passenger, or any person acting in his behalf, at the place to which it was to be transported, or at a regular intermediate stopping place, upon notice to such agent or employee of such owners or lessees, in whose charge such bicycle shall have been given by such passenger, of not less than ten minutes, upon presentation of such duplicate check to such agent or employee of such owners or lessees.

The object and intent of this section is to compel the owners or lessees of any steamboat, or line of steamboats, navigating the waters of this state to furnish, without further charges other than the customary fare generally paid such owners or lessees as compensation for transporting any passenger and his ordinary baggage, the same facilities to passengers going by boat, to or from any point or points in this state, as is afforded those who go by railroad.

Any person or persons, partnership or corporation violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than two hundred and fifty dollars, or by imprisonment in a county jail for a period of not less than thirty days, or by both such fine and imprisonment.

New section; added by L. 1909, ch. 219, being prior thereto L. 1903, ch. 121.

ARTICLE 4

Stage-Coach Corporations

SECTION 20. Incorporation.
21. Alteration or extension of route.
22. Powers.
23. Existing routes and extensions.
24. Certain persons and corporations subject to public service commissions law.
25. Additional persons and corporations subject to the public service commissions law.

§ 20. Incorporation. Five or more persons may become a corporation for the purpose of establishing, maintaining and

operating any stage or omnibus route or routes for public use in the conveyance of persons and property elsewhere than in the city of New York, or any stage route or routes already established for a like public use, by making, signing, acknowledging and filing a certificate which shall state the name of the corporation, the number of years it is to continue, the route or routes upon which it is intended to run as near as practicable, the number of the directors thereof, not less than three nor more than five, the names of the directors for the first year, the amount of its capital stock, the place of residence of each subscriber thereto, and the number of shares of stock he agrees to take in such corporation.

Formerly L. 1890, ch. 566, § 20.

For form of certificate of incorporation, see post, Form No. 384.

See comments under "Incorporators," "Corporate Name," "Objects," "Capital Stock," "Shares of Stock," "Directors," "Additional Powers," "Liability of Stockholders," "Filing and Recording," and "Fees," on pages 591, 592, all of which are applicable to corporations under this article. No maximum limit is prescribed within which the term of existence of stage coach corporations is to be fixed.

§ 21. Alteration or extension of route. The directors may, by a vote of two-thirds of their number, at any time alter or extend the route or routes designated in the certificate of incorporation, upon making, acknowledging, and filing a certificate to that effect, in the offices where the original certificates of incorporation were filed.

Formerly L. 1890, ch. 566, § 21.

For form of certificate of extension, see post, Form No. 385.

§ 22. Powers. In addition to the powers conferred by the general and stock corporation laws, every such corporation shall have power:

1. To take and convey persons and property in stages and omnibuses, and to provide and run the necessary stages and omnibuses upon their route or routes for the public use and to receive compensation therefor.

2. To erect and maintain all necessary and convenient buildings, fixtures and machinery for the use and accommodation of their passengers and business.

Formerly L. 1890, ch. 566, § 22.

Where a stage coach company in New York City has a charter authorizing the transportation of passengers for hire, such charter does not authorize the carrying of exterior advertisement on its stages and it cannot restrain the enforcement of a city ordinance forbidding such advertisement. Fifth Ave. Stage Co. v. City of New York, 194 N. Y. 19 (1909); the board of aldermen of the City of New York have the power to enact ordinances in reference to the running of stages as may be necessary for the convenient use of the streets. Id.

§ 23. Existing routes and extensions. Any corporation incorporated under any law of this state heretofore enacted which owns and operates a lawfully established stage route which has been continuously operated by such company or its predecessors in title to such route for five years last past in any city of the first class, is hereby authorized and empowered to extend its existing routes at any time or times and to operate the same as extended with stages and omnibuses propelled by electricity or any other motive power, in and upon any streets and highways of such city, without further or other authority, proceeding, or consent required under any act, general, public, private or local; provided, however, that such extensions shall not become valid until they shall have been first approved by the public service commission which, on giving its approval, shall make a certificate of such extension or extensions of route as approved, which certificate shall be filed in the office of the secretary of state, and in the office of the clerk of the county in which such extension is located. Such company, on filing in said offices an acceptance of the extensions specified in such certificate and on operating such extensions, shall have the right to charge a fare not exceeding ten cents per passenger for a continuous ride over the whole or any part of the routes owned or operated by it, and shall pay a license fee to the city in which it operates equal to the charge now in force for licensing similar stages and omnibuses, and shall also pay to the comptroller or other chief fiscal officer of said city five per centum per annum of its gross receipts from the operation of said routes.

Formerly L. 1890, ch. 566, § 23, added by L. 1900, ch. 657.

When a stage coach company claimed the right to operate its stages upon a parkway by reason of an extension of route authorized under this section it was held that as such parkway was a part of the public park system the company acquired its privilege to operate subject to the paramount right of the municipality to reasonably regulate traffic; therefore, it is within the jurisdiction of the park department to prohibit vehicles of an excessive height from the use of said parkway. Peo. v. Shellenberg, A. D., First Dept. June, 1909.

§ 24. Certain persons and corporations subject to public service commissions law. Any person or any corporation who or which owns or operates any stage route in any city of one million inhabitants, or more, shall be deemed to be included within the meaning of the term "common carrier" as used in the public service commissions law, and shall be subject to all the provisions of the said law applicable to common carriers.

New provisions; added by L. 1909, ch. 219.

§ 25. Additional persons and corporations subject to the public service commissions law. Any person or any corporation who or which owns or operates a stage route or bus line wholly or partly upon and along a highway known as a state route or any road or highway constructed wholly or partly at the expense of the state or in, upon or along any highway, avenue or public place in any city of the first class having a population of seven hundred and fifty thousand or under, shall be deemed to be included within the meaning of the term "common carrier" as used in the public service commissions law, and shall be required to obtain a certificate of convenience and necessity for the operation of the route proposed to be operated, and shall be subject to all the provisions of the said law applicable to common carriers. Wherever the portion of such route, road or highway upon which such bus line or stage route is or shall be operated shall have been constructed partly at the expense of a railroad corporation, or street railroad corporation, it shall be the duty of the state highway commission to certify to the public service commission of the proper district a statement of the total sum contributed by such railroad or street railroad corporation for the purposes of such construction, and the public service commission may, in its discretion, require such person or corporation operating a bus line or stage route to contribute to the fund for maintenance of state and county highways within the county in which such bus line or stage route is operated a sum equal to five per centum of the sum paid by such railroad or street railroad corporation for construction, as a condition for further operating such bus line or stage route.

New section added by L. 1913, ch. 495.

ARTICLE 5

Tramway Corporations

SECTION 30. Incorporation.
31. Powers.
32. May acquire land by condemnation.
33. Crossings.

§ 30. Incorporation. Thirteen or more persons may become a corporation for constructing, maintaining and operating an elevated tramway, constructed of poles, piers, wires, rods, ropes, bars or chains, for the transportation of freight in suspended buckets, cars or other receptacles, for hire, by making, signing, acknowledging and filing a certificate stating the name of the corporation, the number of years it is to continue, the places from and to which such tramway is to be constructed, maintained and operated, its length as near as may be, the name of each county through or in which it is made or intended to be made, the amount of its capital stock and the number of shares into which it is to be divided, the number of the directors thereof, not less than three, the names and places of residence of the directors for the first year, the place of residence of each subscriber thereto and the number of shares he agrees to take in such corporation.

Formerly L. 1890, ch. 566, § 30.

For form of certificate of incorporation, see post, Form No. 386.

See comments under "Incorporators," "Corporate Name," "Objects," "Capital Stock," "Shares of Stock," "Directors," "Additional Powers," "Liability of Stockholders," "Filing and Recording," and "Fees," on pages 591, 592, all of which are applicable to corporations under this article. No maximum limit is prescribed within which the term of existence of tramway corporations is to be fixed.

§ 31. Powers. Every such corporation, in addition to the powers conferred by the general and stock corporation laws, shall have power:

1. To cause such examination and surveys for its proposed tramway to be made as may be necessary to the selection of the most advantageous route, and for such purpose by its officers and servants, to enter upon the lands or waters of any person, but subject to responsibility for all damages done thereto.

2. To lay out its tramway and to construct the same as hereby provided.

3. To erect and maintain all necessary and convenient buildings, stations, fixtures and machinery for the accommodation and transaction of its business.

Formerly L. 1890, ch. 566, § 31.

§ 32. May acquire land by condemnation. In case any such corporation is unable to agree for the purchase, use or lease of any real property required for the purposes of its incorporation, it shall have the right to acquire title to the same by condemnation.

Formerly L. 1890, ch. 566, § 32.
See the provisions of the Condemnation Law, post.

§ 33. Crossings. Whenever any tramway, constructed by any such corporation, shall cross a railroad, highway, turnpike, plank-road or canal, such tramway shall be so constructed as not to interfere with the free use of such railroad, highway, turnpike, plank-road or canal for the purposes for which it was intended.

Formerly L. 1890, ch. 566, § 33.

ARTICLE 6

Pipe Line Corporations

SECTION 40. Incorporation.
41. Location of line.
42. Condemnation of real property.
43. Railroad, turnpike, plank-road and highway crossings.
44. Construction across and along canals, rivers and creeks.
45. Consent of local authorities.
46. Construction through villages and cities.
47. Over Indian reservations.
48. Over state lands.
49. Additional powers.
50. Use of line to be public; storage; liable as common carriers; rates and charges.
51. Receipts for property; cancellation of vouchers; delivery of property.
52. Monthly statements.
53. Fences; farm crossings and use of line not inclosed.
54. Taxation of property.

§ 40. Incorporation. Twelve or more persons may become a corporation for constructing and operating for public use, except in the city of New York, lines of pipe for conveying or transporting therein petroleum, gas, liquids or any products or property, or for maintaining and operating any line of pipe already

constructed and owned by any corporation, person or persons, except in such city, for the public use, by making, signing, acknowledging and filing a certificate stating the name of the corporation, the number of years it is to continue, the places from and to which it is to be constructed or maintained and operated, its length as near as may be, the name of each county through or into which it is to be constructed; the amount of its capital stock, which shall not be less than fifteen hundred dollars for every mile of pipe constructed or proposed to be constructed, and the number of shares of which it shall consist; the number of directors not less than seven, and the names and places of residence of the directors for the first year, and the place of residence of each subscriber and the number of shares he agrees to take in such corporation, which must in the aggregate equal ten hundred and fifty dollars for every mile of pipe constructed or proposed to be constructed, and twenty-five per centum of which must be paid in cash. Such certificate shall have indorsed thereon or appended thereto and as a part thereof, an affidavit made by at least three of the directors named therein that at least ten hundred and fifty dollars of stock for every mile of line proposed to be constructed or maintained and operated has been in good faith subscribed, and twenty-five per centum paid in money thereon, and that it is intended in good faith to construct or to maintain and operate the line of pipe mentioned in such certificate, and that such corporation was not projected or formed with the intent or for the purpose of injuring any person or corporation, nor for the purpose of selling or conveying its franchise to any person or corporation, nor for any fraudulent purpose.

Formerly L. 1890, ch. 566, § 40.

For form of certificate of incorporation, see post, Form No. 387.

See comments under "Incorporators," "Corporate Name," "Objects," "Capital Stock," "Shares of Stock," "Directors," "Additional Powers," "Liability of Stockholders," "Filing and Recording," and "Fees" on pages 591, 592, all of which are applicable to pipe line corporations, but it should be carefully noted that the capital stock of pipe line corporations "shall not be less than $1,500 for every mile of pipe constructed or proposed to be constructed." There is no maximum limit for the duration of these corporations.

§ 41. Location of line. Every such corporation shall before commencing the construction of its pipe line in any county, or any proceeding for the condemnation of real property, plainly and distinctly mark and designate the line adopted and located

by it by a line of stakes consecutively numbered and equally distant, and not more than twenty rods from each other, so that each line can be definitely known and ascertained in all places, and make a map and survey of the route so located and staked out, and shall indicate thereon plainly the points where such route crosses each parcel of land to which it has not acquired title by agreement, and shall cause such map and survey to be certified by the president and engineer, and filed in the office of the clerk of the county into or through which the line so located and mapped passes, and shall give to the owner or occupant, if he is known or can be ascertained, of every parcel of land through which such route passes, the title to which has not been acquired by purchase, written notice of the filing of such map and survey, stating that such route passes over or across such owner's or occupant's lands, and that the route thereof is indicated thereon by such line of stakes. Any occupant or owner of such lands feeling aggrieved by the proposed location may, within fifteen days after the service of such notice, give ten days' written notice to the corporation, by service upon the president, engineer, or any director thereof, and to the owner or occupant of any lands to be affected by the alteration to be proposed by him, of the time and place of an application to be made by him to a special term of the supreme court in the judicial district in which the lands are situated for the appointment of commissioners to relocate such line. If upon the hearing the court shall consider that sufficient cause exists therefor, it shall appoint three disinterested persons commissioners to examine the route located and the proposed alteration thereof, and direct the mode of proceeding, who shall report to the court the facts relating thereto and their opinion as to the proposed alteration, and what, if any, alteration should be made in such line, and the court shall thereupon make such order as it shall deem proper in relation to such alteration, and determine the location of such line, and fix and adjust the costs, fees and charges of the commissioners, and the costs and charges of the proceedings, and direct by which party the same shall be paid, and may enforce payment thereof by proceedings as for a contempt of court, for refusal to pay costs directed to be paid by an order of the court, and such order shall be final as to the location of the line upon the lands embraced therein. Such corporation shall not commence the work of constructing or laying its line of pipe, or institute proceedings for

the condemnation of real property, in any county, until after the expiration of fifteen days from the service by it of the notice herein required, nor until all applications for a re-location of its line in such county, if any are made, have been finally determined.

Formerly L. 1890, ch. 566, § 41.
For forms under this section, see post, Forms Nos. 388–393.

§ 42. Condemnation of real property. In case such corporation is unable to agree for the purchase of any real estate required for the purposes of its incorporation, and its line of pipe in the county in which such real estate is situated has been finally located, it shall have the right to acquire title thereto by condemnation, but such corporation shall not locate or construct any line of pipe through or under any building, dooryard, lawn, garden or orchard, except by the consent of the owner thereof in writing duly acknowledged, nor through any cemetery or burial ground, nor within one hundred feet of any building, except where such line is authorized by public officers to be laid across or upon any public highway, or where the same is laid across or upon any turnpike or plank-road. No pipes shall be laid for the purpose of carrying petroleum, gas or other products or property through or under any of the streets in the cities of this state, unless such corporation shall first obtain the consent of a majority of the property owners on the streets which may be selected for the laying of pipes, and such pipe line shall be located with all reasonable care and prudence so as to avoid danger from the bursting of the pipes.

Formerly L. 1890, ch. 566, § 42.
For provisions of Condemnation Law, see post.

§ 43. Railroad, turnpike, plank-road and highway crossings. Whenever any line of pipe of any such corporation shall necessarily cross any railroad, highway, turnpike or plank-road, such line of pipe shall be made to cross under such railroad, highway, turnpike or plank-road and with the least injury thereto practicable, and unless the right to cross the same shall be acquired by agreement, compensation shall be ascertained and made to the owners thereof, or to the public in case of highways, in the manner prescribed in the condemnation law, but no exclusive title or use shall be so acquired as against any railroad, turnpike or plank-road corporation, nor as against the rights of the people

of this state in any public highway, but the rights acquired shall be a common use of the lands in such manner as to be of the least practical injury to such railroad, turnpike or plank-road, consistent with the use thereof by such pipe line corporation, nor shall any such corporation take or use any lands, fixtures or erections of any railroad corporation, or have the right to acquire by condemnation the title or use, or right to run along or upon the lands of any such corporation, except for the purpose of directly crossing the same when necessary.

Formerly L. 1890, ch. 566, § 43.

§ 44. Construction across and along canals, rivers and creeks. No pipe line shall be constructed upon or across any of the canals of this state, except by the consent of and in the manner and upon the terms prescribed by the superintendent of public works, unless constructed upon a fixed bridge across such canal, and with the consent of the person for whose benefit such bridge is constructed and maintained, or upon such a bridge over the canal, at the crossing of a public highway or street, with the consent of the public officers having the supervision thereof, or of the municipal authorities of any village or city within whose limits such bridge may be, nor shall the pipes of any such corporation be laid through or along the banks of any of the canals of this state, nor through or under any of its rivers or creeks, unless such pipes shall be encased so as to prevent leakage, in such manner as shall be approved by the superintendent of public works.

Formerly L. 1890, ch. 566, § 44.

§ 45. Consent of local authorities. No pipe line shall be constructed across, along or upon any public highway without the consent of the commissioners of highways of the town in which such highway is located, upon such terms as may be agreed upon with such commissioners. If such consent or the consent of the commissioners or municipal authorities required by the preceding section can not be obtained, application may be made to the appellate division of the supreme court of the department in which such highway or bridge is situated for an order permitting the corporation to construct its line across, along or upon such highway, or across or upon such bridge. The application shall be by duly verified petition and notice which shall be served upon

the commissioners of highways of the town in which the highway is situated, or the municipal authorities of the village or city where such bridge is located, according to the practice or order of the court, or by an order to show cause, and the court upon the hearing of the application may grant an order permitting the line to be so constructed in such manner and upon such terms as it may direct.

Formerly L. 1890, ch. 566, § 45.
For forms under this section, see post, Forms Nos. 394–396.

§ 46. Construction through villages and cities. No pipe line shall be constructed into or through any incorporated village or city in this state, unless authorized by a resolution prescribing the route, manner of construction and terms upon which granted, adopted at a regular meeting of the board of trustees of the village or the common council of the city by a two-thirds vote of such board or council, but such resolution shall not affect any private right. No pavement shall be removed in any city under the provisions of this article, unless done under the direction of the common council, nor until such corporation shall give a bond in such sum as the common council may require for the replacing of any pavements which shall have been removed. In case any pavement shall have been removed and not properly relaid, the common council may bring suit in any court of record, for the cost of relaying such pavement against any such corporation. No gas-houses shall be erected in any city under the provisions of this article, for supplying gas to the inhabitants, unless consent is first given by the corporate authorities of the city.

Formerly L. 1890, ch. 566, § 46.

§ 47. Over Indian reservations. Such corporation may contract with the chiefs of any nation of Indians over whose lands it may be necessary to construct its pipe line for the right to construct such pipe line upon such lands, but no such contract shall vest in the corporation the fee of such lands, nor the right to occupy the same for any purpose other than for the construction, operation and maintenance of such pipe line, nor shall such contract be valid or effectual until the same has been ratified by the county court of the county in which the lands are situated.

Formerly L. 1890, ch. 566, § 47.

§ 48. Over state lands. The commissioners of the land office shall have power to grant to any pipe line corporation any lands belonging to the people of this state which may be required for the purposes of its incorporation on such terms as may be agreed on by them, or such corporation may acquire title thereto by condemnation, and if any lands owned by any county, city or town be required by such corporation for such purposes, the county, city or town officers having charge of such lands may grant them to such corporation upon such terms and for such compensation as may be agreed upon.

Formerly L. 1890, ch. 566, § 48.
For provisions of Condemnation Law, see post.

§ 49. Additional powers. Every corporation formed under this article shall in addition to the powers conferred by the general and stock corporation laws have power:

1. To cause such examinations and surveys of its proposed line of pipe to be made as may be necessary to the selection of the most advantageous route, and for such purpose by its officers, agents or servants may enter upon the lands or waters of any person, upon, through or across which such corporation can construct its line of pipe, under the provisions of this article, subject however to liability for all actual damage which shall be done thereto.

2. To take and hold such voluntary grants of real estate and other property, as shall be made to it to aid in the construction, maintenance, operation and accommodation of its pipe line.

3. To lay out its pipe line route not exceeding twelve feet in width, but at the terminations of such line and at all receiving and discharging points and at all places where machinery may properly or must necessarily be set up for the operation of such pipe line it may take such additional width, and for such length as may be necessary.

4. To take and convey through pipes any property, substance or product capable of transportation therein by any force, power or mechanical agency, and to erect and maintain all necessary and convenient buildings, stations, fixtures and machinery for the purposes of its incorporation.

5. To regulate the time and manner in which property shall be transported over its pipe lines, and the compensation to be paid therefor, but such compensation shall not exceed the sum or be

above the rate of twenty-five cents per one hundred miles for the transportation of forty-two gallons of any product transported on lines of one hundred miles in length or over, which shall be reckoned and adjusted upon the quantity or number of gallons delivered by such corporation at the point to which it shall have undertaken to deliver the same.

Formerly L. 1890, ch. 566, § 49.

§ 50. Use of line to be public; storage; liable as common carriers; rates and charges. The pipe lines of every such corporation shall be open for transportation to the public use, and all persons desiring to transport products through such pipe line shall have the absolute right upon equal terms to such transportation in the order of application therefor, on complying with the general requirements of such corporation, as to delivery for and payment of such transportation, but no application for such transportation shall be valid beyond or for a greater quantity of products than the applicant shall then own and have ready for delivery for transportation to such corporation, and every such corporation shall provide suitable and necessary receptacles for receiving all such products for transportation, and for storage at the place of delivery until the same can reasonably be moved by the consignee, and shall be liable as common carriers therefor from the time the same is delivered for transportation until a reasonable time after the same has been transported to the place of consignment and ready for delivery to the consignee, which time shall be fixed by general regulation by the corporation, and shall not be less than two days from and after the same shall be ready for delivery and notice thereof given to such consignee, and all rates and charges of every description, for or on account of or in any manner connected with the transportation of any products, shall be fixed by such corporation by general rules and regulations, which shall be applicable to all parties who shall transport any products through such pipe line, or deliver or contract to deliver products for transportation and shall be written or printed and exposed to public view and at all times open to public examination.

Formerly L. 1890, ch. 566, § 50.

§ 51. Receipts for property; cancellation of vouchers; delivery of property. No receipt, certificate or order of any kind shall be made, accepted or issued by any pipe line corporation for

any commodity unless the commodity represented by them is actually in possession of the corporation at the time of making, issuing or acceptance thereof. Whenever any such corporation shall have parted with the possession of any commodity and received therefor any order, voucher, receipt or certificate, such order, voucher, receipt or certificate shall not be issued or used again, but shall be canceled with the word "canceled" stamped or printed legibly across the face thereof, and such canceled order, voucher, receipt or certificate shall be filed and preserved by such corporation and a record of the same kept by the secretary thereof. No petroleum or other commodity received for transportation by such corporation shall be delivered to any person without the presentation and surrender of all vouchers, receipts, orders or certificates that have been issued or accepted for the same.

Formerly L. 1890, ch. 566, § 51.

§ 52. Monthly statements. Every pipe line corporation shall make monthly a specific statement showing the amount of all commodities received, the amount delivered during the month, and the stock on hand on the last day of each month of the year, and how much of such stock is represented by outstanding certificates, vouchers, receipts or orders, and how much in credit balances on the books of the corporation. Such statement shall be made on or before the tenth day of the succeeding month and verified by the oath of the president and secretary that it is in all respects true and correct, and shall be filed within three days thereafter in the county clerk's office in the county where the principal office of the corporation is located, and a true copy of the same posted in a conspicuous place in its principal office for at least thirty days thereafter.

Formerly L. 1890, ch. 566, § 52.
For form of statement, see post, Form No. 397.

§ 53. Fences; farm crossings and use of line not inclosed. It shall not be necessary for any such corporation to fence the lands acquired by it for the purposes of its incorporation. But, if not inclosed by a substantial fence, the owner of the adjoining lands from whom such lands were obtained, his heirs or assigns, may occupy and use such lands in any manner not injurious to the interests of the corporation and shall not be liable therefor, or for any trespass upon any such lands except for wilful or

negligent injuries to the pipes, fixtures, machinery or personal property of the corporation. If the corporation shall keep such lands inclosed it shall construct and provide all suitable and necessary crossings with gates for the use and convenience of any owners of lands adjoining the portion of its lands so inclosed, and no claim shall be made by it against any owner of adjoining lands to make or contribute to the making or maintaining of any division fence between such adjoining lands and its lands, and if it shall neglect to keep and maintain substantial fences along its lands the owners of adjoining lands may construct and maintain all farm or division fences, and all line fences crossed by such pipe line in the same manner as though it had not acquired such lands for such pipe line, and it shall be liable for all injuries to such fences caused or done by any of its officers or agents, or any persons acting in their or its behalf, or by any laborer in its or their employ or in the employ of any of its contractors.

Formerly L. 1890, ch. 566, § 53.

§ 54. Taxation of property. The real estate and personal property belonging to any pipe line corporation in this state, shall be assessed and taxed in the several towns, villages and cities in the same manner as the real estate and personal property of railroad corporations are assessed and taxed, and such corporation may pay such taxes or commute therefor in the same manner as railroad corporations.

Formerly L. 1890, ch. 566, § 54.
For Tax Laws, see post.

ARTICLE 7

Gas and Electric Light Corporations

SECTION 60. Incorporation.
61. Powers.
62. Gas and electric light must be supplied on application.
63. Deposit of money may be required.
64. Buildings may be entered for the examination of meters, pipes, fittings, wires and works.
65. Refusal or neglect to pay rent.
66. No rent for meters to be charged.

§ 60. Incorporation. Three or more persons may become a corporation for manufacturing and supplying gas for lighting the streets and public and private buildings of cities, villages and

towns in this state, or for manufacturing and using electricity for producing light, heat or power, and in lighting streets, avenues, public parks and places, and public and private buildings of cities, villages and towns within this state, or for two or more of such purposes, by making, signing, acknowledging and filing a certificate stating the name of the corporation, its objects, the amount of its capital stock, the term of its existence not to exceed fifty years, the number of shares of which the stock shall consist, the number of directors not less than three nor more than thirteen, the names and places of residence of the directors for the first year, and the names of the towns, villages, cities and counties in which the operations of the corporation are to be carried on, and thereupon the persons who shall have signed the same, their associates and successors shall be a corporation by the name stated in the certificate.

Formerly L. 1890, ch. 566, § 60, as am'd by L. 1900, ch. 575.

For form of certificate of incorporation, see post, Form No. 398.

See comments under "Incorporators," "Corporate Name," "Objects," "Term of Existence," "Capital Stock," "Shares of Stock," "Directors," "Additional Powers," "Liability of Stockholders," "Filing and Recording" and "Fees," on pages 591, 592, all of which are applicable to gas and electric light corporations.

Public Service Commission.

No gas or electrical corporation is permitted to begin construction, or exercise any corporate right or franchise without first having obtained the approval of the above named commission. See Pub. Serv. Com. Law, § 68, post.

Scope of Section.

By the amendment of 1900, corporations may be formed for one or more of the purposes set forth therein. This change conforms the section to the decision in Peo. ex rel. Municipal Gas Co. v. Rice, 138 N. Y. 151 (1893).

A corporation heretofore organized for gas lighting may extend its objects so as to include electric lighting by filing an amended certificate pursuant to the Stock Corp. Law, § 32 (now § 18). It may also acquire the right to exchange its stock for that of an electric light company. Peo. ex rel. Municipal Gas Co. v. Rice, 138 N. Y. 151 (1893).

A corporation for the purpose of boring natural gas wells and conveying and furnishing gas for hire may be organized under the Business Corporations Law, and need not be formed under this act. Wilson v. Tennent, 61 A. D. 100 (1901), affd., 179 N. Y. 546.

Use of Highway.

The lighting of a highway is not only one of the uses to which the public ways may be devoted, but in the case of crowded thoroughfares, whether urban or rural, a duty devolves upon the municipality to supply it and in such cases it is one of the burdens of the fee which must be borne as an incident to the public right of traveling over the way and the abutting owner of the

fee is not entitled to compensation. Palmer v. Larchmont Elec. Co., 158 N. Y. 231 (1899), revsg. 6 A. D. 12.

For other cases on use of highway, see section 102, post.

A gas company, lawfully occupying a street with its mains and pipes, is bound to use its rights and to conduct its operations so as not to inflict injury upon neighboring property. Evans v. Keystone Gas Co., 148 N. Y. 112 (1895).

A town may in a proper case grant a franchise authorizing a corporation to carry poles in its highways and string wires thereon for the purpose of conveying electricity for lighting purposes. Van Siclen v. Jamaica Electric Light Co., 45 A. D. 1, affd., 168 N. Y. 650 (1901); Palmer v. Larchmont Electric Co., 158 N. Y. 231 (1899).

A provision in a contract between a town board and a gas company that no other lighting company shall have the consent of the town board to lay its pipes within the town during the term of the agreement is not binding. Parfitt v. Ferguson, 159 N. Y. 111 (1899), affg. 3 A. D. 176.

In stringing its wires, an electric company has no right to cut branches of trees belonging to abutting owners, unless such course is demanded by a necessity which cannot be avoided by insulating the wires. Van Siclen v. Jamaica Electric Light Co., 45 A. D. 1, affd., 168 N. Y. 680 (1901).

A gas light corporation has no right to lay its pipes in a country highway without first securing the consent of the adjoining owners. Bloomfield Gas Co. v. Calkins, 62 N. Y. 386 (1875).

A grant by town authorities to lay conductors for gas through the public streets and highways, without limitation, is not restricted to existing streets and highways. Peo. ex rel. Woodhaven Gas Lt. Co. v. Deehan, 153 N. Y. 528 (1897), revsg. 11 A. D. 175. Such consent confers upon the company a franchise which is property and of which it cannot be divested except for cause and by due legal process. Id. If a portion of the town for which such consent was granted is thereafter incorporated into a village, such change does not alter the rights of the gas light company. Id.

Injury to Private Property.

Although an abutting owner does not own the fee he can recover for damages to shade trees caused by leaking mains. The fact that the city has a right of action does not amount to double recovery for the same injury. Donahue v. Keystone Gas Co., 181 N. Y. 313 (1905).

A gas company is not an insurer against explosions of gas carried into buildings by its pipes, but is simply bound to exercise that degree of care which the nature of the article it deals in and the consequences to be apprehended from an accident reasonably call for. Schmeer v. Gas Light Co. of Syracuse, 147 N. Y. 529 (1895).

It is the duty of employees of a gas company, in remedying a defective flow of gas through a house, to use care so that occupants may have an opportunity to properly protect themselves. Beyer v. Cons. Gas Co., 44 A. D. 158 (1899); German-Am. Ins. Co. v. Standard Gas Co., 67 A. D. 539 (1902).

Injury to plants in a greenhouse, by gas escaping from street mains, entitles the owner to damages from the company. Armbruster v. Auburn Gas Lt. Co., 18 A. D. 447, affd., 162 N. Y. 655 (1900).

A gas company may be prosecuted for damages caused by nuisance. Bohan v. Port Jervis Gas Lt. Co., 122 N. Y. 18 (1890), and cases there cited.

The fact that a franchise to manufacture gas was conferred upon a corporation by chapter 248, Laws of 1886, does not relieve it from liability for creating a nuisance. Rosenheimer v. Standard Gas Light Co., 36 A. D. 2 (1898).

Taxpayers' Actions.

An action cannot be maintained, under the Code, § 1948, against a corporation, to restrain laying of pipes in a city street, upon the ground that its corporate power had ceased because of failure to commence business within the statutory period, and that the work would be an injury to the highway and a nuisance. Peo. v. Equity Gas Lt. Co., 141 N. Y. 232 (1894).

In a taxpayer's action to prevent waste, an injunction will not lie to restrain an electric company from excavating in a public park in order to set poles where there is failure to allege that city officials intend to do an unlawful act. Sheehy v. McMillan, 26 A. D. 140 (1898).

A taxpayer's action to prevent the erection of poles and the stringing of wires in a public park must fail, unless it is shown that such acts will result in injury to or waste of city property. Sheehy v. Clausen, 26 Misc. 269 (1899), affd., 42 A. D. 622.

Semble, that where a taxpayer sues, upon the ground of fraud and illegality, to set aside a gas-lighting contract it is erroneous to set up each instance of illegality or fraud as an independent cause of action. Van Allen v. Dunton, 24 Misc. 230 (1898).

§ 61. Powers. Every such corporation shall have the following additional powers:

1. If incorporated for the purpose of supplying gas for light, to manufacture gas, and to acquire by purchase or otherwise natural gas and to sell and furnish such quantities of gas as may be required in each city, town and village named in its certificate of incorporation, for lighting the streets, and public or private buildings or for other purposes; and to lay conductors for conducting gas through the streets, lanes, alleys, squares and highways, in each such city, village and town, with the consent of the municipal authorities thereof, and under such reasonable regulations as they may prescribe; and such municipal authorities shall have power to exempt any such corporation from taxation on its personal property for a period not exceeding three years from the organization of the corporation. Any corporation authorized under any general or special law of this state to manufacture and supply gas shall have the like powers and privileges.

Formerly L. 1890, ch. 566, § 61, as am'd by L. 1900, ch. 575; L. 1902, ch. 596.

By the amendment of 1900 the restriction as to gas lighting in places not over five miles distant from each other was stricken out.

The provision relative to natural gas and the last sentence in the foregoing subdivision were added by the amendment of 1902. Natural gas companies may be organized under the Business Corporations Law. Wilson v. Tennent, 61 A. D. 100 (1901), affd., 179 N. Y. 546 (1904).

2. If incorporated for the purpose of using electricity for light, heat or power, to carry on the business of lighting by electricity

or using it for heat or power in cities, towns and villages within this state, and the streets, avenues, public parks and places thereof, and public and private buildings therein; and for the purposes of such business to generate and supply electricity; and to make, sell or lease all machines, instruments, apparatus and other equipments therefor, and to lay, erect and construct suitable wires or other conductors, with the necessary poles, pipes or other fixtures in, on, over and under the streets, avenues, public parks and places of such cities, towns or villages, for conducting and distributing electricity, with the consent of the municipal authorities thereof, and in such manner and under such reasonable regulations, as they may prescribe.

Any electric light company in any town or village in this state having a contract with any town or incorporated village for the lighting of streets, parks, squares or public buildings in any town or village, shall have the right and is hereby vested with the power and authority to acquire such real estate as may be necessary for the purposes of its incorporation, or acquire the right of way through any property in the same manner as is now vested by law in water-works companies. Such real estate or right of way shall be acquired in the manner and form prescribed by the general condemnation law of this state.

Formerly L. 1890, ch. 566, § 61, subd. 2.

The second paragraph of subdivision 2, giving electric light companies the right of condemnation, was added to this section by L. 1909, ch. 219. Prior thereto it was a separate statute, enacted by L. 1896, ch. 446.

3. Subject to the permission and approval of the proper public service commission, any two or more corporations organized under this article or under any general or special law of the state for the purpose of carrying on any business which a corporation organized under this article might carry on, may consolidate such corporations into a single corporation, and any such corporation may with the like permission and approval be merged with any other such corporation, upon complying with the provisions of the business corporations law relating to the consolidation of business corporations, and the stock corporation law relating to the merger of stock corporations.

Formerly L. 1890, ch. 566, § 61, subd. 3.

4. Any corporation organized under this article or under any general or special law of this state for the purpose of using elec-

tricity for light, heat or power in cities, other than of the first class, towns or villages within this state, may have and acquire the following additional powers, to wit: the power of supplying steam to consumers from a central station or stations through pipes laid in the public streets of the cities, towns and villages within this state, and for that purpose to lay, construct and maintain suitable pipes and conduits or other fixtures in, on and under the streets, avenues, public parks and places of such cities, towns or villages, with the consent of the municipal authorities thereof, and under such reasonable regulations as they may prescribe. For the purpose of acquiring the powers above specified any such corporation may make, sign, acknowledge and file in the same manner as an original or amended certificate of incorporation, a certificate stating that such corporation desires and intends to exercise the powers hereinabove specified. Upon the making, signing, acknowledging and filing such certificate, such corporation shall have and acquire for the purposes specified in such certificate all the rights, privileges and powers, and be subject to all the restrictions of district steam corporations, specified in sections twelve, thirteen and fourteen of the business corporations law.

Subd. 4, added by L. 1899, ch. 565.

For provisions empowering city, village and town authorities to contract for lighting streets, see post, pages 620–622.

The grant of a municipal franchise to an electric power company, containing several conditions, construed. Cataract Power & Conduit Co. v. Buffalo, 131 A. D. 485 (1909).

Where a corporation maintains wires, over which it furnishes power for the movement of machinery, although such business is unauthorized, it affords no excuse for the destruction of its property, and conceding that a telephone and telegraph company has the right to remove the wires from certain fixtures, by carrying wires away it becomes liable for conversion. Electric Power Co. v. Metropolitan Telephone & Teleg. Co., 75 Hun 68 (1894); Electric Power Co. v. The Mayor, 36 A. D. 383 (1899).

A lease by a gas company of all its property and franchises is ultra vires; but where the lessee has used the property recovery for the amount due for rent may be had. Bath Gas Light Co. v. Claffy, 26 N. Y. Supp. 287, 56 St. Rep. 426, 74 Hun 638, aff'd., 151 N. Y. 24 (1896).

An application of a holder of only one-thirtieth of one per cent. of the preferred stock of a gas corporation, to examine its books to determine whether it is selling gas below cost, will not be granted except in the furtherance of essential justice. Matter of Pierson, 28 Misc. 726, aff'd., 44 A. D. 215 (1899).

Even if the highway commissioners of the town were not the proper municipal authorities to give necessary consents to a gas corporation to lay its mains in the highways of such town, and even if it were not possible to show any formal action on the part of the highway commissioners, such objections are not, after a lapse of nearly fifty years, available to defeat the

corporation's right to exercise its franchises. Peo. ex rel. N. Y. & Richmond Gas Co. v. Cromwell, 89 A. D. 291 (1903), and cases therein cited.

An electric lighting company is subject generally to the rules which govern carriers and may not discriminate between its customers. Armour Packing Co. v. Edison Electric Illuminating Co., 115 A. D. 51 (1906).

A consumer may maintain an action to recover the excess paid where the complaint alleges that the company in furnishing the electricity unlawfully and unjustly discriminated against the consumer by charging a greater rate than charged to others for the same service under similar conditions. Armour Packing Co. v. Edison Electric Illuminating Co., 115 A. D. 51 (1906). The payments made will not be deemed voluntary if the consumer had no knowledge of the discrimination. Id.

Effect of Special Charter.

A charter granted by a special legislative act which gives a corporation a perpetual, full and complete franchise and right to manufacture and sell gas in a city and for that purpose to use the streets requires no secondary franchise from the municipal authorities, and a provision requiring local permission before any street could be disturbed merely related to the method of laying pipes. Provisions in the general law inconsistent with the special legislative charter are, as to it, inoperative. City of N. Y. v. N. Y. Mutual Gas Light Co., 207 N. Y. 647 (1912), affg. 140 A. D. 911 and 135 A. D. 260.

Attempt to Enjoin Competing Corporation upon the Ground of Unconstitutionality of Special Charter.

A corporation furnishing electricity to a city under a franchise which is not exclusive, cannot enjoin another competing corporation from furnishing electricity to the city upon the ground that it lacks corporate existence because the special act incorporating it is void; however, the corporation could have called upon the Attorney-General to bring an action to prevent an unlawful exercise of alleged corporate rights. Geneva-Seneca Elec. Co. v. Economic Power & Const. Co., 136 A. D. 219 (1910).

Injunction, When not to Issue.

Equity will not perpetually enjoin an electric lighting company from maintaining a dam where it is the only company furnishing light to a municipality and the damage to plaintiff is slight and recoverable at law. Schwarzenbach v. Oneonta Lt. & Power Co., 144 A. D. 884 (1911), modfd. 207 N. Y. 671.

Secondary Franchise, When Acted Upon Constitutes Property.

A franchise granted by the municipal authorities and acted upon and lived up to by the party receiving it is in effect a contract, and the privileges secured by such franchises are property rights which may not thereafter be withdrawn, impaired or violated by the municipality granting them. Matter of N. Y. Elec. Lines Co., 201 N. Y. 321, 333 (1911).

The granting of a permit by a municipality to a corporation to use the streets for lighting or other purposes is a license merely, revocable at the pleasure of such municipality, unless the grantee has accepted the permit and performed some substantial part of the work contemplated by the permission and sufficient to create a right of property and thus form a consideration for the contract. Matter of N. Y. Elec. Lines Co., 201 N. Y. 321 (1911), and cases cited.

A grant by the local authorities of permission to lay pipes in the streets confers a franchise which is property and of which the corporation cannot be divested except for cause and by due legal process. Peo. ex rel. Woodhaven Gas Lt. Co. v. Deehan, 153 N. Y. 528, revsg. 11 A. D. 175. If a portion of the town for which such franchise was granted is thereafter incorporated into a village, such change does not alter the rights of the corporation. Id.

Forfeiture of Special Franchise for Non-User.

Where, after a gas light company had for three years ceased to furnish gas but had paid to the municipality the tax imposed upon its special franchise in the streets, the receipt and retention of such tax by the municipality estops it from asserting that the company had forfeited its special franchise for non-user. Vil. of Fredonia v. Fredonia Central Gas Lt. Co., 84 Misc. 150 (1914).

The terms "corporate rights, privileges and franchises" in section 101 of the General Corporation Law must be differentiated from the special franchise or right conferred by the action of a municipality in giving the right to lay and maintain a piping system in its streets. The provisions of said section relate solely to the right of corporate existence and the corporate rights given by the statutes, but do not relate to the property rights acquired independently thereof. The corporate existence may be terminated either by legislative action or judicial decree, but such proceedings do not impair property rights of the corporation dissolved, such as franchise rights in public streets. Vil. of Fredonia v. Fredonia Central Gas Lt. Co., 84 Misc. 150 (1914), citing People v. O'Brien, 111 N. Y. 1.

Grant to Use Streets Extends to New Streets.

A gas lighting corporation, engaged in supplying gas for public use, which has been granted in general terms the right to use the streets of a municipality has the right to extend the privilege on new streets that are thereafter opened, since such grant contemplates that new streets are to be opened and old streets extended. Carroll v. Silver Creek Natural Gas & Imp. Co., 153 A. D. 630 (1912).

A grant by town authorities to lay conductors for gas through the public streets and highways without any express limitation is not to be deemed restricted to existing streets and highways, but is to be construed as extending to streets and highways as subsequently enlarged, changed or opened. Peo. ex rel. Woodhaven Gas Lt. Co. v. Deehan, 153 N. Y. 528, revsg. 11 A. D. 175.

Furnishing Gas to Other Municipalities.

A municipality which has granted the right to lay gas mains in its streets cannot interfere with the right of the corporation to lay branch mains to supply other municipalities named in its charter upon the ground that the consent of abutting owners has not been obtained, as the rights of such owners are not within the control of the municipality. Northern Westchester Lighting Co. v. Ossining, 154 A. D. 789 (1913). Subdivision 3 of this section authorizes a gas company to lay pipes through the streets of a village which has granted its consent without limitation, even if the purpose is to supply other towns and villages named in its certificate of incorporation. Id.

Consolidation with Business Corporation.

Subdivision 3 above does not authorize the consolidation of a corporation organized under the Transportation Corporations Law with one formed under the Business Corporations Law. Opinion of Atty. Genl. (1911), Vol. 2, p. 140,

Who Are "Municipal Authorities."

In the city of New York under the present charter the municipal authorities are the municipal assembly which gives its consent through appropriate ordinances. Ghee v. Northern Union Gas Co., 158 N. Y. 510 (1899). The administrative officers must be applied to for a permit that will allow the corporation to exercise its rights. Id.

Prior to the enactment of the Greater New York Charter the consent in the city of Brooklyn was required from the Common Council and not from the Park Department, although the electric conduits were to be laid in the parkway under the control of said Department. Peo. ex rel. Flatbush Gas Co. v. Coler, 190 N. Y. 268 (1907), revsg. 121 A. D. 898.

In New York city in 1896 the consent to lay wires for conducting and distributing electricity had to be obtained from the Board of Aldermen and not from the Board of Electric Control, established by L. 1887, ch. 716. Peo. ex rel. West Side Electric Co. v. Cons. Tel. & Elec. Subway Co., 187 N. Y. 58 (1907), affg. 110 A. D. 171.

Monopoly.

The consolidation of public lighting companies even if effected for the purpose of preventing competition, does not create a monopoly within the meaning of the statute, for no exclusive right is to be obtained, nor can the price of gas or electricity be arbitrarily fixed by the corporation as both are within the control of the Legislature. The Attorney-General will not be permitted to commence an action to annul the charter of a corporation because of such combination. Matter of Attorney-General, 124 A. D. 401 (1908).

Expiration of Secondary Franchise.

The Attorney-General cannot maintain an action to annul the charter of a corporation because it is claimed that the right to lay mains in the street has expired, as this is a question for the consideration of the municipal authorities and is no concern of the State. Matter of Attorney-General, 124 A. D. 401 (1908). Nor can he maintain an action under Code Civ. Pro. § 1948 seeking to have it adjudged that there is a usurpation of the franchise because of the expiration of such rights. Peo. v. Consolidated Gas Co., 130 A. D. 626 (1909).

No Presumption of Grant.

The Real Property Law, § 261, contains a section, applicable to construction of lines by electrical corporations, which reads as follows:

§ 261. **Maintenance of telegraph or other electric wires raises no presumption of grant.** Whenever any wire or cable used for any telegraph, telephone, electric light or other electric purpose, or for the purpose of communication otherwise than by the aid of electricity, is or shall be attached to, or does or shall extend upon or over any building or land, no lapse of time whatever shall raise a presumption of any grant of, or justify a prescription of any perpetual right to, such attachment or extension. Real Property Law, § 261 (L. 1909, ch. 52), added by Consolidated Laws; formerly L. 1886, ch. 40.

Cities May Contract for Lighting.

The General City Law (L. 1909, ch. 26), §§ 130, 131 and 132, contains provisions respecting contracts for supplying gas, the full text of which is as follows:

§ 130. **Contracts with corporations for supply of gas.** The municipal officers authorized by law to contract in behalf of any city of the first class, for the lighting of its streets may, from time to time, in the manner, upon the terms and with the conditions hereinafter provided contract in behalf of such city with any corporation or corporations then supplying gas therein for a supply of gas to such city, for and during such specified period not exceeding fifteen years as shall by such municipal officers be deemed to be for the best interests of such city and of the inhabitants thereof.

§ 131. **Letting of contract to be public.** Every such contract shall be let at public letting as required by law, and as a consideration for the execution and performance thereof, shall expressly provide for and secure to such city, prices lower than any now prescribed therein by law, and a progressive reduction in such price for each year during the continued performance of such contract and also adequate assurance of the continuing mutual performance of such contract according to the conditions thereof, with proper indemnity to either party to such contract against any possible violation, impairment, abrogation or supersession thereof, within the term specified.

§ 132. **Contract to provide for reduction of price.** Every such contract shall also provide and require that during the term therein specified the corporation party thereto may and shall supply gas to the inhabitants of such city at prices lower than those now or then charged therein by such corporation party thereto and progressively lower for each year of such term; any company or corporation bidding for such contract shall specify such several prices and reductions of price for the several classes and terms of gas supply, and the same shall be considered in the award of any such contract to the bidders or bidder therefor, and the corporation receiving any such contract shall be entitled to charge and collect the prices therein specified during the continuance thereof. Nothing in this article contained is intended or shall be construed to affect or impair any existing right or contract except with the consent of the parties to any such contract.

Towns May Contract for Lighting.

The Town Law (L. 1909, ch. 63), §§ 260–263, contains regulations concerning the establishment of lighting districts, as follows:

§ 260. **Establishment of lighting district.** It shall be lawful for the town board of any town in this state to contract for the lighting of the streets, avenues, highways, public places and public buildings therein, outside of the corporate limits of any incorporated village in said town, upon such terms and for such time or period, not exceeding ten years, as the town board may deem proper or expedient, and for the payment of the expenses thereof and may establish one or more lamps or lighting districts therein. It shall be lawful for the town boards of two or more adjoining towns in this state, whenever a petition for the establishment of a lamp or lighting district shall cover territory lying in two or more adjoining towns in this state, to contract for the lighting of the streets, avenues, highways, public places and public buildings therein, outside of the corporate limits of any incorporated village in said town, upon such terms and for such time or period not exceeding ten years, as the town boards of two or more adjoining towns in joint session assembled may deem proper or expedient and for the payment of the expenses thereof.

§ 261. **Petition.** No such contract shall be made unless a petition for such lighting, signed by a majority of the taxpayers of such lamp or lighting district, shall be filed with the town clerk of said town thirty days before the contract is made, but in the county of Nassau no such contract shall be made

unless the petition for such lighting is signed by a majority of the resident taxpayers in such lamp or lighting district, unless it be a renewal or extension of such a contract.

§ 262. **Notice of presentation of petition.** The town board, or if such district shall lie in two or more adjoining towns, then the town boards of each such town, shall cause notice of the same to be published for one week in one or more of the newspapers published in such town or towns, or if no newspaper be published in such town or towns, then by posting said notice in at least six public and conspicuous places in said district, of the filing of said petition, and the time and place when the same will be acted upon by said town board, or if such lighting district lies in two or more adjoining towns, then when the same will be acted upon at a joint meeting of the town boards of such towns, to be held in the territory where such district is to be created.

§ 263. **Levy of tax for payment of the amount of contract.** The amount of any contract that may be entered into pursuant to the provisions of this article shall be assessed, levied and collected upon the taxable property in said town or district in the same manner, at the same time, and by the same officers as the town taxes, charges or expenses of said town are now assessed, levied and collected, and the same shall be paid over by the supervisor to the corporation, company, person or persons furnishing or supplying said light. If the town boards of two or more adjoining towns shall, in joint session, establish a lamp or lighting district in two or more adjoining towns, they shall determine the relative proportion of the expense of such lighting which shall be borne by each of said towns, and the amount of such expense shall be assessed and levied on the taxable property in such lighting district in each of said towns, and collected in the same manner and at the same time, and by the same officers as the town taxes or charges or expenses of the town in which said district is located are now assessed, levied and collected, and such relative expense shall be paid over by the supervisor of each of said towns to the corporation, company, person or persons furnishing or supplying said light.

Villages May Contract for Lighting.

The Village Law (L. 1909, ch. 64), § 240, contains provisions authorizing villages to contract for lighting by gas, electricity or other substance. The full text of said section is as follows:

§ 240. **Contracts for lighting.** The board of light commissioners may contract, in the name of the village, with an individual or corporation, for lighting the streets, public grounds and public buildings of the village by gas, electricity or other substance: but such contract shall not be made for a longer period than five years, nor at an expense for each fiscal year exceeding two and a half mills on every dollar of taxable property of the village as appears on the last preceding village assessment-roll, unless authorized at a village election. The amount of such contract shall be paid in annual instalments, commencing with the date of the contract.

An incorporated village has power to establish or acquire a system for supplying the village and its inhabitants with light. Village Law, §§ 241–247.

§ 62. Gas and electric light must be supplied on application. Upon the application, in writing, of the owner or occupant of any building or premises within one hundred feet of any main laid down by any gas light corporation, or the wires of any electric

light corporation, and payment by him of all money due from him to the corporation, the corporation shall supply gas or electric light as may be required for lighting such building or premises, notwithstanding there be rent or compensation in arrears for gas or electric light supplied, or for meter, wire, pipe or fittings, furnished to a former occupant thereof, unless such owner or occupant shall have undertaken or agreed with the former occupant to pay or to exonerate him from the payment of such arrears, and shall refuse or neglect to pay the same; and if for the space of ten days after such application, and the deposit of a reasonable sum as provided in the next section, if required, the corporation shall refuse or neglect to supply gas or electric light as required, such corporation shall forfeit and pay to the applicant the sum of ten dollars, and the further sum of five dollars for every day thereafter during which such refusal or neglect shall continue; provided that no such corporation shall be required to lay service pipes or wires for the purpose of supplying gas or electric light to any applicant where the ground in which such pipe or wire is required to be laid shall be frozen, or shall otherwise present serious obstacles to laying the same; nor unless the applicant, if required, shall deposit in advance with the corporation a sum of money sufficient to pay the cost of his portion of the pipe or wire required to be laid, and the expense of laying such portion.

Formerly L. 1890, ch. 566, § 65.

Former sections 62, 63 and 64 of this law relating to inspection of gas meters, etc., were repealed by L. 1907, ch. 429 (Public Service Commissions Law), section 67 of which contains the provisions of said repealed sections.

An electric illuminating company having a wire carrying a current too powerful to be used for house lighting within 100 feet of a dwelling and which has no wire suitable for house lighting within 1700 feet of such dwelling does not incur the penalty for refusal to light the dwelling upon written request of the owner. Moore v. Champlain Elec. Co., 88 A. D. 289 (1903) The wire, the expense of laying which this section permits the illuminating company to require the applicant to advance, is not the street or supply wire but simply the wire extending from the street supply wire to the applicant's premises. Id.

The sufficiency of a demand to be supplied with gas considered. Bennett v. East Chester Gas Light Co., 54 A. D. 74 (1900).

The foregoing section applies where any part of a building is within 100 feet of the gas mains, and it is immaterial that the office of the person applying for gas in such building is not within 100 feet of the main. Jones v. Rochester Gas & Electric Co., 7 A. D. 465, affd., 158 N. Y. 678 (1899).

In an action against a gas company to recover the penalty imposed by this section, the burden of proof that a deposit required by the corporation, in pursuance of section 66 of this act, is unreasonable in amount, is upon the plaintiff. Bennett v. East Chester Gas Light Co., 40 A. D. 169.

A requirement of an electric lighting company that customers pay a rate, based upon meter measurement, with the proviso that there should be a minimum of $1.50 per month, is not unreasonable nor violative of the duties of the corporation. Gould v. Edison Elec. Illg. Co., 29 Misc. 241 (1899).

The provision imposing a penalty for refusal to supply gas or electricity does not limit recovery to one penalty. The applicant may recover ten dollars for the first day's refusal, and five dollars for each day of its continuance thereafter; nor does the fact that he has brought an action to recover penalties for one building bar his action for refusal to furnish light to another, although the refusal in each case arose from the fact that he declined to pay the same bill. Jones v. Rochester Gas & Electric Co., 7 A. D. 474, affd., 158 N. Y. 678, modified by 168 N. Y. 65 (1901).

Where a company has based its refusal to furnish gas upon the ground that the applicant owed for escaped gas, it is not in a position to claim that there existed any other indebtedness in its favor from him. Jones v. Rochester Gas & Electric Co., 7 A. D. 465, affd., 158 N. Y. 678 (1899).

A written requisition upon a company to supply electric light and power at once, replied to by a written inquiry asking "how much power and how many lights do you want," but not answered by the applicant in writing, does not subject the company to the statutory penalties. Andrews v. North River Electric Light & Power Co., 24 Misc. 671 (1898), affg. 23 Misc. 512.

The penalty prescribed for failure to supply gas, after demand, does not apply to a natural gas company organized under the Business Corporations Law. Wilson v. Tennent, 61 A. D. 100 (1901), affd., 179 N. Y. 546.

The fact that an applicant for light has at one time consented to the removal of gas meters will not estop him from making a demand, under the statute, for a return of the supply of gas. Jones v. Rochester Gas & Electric Co., 7 A. D. 474, affd., 158 N. Y. 678 (1899).

Under this section but one action can be maintained to recover the penalties prescribed for a failure to supply gas. A subsequent action to recover penalties alleged to have accrued during a continuance of the default, in the absence of a new application and a new default, is not maintainable. Jones v. Rochester Gas & Electric Co., 168 N. Y. 65 (1901), revsg. 45 A. D. 629. The defendant in an action to recover a penalty for a failure to supply plaintiff with gas is not relieved from liability by the fact that the latter obtained gas by an arrangement with one of his tenants who was a customer of the defendant. Id.

Where in an action to compel the furnishing of electric light, the company set up the affirmative defense that plaintiff had theretofore interfered with meters on his premises or had permitted others to do so for the purpose of cheating it out of legitimate charges, a temporary injunction restraining the cutting off of the supply will be granted since to deny it would give defendant all the relief it demands in advance of trial. Schmitt v. Edison El. Illum. Co., 58 Misc. 19 (1908).

If a gas company pursuant to demand supplies gas and thereafter cuts off the supply because the consumer refuses to pay arrears due from the previous occupant of the building, the penalty may be recovered. The section applies both to a case of refusal to supply after written request and a case where the supply has been cut off after having been begun. Hoch v. Bklyn. Borough Gas Co., 117 A. D. 882 (1907).

The penalty cannot be recovered without the written application required by the section and the company by commencing to supply gas without a written application does not waive the requirement so as to become liable for the penalty on discontinuing the service. Shelley v. Westchester Lighting Co., 119 A. D. 61 (1907); Same v. Same, 55 Misc. 105 (1907).

Where the franchise of an insolvent electric company is sold at public auction by the receiver, the purchaser acquires all the rights conferred by the original franchise. Matter of Long Acre El. Light & Power Co., 188 N. Y. 361 (1907).

If an electrical company has made a voluntary assignment of its franchise to an individual acting as an intermediary to transmit title to another corporation to which he thereafter assigns, the validity of such transfer can only be questioned by the State. Matter of Long Acre El. Light & Power Co., 188 N. Y. 361 (1907).

As to conduits in New York city under Special Acts, see Matter of Long Acre El. Light & Power Co., 188 N. Y. 361 (1907), and Peo. ex rel. New York El. Lines Co. v. Ellison, 188 N. Y. 523 (1907).

Penalty; Accrual of.

Plaintiff must prove an application made in writing by him, and the penalty does not accrue for failure to install until the neglect or refusal has continued for ten days. Reiser v. Edison Elec. Illg. Co., 76 Misc. 563 (1912).

Discrimination in Rates.

An electric lighting company which uses the public streets and highways is a public service corporation and is subject generally to the rules which govern common carriers and may not discriminate between its customers. Armour Packing Co. v. Edison Elec. Illg. Co., 115 A. D. 51 (1906); Armour & Co. v. Same, 115 A. D. 57 (1906); see, also, N. Y. Telephone Co. v. Siegel-Cooper Co., 202 N. Y. 502 (1911).

§ 63. Deposit of money may be required. Every gas light and electric light corporation may require every person to whom such corporation shall supply gas or electric light for lighting any building, room or premises to deposit with such corporation a reasonable sum of money according to the number and size of lights used or required, or proposed to be used, for two calendar months, by such person, and the quantity of gas and electric light necessary to supply the same, as security for the payment of the gas and electric light rent or compensation for gas consumed, or rent of pipe or wire and fixtures, to become due to the corporation, but every corporation shall allow and pay to every such depositor legal interest on the sum deposited for the time his deposit shall remain with the corporation.

Formerly L. 1890, ch. 566, § 66.

Laws 1906, ch. 125, post, does not affect the right of the company to demand the deposit and a consumer who refuses to make such deposit is not entitled to an injunction restraining the shutting off of his supply for his refusal to pay more than eighty cents per 1000 feet as provided for in said statute, although he would otherwise be entitled to such injunction. Pollitz v. Consolidated Gas Co., 118 A. D. 92 (1907); Bienenfeld v. Consolidated Gas Co., 119 A. D. 855 (1907).

The deposit is not provided for as prepayment of rent and the company is entitled to require that it be kept intact and if the consumer fails to pay the

amount due, the company may cut off the supply at once as there is no warrant for the contention that the company is prohibited from cutting off the supply until the amount of the deposit has been used up by charges for gas supplied. Hewsey v. Queens Borough Gas & El. Co., 47 Misc. 375 (1905).

§ 64. Buildings may be entered for the examination of meters, pipes, fittings, wires and works. Any officer or other agent of any gas light or electric light corporation, for that purpose duly appointed and authorized by the corporation, may, at all reasonable times, upon exhibiting a written authority, signed by the president and secretary of the corporation, enter any dwelling, store, building, room or place lighted with gas or electric light supplied by such corporation, for the purpose of inspecting and examining the meters, pipes, fittings, wires and works for supplying or regulating the supply of gas or electric light and of ascertaining the quantity of gas or electric light consumed or supplied, and if any person shall, at any time, directly or indirectly, prevent or hinder any such officer or agent from so entering any such premises, or from making such inspection or examination at any reasonable time, he shall, for every such offense, forfeit to the corporation twenty-five dollars.

Formerly L. 1890, ch. 566, § 67.

When a gas company entitled under this section to enter upon a consumer's premises for the purpose of removing a gas meter, breaks open a cellar door in effecting such entry, it becomes a trespasser ab initio. Reed v. N. Y. & Richmond Gas Co., 93 A. D. 453.

The company is a technical trespasser if it enters without permission or complying with this section in default thereof. Fortescue v. Kings Co. Lighting Co., 128 A. D. 826 (1908).

§ 65. Refusal or neglect to pay rent. If any person supplied with gas or electric light by any such corporation shall neglect or refuse to pay the rent or remuneration due for the same or for the wires, pipes or fittings let by the corporation, for supplying or using such gas or electric light or for ascertaining the quantity consumed or used as required by his contract with the corporation, or shall refuse or neglect, after being required so to do, to make the deposit required, such corporation may prevent the gas or electric light from entering the premises of such person; and their officers, agents or workmen may enter into or upon any such premises between the hours of eight o'clock in the forenoon and six o'clock in the afternoon, and separate and carry away any meter, pipe, fittings, wires or other property of the corporation,

and may disconnect any meter, pipe, fittings, wires or other works whether the property of the corporation or not, from the mains, pipes or wires of the corporation.

Formerly L. 1890, ch. 566, § 68.

The deposit is not provided for as prepayment of rent and the company is entitled to require that it be kept intact and if the consumer fails to pay the amount due, the company may cut off the supply at once as there is no warrant for the contention that the company is prohibited from cutting off the supply until the amount of the deposit has been used up by charges for gas supplied. Hewsey v. Queens Borough Gas & El. Co., 47 Misc. 375 (1905).

Cutting Off Gas Supply.

Where a supply of gas is cut off on the claim that the customer refused to pay an indebtedness, it is incumbent on the corporation to show existence of the debt and refusal to pay. Levine v. Brooklyn Union Gas Co., 146 A. D. 464 (1911); Hollander v. Westchester Lighting Co., 79 Misc. 646 (1913).

Where an employee of a gas company accepts the application of the tenant of premises and the company turns on the gas supply, but later shuts it off because a prior tenant failed to pay, the plaintiff may recover the penalty. Shelley v. Westchester Lighting Co., 139 A. D. 690 (1910), affd. 204 N. Y. 641.

§ 66. No rent for meters to be charged. No gas light corporation in this state shall charge or collect rent on its gas meters, either in a direct or indirect manner, and any person, party or corporation violating this provision shall be liable to a penalty of fifty dollars for each offense, to be sued for and recovered in the corporate name of the city or village where the violation occurs, in any court having jurisdiction, and when collected to be paid into the treasury of such city or village and to constitute a part of the contingent or general fund thereof.

Formerly L. 1890, ch. 566, § 69.

The provision prohibiting a charge or rental for gas meters is constitutional. Buffalo v. Buffalo Gas Co., 81 A. D. 505 (1903).

Quality of Gas and Pressure.

The General Business Law, §§ 320–323, contains provisions respecting the quality and pressure of gas, as follows:

§ 320. Standard of purity. The gas furnished or supplied by any corporation, association, partnership or person in any city of the second class shall be free from sulphuretted hydrogen, to be determined by exposing for thirty seconds a slip of white paper saturated with acetate of lead to a jet of gas flowing about five feet per hour, and each one hundred cubic feet shall not contain more than ten grains of ammonia nor twenty grains of sulphur.

Gen. Business Law, § 320; formerly L. 1907, ch. 557, § 1.

§ 321. Standard of illuminating power. The maximum illuminating power required and minimum illuminating power permitted of gas so furnished or supplied in any such city shall be as follows: If a coal gas, sixteen candles; if a mixed coal and water gas, eighteen candles; and if a carburetted water

gas, twenty candles. A candle shall mean a sperm candle, six to a pound, burning at the rate of one hundred and twenty grains of spermaceti per hour. The test for illuminating power shall be made with gas obtained from a service pipe or main located at a distance of not less than one mile nor more than one and one-half miles from any distributing holder, using, for coal gas and mixed coal and water gas containing more than fifty per centum of coal gas an F Argand burner, and for mixed coal and water gas containing fifty per centum and less of coal gas and for carburetted water gas a number seven slit union Bray burner, on a basis of consumption of five cubic feet of gas per hour.

Gen. Business Law, § 321; formerly L. 1907, ch. 557, § 2.

§ 322. **Standard of pressure.** The minimum pressure of gas so furnished or supplied which shall be permitted in any service main in any such city shall be sufficient to balance a column of water one and one-half inches in height. The maximum pressure therein allowed shall be an amount sufficient to balance a column of water three and three-fourths inches in height, plus an allowance at the rate of one inch for variation of each one hundred feet of increase in altitude in the distributing system between the holder and the point of consumption, except that no maximum pressure shall be prescribed in service mains the pressure of gas from which is regulated by service governors, supplied and maintained without charge to consumers.

Gen. Business Law, § 322; formerly L. 1907, ch. 557, § 3.

§ 323. **Penalty.** A violation of any of the provisions of this article shall constitute a misdemeanor.

Gen. Business Law, § 323; formerly L. 1907, ch. 557, § 4.

For provisions conferring powers upon the Public Service Commissioners in relation to the quality, pressure and price of gas, see Pub. Serv. Com. Law, § 66 and §§ 71–76.

Price of Gas in Greater New York.

Former section 70 of the Transportation Corporations Law, fixing the price of gas in Greater New York, was superseded by L. 1897, ch. 385, and the latter act was repealed and superseded by L. 1906, ch. 125, which constitutes the existing law on the subject, and reads as follows:

An act in relation to illuminating gas in the City of New York and regulating the quality and pressure thereof and the price to consumers other than said city and providing a penalty for violation.

Section 1. A corporation, association, copartnership or person engaged in the business of manufacturing, furnishing or selling illuminating gas in the City of New York, except in the fifth ward of the borough of Queens and in that portion of the borough of the Bronx formerly contained in the towns of Eastchester and Pelham, shall not charge or receive for gas manufactured, furnished or sold in said city a sum per one thousand cubic feet in excess of the following rates:

1. In the borough of Manhattan, in the first ward of the borough of Queens, in the borough of Brooklyn except the thirtieth and thirty-first wards thereof, and in the borough of the Bronx, except that portion of it formerly contained in the town of Westchester outside of the villages of Wakefield and Williamsbridge, eighty cents.

2. In the second and fourth wards of the borough of Queens, and in the thirtieth ward of the borough of Brooklyn, one dollar.

3. In the third ward of the borough of Queens, in the thirty-first ward of the borough of Brooklyn, and in the borough of Richmond, one dollar and twenty-five cents for the remainder of the year nineteen hundred and six; one

dollar and twenty cents during the year nineteen hundred and seven; one dollar and fifteen cents during the year nineteen hundred and eight; one dollar and ten cents during the year nineteen hundred and nine; one dollar and five cents during the year nineteen hundred and ten; and one dollar thereafter.

4. In that portion of the borough of the Bronx formerly contained in the town of Westchester, outside of the villages of Wakefield and Williamsbridge, one dollar and fifteen cents during the years nineteen hundred and six, nineteen hundred and seven and nineteen hundred and eight; one dollar and ten cents during the year nineteen hundred and nine; one dollar and five cents, during the year nineteen hundred and ten; and one dollar thereafter.

§ 2. The illuminating gas furnished by any such corporation, association, copartnership or person shall have an illuminating power of not less than twenty-two sperm candles of six to a pound, burning at the rate of one hundred and twenty grains of spermaceti per hour tested at a distance of not less than one mile from the distributing holder by a burner consuming five cubic feet of gas per hour and each one hundred cubic feet of gas shall not contain more than five grains of ammonia nor more than twenty grains of sulphur nor more than a trace of sulphuretted hydrogen. The pressure of illuminating gas in any service mains in the said city at any distance from the place of manufacture shall not be less than one inch, nor more than two and one-half inches.

§ 3. Any corporation, association, copartnership or person violating any provision of this act shall forfeit the sum of one thousand dollars for each offense to the people of the state.

§ 4. This act shall not apply to gas furnished or sold to the city of New York.

§ 5. Chapter three hundred and eighty-five of the laws of eighteen hundred and ninety-seven, entitled "An act to regulate the price of illuminating gas in cities of fifteen hundred thousand inhabitants," and all other acts or parts of acts inconsistent herewith are hereby repealed.

§ 6. This act shall take effect on the first day of May, nineteen hundred and six.

Where the price of a commodity is established by law (in this case illuminating gas), whatever price the Legislature permits to be charged must be deemed to be reasonable, and when the seller makes a charge of less than the maximum price, the purchaser cannot resist payment upon the ground that the law permitted an unreasonable charge. Brooklyn Union Gas Co. v. City of New York, 188 N. Y. 334 (1907), affg. 115 A. D. 69.

A contract to pay for electric current at a given rate as measured by or at the meter only requires the consumer to pay for the actual current consumed, the amount of which is a question for a jury. N. Y. & Queens El. Light & Power Co. v. L. I. Machine, Etc., Cons. Co., 123 A. D. 552 (1908).

In an action brought to enjoin the enforcement of this law because unconstitutional it was held:

1. The rate provided for the borough of Manhattan in § 1, subdivision 1 is not so unreasonably low that the enforcement thereof would be the taking of property for public use without compensation, and that the complainant had failed to clearly show that the act was confiscatory in not allowing a fair return upon its investment. Leave was granted to file another bill after the rate had gone into effect if the same should prove confiscatory.

2. The provision of § 2 of the Act respecting pressure is unconstitutional.

3. The provision in § 3 as to penalties is unconstitutional.

Both of the unconstitutional provisions were held, however, to be separable from the rest of the Act and not to interfere with its enforcement. Willcox v. Consolidated Gas Co., 212 U. S. 19 (1909), revsg. 157 Fed. 849.

Price of Gas in Cities of First, Second and Third Class.

For provisions setting forth the powers of the Public Service Commissioners in relation to the price and quality of gas in cities of the above named classes, see the Pub. Serv. Com. Law, §§ 71–76, post.

Inspector of Gas Meters.

Former sections 62, 63, and 64 of the Transportation Corporations Law, relating to inspectors of gas meters and their duties, were repealed by § 87, ch. 429, L. 1907, the Public Service Commissions Law, article 4 of which contains provisions relating to gas and electrical corporations. For such provisions, see said Pub. Serv. Com. Law, post.

ARTICLE 8

Water-Works Corporations

SECTION 80. Incorporation.
81. Must supply water; contracts with municipalities.
82. Powers.
83. Survey and map.
84. Condemnation of real property.
85. Corporation may contract with other cities, towns or villages; amended certificate.

§ 80. Incorporation. Seven or more persons may become a corporation for the purpose of supplying water to any of the cities, towns or villages and the inhabitants thereof in this state, by executing, acknowledging and filing a certificate stating the name of the corporation, the amount of its capital stock, the number of shares into which it is to be divided, the location of its principal office, the number of its directors, not less than seven, the names and places of residence of the directors for the first year, the names of the cities, towns and villages which it is proposed to supply with water; that the permit of the authorities of such cities, towns and villages herein required has been granted; the post-office address of each subscriber, and the number of shares he agrees to take in such corporation, the aggregate of which shall be at least one-tenth of the capital stock, and ten per centum of which shall be paid in cash to the directors. At the time of filing there shall be annexed to the certificate and as a part thereof, a permit, signed and acknowledged by a majority of the board of trustees of the village, in case an incorporated village is to be supplied with water, and in case a town, or any part thereof, not within an incorporated village, is to be so supplied, by the supervisor, justice of the peace, town clerk and highway commissioners

thereof or a majority of them, and in case a city is to be supplied with water, by the board of water commissioners of said city, or by such other board or set of officials as perform the duties of water commissioners and have charge of the water supply for said city, authorizing the formation of such corporation for the purpose of supplying such city, village or town with water, and an affidavit of at least three of the directors that the amount of capital stock herein required has been subscribed and paid in cash.

Formerly L. 1890, ch. 566, § 80, as am'd by L. 1892, ch. 617.

For form of certificate of incorporation, see post, Form No. 399.

See comments under "Incorporators," "Corporate Name," "Objects," "Capital Stock," "Shares of Stock," "Directors," "Additional Powers," "Liability of Stockholders," "Filing and Recording" and "Fees," on pages 591, 592, all of which are applicable to corporations under this article.

An incorporated village, by availing itself of the permissive power conferred by the general acts to construct water-works, does not thereby sustain such an implied contractual relation to the public with respect to the construction of such public work, as to be responsible for reasonable care and diligence in respect to its maintenance. Springfield Fire & Marine Ins. Co. v. Village of Keeseville, 148 N. Y. 46 (1896), revsg. 80 Hun 162.

When a municipality takes steps to create water-works of its own, and, without making any compensation therefor, damages the water-works system of a private corporation or of an individual, an action for damages is maintainable against such municipality. Boyer v. Village of Little Falls, 5 A. D. 1 (1896).

Failure to maintain water-works system in proper condition does not afford a cause of action against a village. Springfield Fire & M. Ins. Co. v. Keeseville, 6 Misc. 233, affd., 148 N. Y. 46 (1896), revsg. 80 Hun 162.

See 66 Hun 619, affd., 142 N. Y. 626.

§ 81. Must supply water; contracts with municipalities. Every such corporation shall supply the authorities or any of the inhabitants of any city, town or village through which the conduits or mains of such corporation may pass, or wherein such corporations may have organized, with pure and wholesome water at reasonable rates and cost, and the board of trustees of any incorporated village and the water commissioners or other board or officials performing the duties of water commissioners, and having charge of the water supplies of any city of this state, shall have the power to contract in the name and behalf of the municipal corporation of which they are officers, for the term of one year or more for the delivery by such company to the village or city, of water through hydrants or otherwise, for the extinguishment of fires and for sanitary and other public purposes; and the amount of such contract agreed to be paid shall be annually raised as a part of the expenses of such village or city, and

shall be levied, assessed and collected in the same manner as other expenses of the village or city are raised, and when collected shall be kept separate from other funds of the village or city, and be paid over to such corporation by such trustees or city officials, according to the terms and conditions of any such contract; and any such contract entered into by the board of trustees of any village, or by water commissioners or other board performing the duties of water commissioners and having charge of the water supply of any city, shall be valid and binding upon such village or city, but no such contract shall be made for a longer period than ten years nor for a sum exceeding in the aggregate, two and one-half mills for every dollar of the taxable property of such village or city, per annum, except upon a petition of a majority of the taxable inhabitants of any such village or city, or portion thereof, which it is proposed to supply with pure and wholesome water, unless a resolution authorizing the same has been submitted to a vote of the electors of the village or city, in the manner provided by the village law or city charter, and approved by a majority of the voters entitled to vote and voting on such question at any annual election or special election duly called; and any board of trustees or board of water commissioners or other city officials, when so authorized, may make such contract for a term not exceeding thirty years, and the amount of such contract shall be paid in semi-annual instalments. The town board of any town may establish a water supply district in such town outside of a city or incorporated village therein, by filing a certificate describing the bounds thereof, in the office of the town clerk; and may contract in the name of the town for the delivery, by a corporation, subject to the provisions of this article, of a supply of water for fire, sanitary or other public purposes, to such districts, and the whole town shall be bound by such contract, but the rental or expense thereof shall annually, in the same manner as other expenses of the town are raised, be assessed, levied upon and collected only from the taxable property within such water supply district. Such money, when collected, shall be kept as a separate fund and be paid over to such corporation by the supervisor of the town, according to the terms and conditions of any such contract. No such contract shall be made for a longer period than five years, nor for an annual expense exceeding three mills upon each dollar of the taxable property within such water supply district, provided, however, that where the population of

the water supply district does not exceed one thousand inhabitants such contract may be made for a period not longer than ten years.

Formerly L. 1890, ch. 566, § 81, as am'd by L. 1892, ch. 617; L. 1893, ch. 549; L. 1894, ch. 230; L. 1896, ch. 678.

A water company derives no exclusive right from the permit of the town authorities to lay and maintain water pipes and hydrants and to supply the town and its inhabitants with water. Syracuse Water Co. v. Syracuse, 116 N. Y. 167 (1889); Matter of Brooklyn, etc., 73 Hun 499 (1891), and cases therein cited.

Where village trustees granted a franchise to install a system of water-works to persons who assigned their interest to a corporation, which availed itself thereof, but has neglected to connect the village hydrant with its water-supply system, such corporation cannot repudiate its liability by asserting want of authority in the trustees who granted the franchise. Village of Bolivar v. Bolivar Water Co., 62 A. D. 484 (1901).

The right of a millowner to use the waters of a stream as a propelling power is an incorporeal hereditament connected with the land, and may be acquired by a water-works company. Stamford Water Co. v. Stanley, 39 Hun 424 (1886).

The requirements of this section are part of the franchise. A municipal contract fixing the rate for water supply to private consumers is not binding on the company and it may test its reasonableness by action. City of Mt. Vernon v. N. Y. I. U. Water Co., 115 A. D. 658 (1906).

The requirement that the company shall supply the inhabitants with water at a reasonable rate is part of the corporate franchise derived from the State, and a municipal contract made with the company fixing the rate at which water is to be supplied to private consumers is not binding upon the latter who may test the reasonableness of the rates by private action. The fact that certain of the rates are designated as "minimum" raises no presumption that the rates are reasonable. City of Mt. Vernon v. N. Y. Interurban Water Co., 115 A. D. 658 (1906). The municipality cannot maintain an action to reform a contract made with the company fixing the rates for private consumers by striking out such provisions as ultra vires, or to have it judicially determined that the rates are unreasonable. The private consumer has his remedy in such a case. Id., and see Peo. ex rel. Pelham Manor v. New Rochelle Water Co., 119 A. D. 472 (1907), and same case, 58 Misc. 287 (1908).

A contract between a consumer and a water company to furnish water contains an implied provision that the quantity supplied will be sufficient for the ordinary uses of the consumer and that the water will be forced into his residence irrespective of its altitude above the water main. Whitehouse v. Staten Island Water Co., 101 A. D. 112 (1905). The fact that the water taps were generally open to prevent freezing is not an excuse for non-performance. Id.

Parol evidence is admissible to show the intention of the parties where a water company furnished a laundry with water through a two-inch meter under a contract whereby the price diminished as the consumption increased, and this supply being insufficient, a second two-inch meter was installed under a similar contract, and a question arises as to whether the price to be paid is to be determined by aggregating the water flowing through both meters or by treating each separately. Green Island Water Supply Co. v. Trojan Laundry Co., 126 A. D. 584 (1908).

This section does not authorize the water company to furnish water to any of the inhabitants of an intervening municipality through which its conduits may pass unless it has obtained the consent of the authorities of that municipality. City of Rochester v. Rochester & Lake Ontario Water Co., 189 N. Y. 323 (1907).

As a railroad company is empowered to acquire a supply of water, it may contract with the water company whose conduits pass through the intervening municipality for a supply of water in consideration of the use of its right of way. City of Rochester v. Rochester & Lake Ontario Water Co., 189 N. Y. 323 (1907).

The area designated as a "water supply district" must correspond with the territory to be supplied with the water under the contract made by the town board. Peo. ex rel. Tupper Lake Water Co. v. Sisson, 75 A. D. 139 (1902), affd. on op. below, 173 N. Y. 606; if the contract made is invalid the water company has no claim, although water has been furnished, for it is bound to know the authority of the town board. Id.

Consumer Can Enforce Contract.

Where a water company contracts with a village to supply private consumers in the village for a period of years and thereafter notifies a resident that no water would be supplied after a given date except through meters at increased rates, the resident consumer may maintain an action for a permanent injunction restraining the enforcement of a rate in excess of that fixed by the contract. Pond v. New Rochelle Water Co., 183 N. Y. 330 (1906); the consumer is deemed a third party for whose benefit the contract was made. Id.

Villages May Contract for Water Supply.

The Village Law (L. 1909, ch. 64), § 220, empowers village authorities to contract for water supply, as follows:

§ 220. **Contracts for water supply.** The board of water commissioners may contract, in the name of the village, with an individual or corporation for supplying water to the village for extinguishing fires or for other public purposes; but such contract shall not be made for a longer period than five years, nor at an expense for each fiscal year exceeding two and a half mills on every dollar of the taxable property of the village as appears on the last preceding village assessment-roll, unless authorized at a village election. The amount of such contract shall be paid in annual instalments, commencing with the date of the contract.

An incorporated village may establish or acquire a system of water-works, and may also furnish water to other municipalities. Village Law, §§ 221–235.

See, also, Village of Waverly v. Water Co., 127 A. D. 440 (1908).

§ 82. **Powers.** Every such corporation shall have the following additional powers:

1. To lay and maintain its pipes and hydrants for delivering and distributing water in any street, highway or public place of any city, town or village in which it has obtained the permit required by section eighty of this article.

2. To lay its water pipes in any streets or avenues or public places of an adjoining city, town or village, to the city, town or village where such permit has been obtained, provided that such right in an adjoining city or village having a population of more than twelve thousand inhabitants shall be subject to the permission of the local authorities thereof and upon such conditions as they may prescribe.

3. To cause such examinations and surveys for its proposed water-works to be made as may be necessary to determine the proper location thereof, and for such purpose by its officers, agents or servants to enter upon any lands or waters in the city, town or village where organized, or in any adjoining city, town or village for the purpose of making such examinations or surveys, subject to liability for all damages done.

Formerly L. 1890, ch. 566, § 82, as am'd by L. 1892, ch. 617; L. 1905, ch. 210; L. 1906, ch. 455.

The words "or village having a population of more than twelve thousand inhabitants" were inserted in subd. 2 by L. 1906, ch. 455. By the amendment of 1905, ch. 210, the provision was inserted making the right to lay water pipes in an adjoining municipality subject to the permission of the local authorities.

Ordinances adopted by the common council of a city, after the passage of the Transportation Corporations Law, for the purpose of regulating the laying of gas and water mains cannot regulate or prohibit the laying of water mains through the city by a water company organized under said law for the purpose of supplying water to adjacent villages, since the common council is not invested with the right to repeal or amend, by ordinance, a general statute of the State. Rochester & L. O. Water Co. v. City of Rochester, 176 N. Y. 36 (1903), affg. 84 A. D. 71. Since the amendment of 1906 this case applies only to places of 12,000 inhabitants or under.

Permit to Use Streets.

The words "municipal authorities" do not mean the administrative officers of the city charged with control of the highways. In the city of New York the power of granting rights to use city streets is conferred upon the board of aldermen or the board of estimate, subject to the approval of the mayor; hence, a permit from a borough president, a deputy water commissioner in the borough and its commissioner of public works to lay water mains along the highway, is ineffectual. Richards v. Citizens' Water Supply Co., 140 A. D. 206 (1910), and cases cited. A mere permit to lay mains obtained from such administrative officers and a contract with the city to supply it with water are not equivalent to a franchise to lay mains for that purpose. Id.

Water Company May Harvest and Sell Ice.

A corporation, organized for furnishing water, has implied power, as a business incidental thereto, to harvest and sell ice. Peo. ex rel. Goff v. Kirk, 65 Misc. 657 (1908).

Discrimination in Rates.

A water company is entitled to show that it makes no unjust discrimination against a State institution, and to show why it cannot furnish water at the same rates as to individuals. People v. Albion Water Works Co., 140 A. D. 646 (1910).

§ 83. Survey and map. Before entering upon, taking or using any land, for the purposes of its incorporation such corporation shall cause a survey and map to be made of the lands

intended to be taken or entered upon, by and on which the land of each owner or occupant shall be designated, which map shall be signed by the president and secretary, and filed in the office of the county clerk of the county in which such lands are situated.

Formerly L. 1890, ch. 566, § 83.

For provisions as to permission of highway commissioners to lay and maintain water pipes under highways, see Highway Law, § 60.

In a proceeding to acquire land under this section, the failure of the corporation to file the survey and map entitles the landowner to the dismissal of such proceeding. Matter of Citizens' Water-Works Co., 32 A. D. 54 (1898).

§ 84. Condemnation of real property. Any corporation organized under this article, shall have the right to acquire real estate, or any interest therein necessary for the purposes of its incorporation, and the right to lay, relay, repair and maintain conduits and water pipes with connections and fixtures, in, through or over the lands of others, the right to intercept and divert the flow of waters from the lands of riparian owners, and from persons owning or interested in any waters, and the right to prevent the flow of drainage of noxious or impure matters from the lands of others into its reservoirs or sources of supply. If any such corporation, which has made a contract with any city, town or village or with any of the inhabitants thereof for the supply of pure and wholesome water as authorized by section eighty-one of this article, shall be unable to agree upon the terms of purchase of any such property or rights, it may acquire the same by condemnation. But no such corporation shall have power to take or use water from any of the canals of this state, or any canal reservoirs as feeders, or any streams which have been taken by the state for the purpose of supplying the canals with water.

Formerly L. 1890, ch. 566, § 84, as am'd by L. 1892, ch. 617; L. 1894, ch. 230.

For provisions as to acquisition of property by condemnation, see the Condemnation Law, post.

The act of 1875, chapter 181, authorizing villages to supply themselves with water and permitting the acquisition of the works of any private corporation that may be supplying the municipality with water, does not make it the duty of local authorities to acquire the property of an existing water-supply corporation. Skaneateles Water-Works Co. v. Vil. of Skaneateles, 161 N. Y. 154 (1899), affg. 33 A. D. 642.

The provisions of chapter 284, Laws of 1894, supplementary to the act of 1875, chapter 181, which, by authorizing local authorities to lay and assess water rates upon property not using water from the municipal system, disclose an intent to assist the local authorities in obtaining customers from an existing private water-works company, are invalid and not enforceable. Warsaw Water-Works Co. v. Vil. of Warsaw, 161 N. Y. 176 (1899), modifying 16 A. D. 502.

Where there has been a diversion of water from a stream, caused by the defendant, a municipality, which fifteen years before had erected a system of water-works, and against the construction of which the plaintiffs or their predecessors had made no protest and the system had been operated ever since, during which time they had never attempted to assert their alleged rights until the commencement of the action, they are chargeable with such laches as will estop them from maintaining it. The claim that although the diversion of water was nominal and the damages slight, unless an injunction was granted, the defendant might by lapse of time acquire a prescriptive right to the use of an indefinite quantity of water on the stream, is untenable, since the use could not be enlarged and a prescriptive right founded thereon; and, if there were any damages, the plaintiff has an adequate remedy at law. Penrhyn Slate Co. v. Granville Elec. Lt. & Power Co., 181 N. Y. 80 (1905), revsg. 84 A. D. 92.

§ 85. Corporation may contract with other cities, towns or villages; amended certificate. When any such corporation has entered into a contract with the authorities of any city, town or village not mentioned in its certificate of incorporation, but situated in the same county as the city, towns or villages mentioned therein or an adjoining county, to supply it with pure and wholesome water, it may file an amended certificate, stating the name of such other city, town or village to be so supplied with water, and it may thereupon supply any such city, town or village with water in the same manner and with the same rights and subject to the same requirements as if it had been named in the original certificate of incorporation.

Formerly L. 1890, ch. 566, as am'd by L. 1892, ch. 617.

ARTICLE 9

Telegraph and Telephone Corporations

SECTION 100. Incorporation.
101. Extension of lines.
102. Construction of lines.
103. Transmission of dispatches.
104. Consolidation of corporations.
105. Special policemen.
106. Application of article.

§ 100. Incorporation. Seven or more persons may become a corporation for the purpose of constructing, owning, using and maintaining a line or lines of electric telegraph or telephone, wholly within or partly beyond the limits of this state, or for the purpose of owning any interest in any such line or lines, or any grants therefor by executing, acknowledging and filing a certifi-

cate, stating the name of the corporation; its general route and the points to be connected; its capital stock; the number of shares into which it is to be divided; the term of its existence; the number of its directors not less than seven; the names and residences of the directors for the first year, and the post-office addresses of the subscribers and the number of shares which each agrees to take in such corporation.

Formerly L. 1890, ch. 566, § 100.

For form of certificate of incorporation, see post, Form No. 401.

See comments under "Incorporators," "Corporate Name," "Objects," "Capital Stock," "Shares of Stock," "Directors," "Additional Powers," "Liability of Stockholders," "Filing and Recording" and "Fees," on pages 591, 592, all of which are applicable to corporations under this article. No maximum limit, within which the term of existence is to be fixed, has been prescribed in the foregoing section.

Principal Office.

When the statute, under which a corporation is organized, does not fix its residence or require the location of its place of business or principal office to be stated in its certificate of incorporation, a statement in such certificate of a place at which its principal office shall be located is binding neither upon the corporation nor the taxing officers for the purpose of fixing the place where the corporation shall be assessed for personal taxation, but its residence is deemed to be where its principal place of business is actually situated. Austen v. Westchester Telephone Co., 8 Misc. 11 (1894); Same v. Hudson R. T. Co., 73 Hun 96 (1893).

A telephone company may change its principal office or place of business from the place at which it was first established to any place within the State where it is actually engaged in carrying on its business pursuant to authority conferred by its certificate of incorporation. Austen v. Hudson R. T. Co., 73 Hun 96 (1893), and cases therein cited.

Liability on Contracts and for Torts.

Where a telephone and telegraph company had the right to remove the wires of another company from certain fixtures, by thereafter carrying them away, it made itself liable for conversion. Electric Power Co. v. Met. Telephone & Telegraph Co., 75 Hun 68 (1894).

§ 101. Extension of lines. Any such corporation may construct, own, use and maintain any line of electric telegraph or telephone, not described in its original certificate of incorporation, whether wholly within or wholly or partly beyond the limits of this state, and may join with any other corporation in constructing, leasing, owning, using and maintaining such line, or hold or own any interest therein, or become lessees thereof, upon filing in the same manner as the original certificate is required to be filed an amended certificate, executed and acknowledged by at least two-thirds of the directors of such corporation, describing the general route of such line or lines, and designating the extreme

points connected thereby, and upon procuring the written consent of the persons owning at least two-thirds of the capital stock of such corporation, and such amended certificate shall not be filed until there is indorsed thereon or annexed thereto an affidavit made by at least three of the directors of the corporation that such consent has been obtained, which affidavit shall be filed with and be a part of such certificate.

Formerly L. 1890, ch. 566, § 101.

For form of certificate of extension, see post, Form No. 402.

§ 102. Construction of lines. Such corporation may erect, construct and maintain the necessary fixtures for its lines upon, over or under any of the public roads, streets and highways; and through, across or under any of the waters within the limits of this state, and upon, through or over any other land, subject to the right of the owners thereof to full compensation for the same. If any such corporation can not agree with such owner or owners upon the compensation to be paid therefor, such compensation shall be ascertained in the manner provided in the condemnation law. Any company or companies organized and incorporated under the laws of this state for the purpose of owning, constructing, using and maintaining a line or lines of electric telegraph within this state or partly within and partly beyond the limits of this state, are hereby authorized, from time to time, to construct and lay lines of electrical conductors under ground in any city, village or town within the limits of this state, subject to all the provisions of law in reference to such companies not inconsistent with this section; provided that such company shall, before laying any such line in any city, village or town of this state, first obtain from the common council of cities, the trustees of villages, or the commissioners of highways of towns, permission to use the streets within such city, village or town for the purposes herein set forth. Nothing herein contained shall be so construed as in any way to limit, alter, or affect the provisions or powers relating or granted to telegraph companies heretofore created by special act of the legislature of this state, except in so far as to confer on any such company the right to lay electrical conductors under ground.

Formerly L. 1890, ch. 566, § 102, and L. 1881, ch. 483.

The third and fourth sentences were formerly L. 1881, ch. 483, and were embodied in this section by the Consolidated Laws of 1909.

As to provisions for acquisition of property by condemnation proceedings, see the Condemnation Law, post.

Use of Highways.

By this section the right of telegraph and telephone corporations to use public streets and highways for the construction and maintenance of its lines is given in unmistakable language and the consent of the local body is not required. Its franchise comes directly from the Legislature. Barhite v. Home Telephone Co., 50 A. D. 25 (1900); Rochester v. Bell Telephone Co., 52 A. D. 6 (1900); New Union Telephone Co. v. Marsh, 96 A. D. 122 (1904). When a corporation of this kind avails itself of the legislative grant, the manner of its exercise, the location of its poles, the stringing of its wires, etc., are within the scope and regulation of the local legislative body. This right of regulation is, however, entirely distinct from and subordinate to the original granting of the privilege. Id.

The right conferred upon a company to maintain wires and appliances in the streets, is subject to the reasonable control, supervision and regulation of the city authorities, as a part of the general police power. Rochester v. Bell Telephone Co., 52 A. D. 6 (1900). The city may require the company to place its wires in an underground conduit beneath the street unless it would be impossible or impracticable for the company to obey the requirement. Id.

The municipality cannot require the company to furnish service at certain rates and the company is not bound by such rates even if it accepts a franchise subject to them. Wright v. Glen Telephone Co., 112 A. D. 745 (1906).

In the absence of express legislative authority a village has no power to compel a telephone company to place the extension of its existing lines in the streets in underground conduits, for the authority is conferred direct from the State by this section and the village authorities are only permitted to regulate the location of the poles and the streets to be occupied. Village of Carthage v. Central N. Y. Tel. Co., 185 N. Y. 448 (1906).

In the matter of N. Y. Independent Tel. Co., 118 N. Y. Supp. 290 (1909), it is held that if the telephone company wishes to lay its wires under ground it must obtain permission from the local authorities pursuant to the third and fourth sentences of this section (formerly Laws 1881. ch. 483). It is pointed out that in the cases above cited, Carthage v. Central N. Y. Tel. Co., 185 N. Y. 448; Barhite v. Tel. Co., 50 A. D. 25, and Union Tel. Co. v. Marsh, 96 A. D. 122, the attention of the court had not been directed to the Laws of 1881, ch. 483, now the third and fourth sentences of this section.

This decision necessarily determines that said statute of 1881 was not superseded by the Transportation Corporations Law of 1890, § 102, as then enacted, for if it had been so superseded the re-enactment by the Consolidated Laws would not have been effective because of Laws of 1909, ch. 596, construing the Consolidated Laws, which see, post. Ed.

The power given by the charter of the City of Jamestown to prevent a telephone company from doing business within its jurisdiction was not repealed by Transportation Corporations Law and therefore the city had authority to impose the condition that the company should pay it a certain percentage of gross earnings for the privilege of operating in such city. City of Jamestown v. Home Telephone Co., 125 A. D. 1 (1908).

The term "public roads," as used in the State laws, permitting telegraph companies to erect fixtures, does not include a railroad company's roadway. N. Y. City & North. R. R. Co. v. Central Union Tel. Co., 21 Hun 261 (1880).

This section does not authorize a corporation to erect poles in city streets in violation of an ordinance to prevent the obstruction of streets providing that telegraph and telephone wires shall be placed beneath the fire-alarm telegraph of the city. Utica v. Utica Telephone Co., 24 A. D. 361 (1897).

As to resolutions passed by the city common council, requiring a telephone company to permit other telephone companies to occupy its poles and conduits with their wires, see Bell Telephone Co. v. Home Telephone Co., 52 A. D. 13 (1900).

Compensation to Owner of Fee.

The State cannot appropriate, nor can it authorize a corporation to appropriate, a rural public highway, by setting up telegraph or telephone poles, and the legality of such use is not affected by the fact that the Legislature has manifested its belief in the existence of the right, or that owners have generally acquiesced in such use. Therefore, where a domestic telegraph and telephone company had, without consent of an owner of the fee of a highway, and without having acquired the right by condemnation, erected poles and strung wires, held, that such use was unlawful, and that an action of ejectment was maintainable. Eels v. Am. Telephone & Telegraph Co., 143 N. Y. 133 (1894), affg. 65 Hun 516.

A distinction is drawn between the use of a street for street purposes and for municipal or private purposes. If the use is for a municipal or private purpose, it is deemed an additional burden upon the fee for which compensation must be made to the owner, whereas if it is a street use no such compensation must be made. Palmer v. Larchmont El. Lighting Co., 158 N. Y. 231 (1899); Osborne v. Auburn Tel. Co., 189 N. Y. 393 (1907), revg. 111 A. D. 702.

Erection of poles for lighting the streets is a street use. Palmer v. Larchmont El. Lighting Co., 158 N. Y. 231 (1899).

Erection of poles for telephone and telegraph wires is not a street use and the owner of the fee is entitled to compensation. Osborne v. Auburn Tel. Co., 189 N. Y. 393 (1907), revsg. 111 A. D. 702.

There is no distinction between city streets and rural highways in cases where the use is not for street purposes. Osborne v. Auburn Tel. Co., 189 N. Y. 393 (1907), revsg. 111 A. D. 702. The dicta in Castle v. W. U. Tel. Co., 49 A. D. 437 (1900); Johnson v. N. Y. & Pa. Tel. & Tel. Co., 76 A. D. 564 (1902), and Weeks v. N. Y. & N. J. Tel. Co., 86 A. D. 257 (1903), and the holding in Gannett v. Independent Tel. Co., 55 Misc. 555 (1907), appear to be overruled by this decision.

Municipality not Entitled to Compensation.

A telephone company may erect its poles on highways acquired by the city of New York in connection with its water supply system without compensating the city although the latter also owns the abutting land. This section is full permission without compensation so far as the State can give it for itself or any of its political subdivisions or bodies politic. State Line Telephone Co. v. Ellison, 121 A. D. 499 (1907).

Particular Agreements.

For construction of particular agreements granting rights of way, easements or licenses see Barber v. Hudson River Tel. Co., 105 A. D. 154 (1905); Morison v. American Tel. & Tel. Co., 115 A. D. 744 (1906), and same case, 126 A. D. 575 (1908); Nichols v. N. Y. & Pa. Tel. & Tel. Co., 126 A. D. 184 (1908).

Condemnation.

The erection of a telephone line on a public highway, not within the bounds of a city or village, and the fee of which is in the abutting owners, imposes an added burden upon the highway, and if attempted without the consent of

abutting owners, or instituting condemnation proceedings, injunctive relief may be granted. Gray v. York State Tel. Co., 92 A. D. 89 (1904).

A telephone company holding a franchise from a village authorizing the erection of poles in the streets cannot, without acquiring the right by condemnation, erect such poles in front of lands owned by a citizen having the fee of the street subject only to the public right of way. Powers v. State Line Telephone Co., 116 A. D. 737 (1907).

A corporation has authority under this section to take proceedings to condemn the right to place its poles and lines in a street, the fee of which is in the abutting owners. The corporation should not be permitted to take the fee of any land in the street, but only an easement for its poles and a right of way for its wires. New Union Telephone Co. v. Marsh, 96 A. D. 122 (1904).

A petition for the condemnation of easements for the erection of a telephone line which merely asks "a right of way or easement for the plaintiff's line of telephone wires and fixtures" over the defendant's land is fatally indefinite. The defendant is entitled to know the size, number and location of the poles and the height and manner of stringing the wires. Suffolk Co. Telephone Co. v. Gammon, 113 A. D. 764 (1906).

An abutting landowner who owns the fee to the center of the highway, is entitled to maintain an action in ejectment to compel the removal of telephone poles which were erected in the highway without obtaining the right to do so either by condemnation or by conveyance from the property-owner. Myers v. Bell Tel. Co., 83 A. D. 623, and cases there cited.

It is doubtful whether a foreign telegraph or telephone company has the right of eminent domain. Whitaker v. Kilby, 55 Misc. 337, 343 (1907).

Where the petition in condemnation describes the property to be taken as an easement of right of way for the erection of a line of telephones to consist of a designated number of poles, and with the right to trim such trees as may be necessary to protect the said line from interference, the petition is insufficient in that it does not sufficiently state the extent of the right which the petitioner desires to acquire to trim the trees in order that the owner may be informed as to the extent of the interest to be condemned. Bell Tel. Co. of Buffalo v. Parker, 187 N. Y. 299 (1907).

A telephone company, with power of eminent domain, and authorized by law to erect poles and string wires through the streets, removed them to the sidewalk to comply with a city ordinance. Trees were necessarily trimmed by servants of the company, under the direction of a city officer. Held, that the company was not liable in an action for trespass brought by the owner, as the act was done under lawful authority. Southern Bell Telephone & Telegraph Co. v. Constantine, 61 Fed. Rep. 61 (1894).

The owner of the fee of land to the center of a city street, subject to the public use thereof as a road or highway, is entitled to restrain a telephone company, which has not obtained his consent, from entering upon such land for the purpose of erecting poles for the stringing of wires, and, also, to damages for injuries to the shade trees upon such land, notwithstanding the telephone company had been granted a franchise by the city to use the street for its poles and wires, since such use of the street is an additional burden upon the fee for which a compensation must be made to the owner. Osborne v. Auburn Telephone Co., 189 N. Y. 393 (1907), revsg. 111 A. D. 702.

Cases Generally.

A franchise granted by a city permitting a corporation to construct a subway beneath the streets must be construed in the interest of the public. W. U. Tel. Co. v. Syracuse El. L. & P. Co., 178 N. Y. 325, revsg. 81 A. D. 655.

The placing beneath the surface of a street, the fee of which is in the abutting owners, of a conduit for telephone wires owned by a private corporation, pursuant to a resolution of the common council of a city, when such wires have previously been maintained on poles erected in the street, does not constitute an additional burden upon the street which will entitle the abutting owners to additional compensation. Castle v. Bell Telephone Co., 49 A. D. 437 (1900).

The owner in fee of the soil in a street, subject only to the easement of the public, possesses an interest which entitles him to remove any unauthorized erection upon his premises. Coatesworth v. Lehigh V. Ry. Co., 156 N. Y. 451 (1898), affg. 24 A. D. 273.

In an action by a telephone company to restrain a street railroad company from operating its road by the single trolley system, it was held, that as the railroad company was occupying the streets to expedite travel and promote the public use to which they were originally devoted, the telephone company's franchise was subordinate and it could not complain that the single system interfered with the operation of its lines. Hudson River Tel. Co. v. Watervliet Turnpike & Ry. Co., 135 N. Y. 393 (1892), revsg. 61 Hun 140, and distg. Story v. N. Y. & E. R. R. Co., 90 N. Y. 122: Lahr v. M. T. R. R. Co., 104 N. Y. 268 (1887), and Peo. ex rel. Third Ave. R. R. Co. v. Newton, 112 N. Y. 396 (1889). See, also, Hudson River Tel. Co. v. Watervliet T. & Ry. Co., 121 N. Y. 397 (1890).

The United States statutes authorizing the construction and maintenance by telegraph companies of their lines over and along any of its military or post-roads, and making all letter carrier routes in cities post-roads (U. S. Rev. St., sections 3964–5263, 5668, act passed March 1, 1884), confer no rights upon such corporations which can divest the State of control over its public highways, or to interfere with their use as such. Am. Rapid Tel. Co. v. Hess, 125 N. Y. 641 (1890).

As to the statute of this State requiring wires in large cities to be underground and the effect of the United States statutes authorizing telegraph companies to use post-roads, see West. U. Tel. Co. v. New York, 38 Fed. Rep. 552 (1889).

The fact that one set of men, of doubtful or unknown financial credit, offer to bid more for the franchise to install a telephone system in the streets of a city than a competing corporation of known financial strength does not require the common council to accept such offer or to sell the franchise at public auction, where the latter course is not made obligatory by the city charter. Barhite v. Home Telephone Co., 50 A. D. 25 (1900).

An action of ejectment will lie where a telephone wire is unlawfully strung a few feet above the soil but does not touch the same, for the owner is deprived of possession sufficiently to authorize such action. Butler v. Frontier Tel. Co., 186 N. Y. 486 (1906).

No Presumption of Grant.

The Real Property Law, § 261, contains a section, applicable to construction of telegraph and telephone lines, which reads as follows:

§ 261. Maintenance of telegraph or other electric wires raises no presumption of grant. Whenever any wire or cable used for any telegraph, telephone, electric light or other electric purpose, or for the purpose of communication otherwise than by the aid of electricity, is or shall be attached to, or does or shall extend upon or over any building or land, no lapse of time whatever shall raise a presumption of any grant of, or justify a prescription of any perpetual right to, such attachment or extension. Real Property Law, § 261 (L. 1909, ch. 52), added by Consolidated Laws; formerly L. 1886, ch. 40.

The owner may maintain ejectment. Andrews v. Delhi & Stamford Tel. Co., 36 Misc. 23 (1901), affd., 66 A. D. 616.

Where a telephone company has wrongfully affixed wires to a residence, the owner may maintain trespass and if he cannot prove the extent of his damage, the recovery will be the amount of the value of the use to the company. Bunke v. N. Y. Tel. Co., 110 A. D. 241 (1905). A license given by a prior owner is revoked by a conveyance of the property. Id.

Poles and Wires on Indian Lands.

The Indian Law (L. 1909, ch. 31), § 90, contains provisions regulating the erection of poles and wires on reservations, as follows:

§ 90. Poles and wires on reservation. Any company may erect poles and wires, and other necessary fixtures thereto, across the lands of the Seneca Indians on the Tonawanda reservation, provided the company shall pay to the Indians to whom allotments have been made, and on whose premises telephone or telegraph poles for the purpose of supporting wires have been or may hereafter be erected, damages therefor, which in case of inability to agree thereon, shall be ascertained in the manner provided in the condemnation law by commissioners to be appointed by the supreme court in the manner provided by said condemnation law. And in case the poles are erected on lands that have not been allotted to any Indian, then the said company shall pay a like sum to the district attorney of Genesee county, who shall distribute the same in accordance with the provisions of section eighty-six of this article. And in case any company may have already erected poles, or in case any company may hereafter erect poles without paying therefor in accordance therewith, then the said Indians are authorized to maintain actions of ejectment against the company therefor, in the same manner as citizens of this state, and as if they were owners in severalty of the lands so allotted to them. In case the lands are not allotted, then such an action may be prosecuted in the name of the Tonawanda band of Seneca Indians. The provisions of this article shall not apply to the existing lines of any such company, which has heretofore obtained the consent of said Seneca Indians to the erection of such existing lines and shall have paid a valuable consideration for the same, so far as such existing lines have been erected upon lands that have not been allotted.

This statute is constitutional. Jemison v. Bell Tel. Co., 186 N. Y. 493 (1906).

§ 103. Transmission of dispatches. Every such corporation shall receive dispatches from and for other telegraph or telephone lines or corporations, and from and for any individual, and on payment of the usual charges by individuals for transmitting dispatches as established by the rules and regulations of such corporation, transmit the same with impartiality and good faith and in the order in which they are received, and if it neglects or refuses so to do, it shall pay one hundred dollars for every such refusal or neglect to the person or persons sending or desiring to send any such dispatch and entitled to have the same so transmitted, but arrangements may be made with the proprietors or publishers of newspapers for the transmission for publication of intelligence of general and public interest out of its regular order.

Formerly L. 1890, ch. 566, § 103.

Discontinuance of Service; Penalty.

Where a telephone company abolished a special rate given to a subscriber and the latter refused to pay the higher rate and the company discontinued service to him, he is not entitled to recover the penalty. Kevand v. N. Y. Telephone Co., 159 A. D. 628 (1913).

Discrimination in Rates.

A telephone company may make a discount from its usual charges in favor of the municipality, charitable institutions and clergymen, without entitling other customers to like discounts, and such discrimination, in the absence of statutes to the contrary, will not be held illegal. N. Y. Telephone Co. v. Siegel-Cooper Co., 202 N. Y. 502 (1911). Discriminations in favor of the public are not opposed to public policy in the absence of a statute on the subject. Id.

Removal of Instrument by Telephone Company.

The object of this section in providing a penalty for refusal or neglect to send messages, is punishment, not damages, and it will not be extended by implication to cover an act not within its obvious meaning; therefore, where a controversy arose over a claim against a subscriber for past services, and, upon his refusal to pay, the company removed the instrument, and it was not alleged by the plaintiff that any particular message was offered to the company for transmission and refused, his action to recover the penalty cannot be maintained. Saltzburg v. Utica Home Tel. Co., 159 A. D. 51 (1913). If the plaintiff is entitled to damages or any affirmative relief his remedy is by an appropriate action therefor. Id.

Contracts Limiting Liability.

The stipulations printed on the blank forms used in sending telegrams, which provide for repeating and insuring a message and limit the liability of the company, are reasonable regulations and create a contract between the parties. Weld v. Postal Tel.-Cable Co., 210 N. Y. 59 (1913).

Notwithstanding the right of a telegraph company to make contracts limiting its liability, public policy forbids that regulations in the contract shall relieve the company from liability caused by gross negligence of its agents. Weld v. Postal Tel.-Cable Co., 210 N. Y. 59 (1913).

Cases Generally.

No action can be maintained under this section by the addressee of a telegraphic dispatch for the penalty imposed. Thompson v. Western Union Tel. Co., 40 Misc. 443 (1903).

The exclusive remedy for refusal of a telephone or telegraph company to transmit or receive messages is by an action at law to recover the penalty imposed, and a writ of mandamus will not lie to compel the performance. Peo. ex rel. Oneida Telephone Co. v. Central N. Y. Telephone & Telegraph Co., 41 A. D. 17 (1899).

This section, in providing that every telephone corporation shall receive dispatches for and from other telephone lines or corporations and transmit the same upon payment of the usual charges, does not authorize the court, upon the refusal of a telephone corporation operating a line in the village and extensively outside thereof, to place a telephone in the office of the village telephone company and establish connections therewith, to compel such action by a writ of peremptory mandamus. The remedy of an aggrieved party is either by an action for the penalty or for damages. Matter of Baldwinsville Telephone Co., 24 Misc. 221 (1898).

A telephone company's refusal to furnish service at reasonable rates is in the nature of a tort, and does not create any contract liability. Sterne v. Metropolitan Telephone & Telegraph Co., 33 A. D. 164 (1898), 53 N. Y. Supp. 467. See, also, 19 A. D. 316 (1896).

A telephone company may be compelled to furnish telephone service upon the payment of a reasonable compensation therefor. Sterne v. Metropolitan Telephone & Telegraph Co., 19 A. D. 316 (1896).

Where an action is brought against a company to compel it to furnish telephone services at a reasonable rate and such company after assigning all its property to another corporation, the grantee assuming its debts, contracts and liabilities, is dissolved, the plaintiff is not entitled to an order substituting the grantee for the original defendant, especially where there is no allegation that it has ever refused telephone service at reasonable rates. Sterne v. Metropolitan Telephone & Telegraph Co., 33 A. D. 164 (1898).

As to the liability of a telegraph company for delay in delivery of message, see Pearsall v. West. U. Tel. Co., 124 N. Y. 256 (1890); Kiley v. Same, 109 N. Y. 231 (1888); Riley v. Same, 8 Misc. 217 (1894); see, also, Riley v. Same, 6 Misc. 221, and cases therein cited, affd., 8 Misc. 217 (1894).

As to the liability to receiver of message, see Halsted v. Postal Tel. Co., 193 N. Y. 293 (1908), affg. 120 A. D. 433.

A stipulation in a telegraph company's blank does not limit its liability when its negligence is gross or its conduct willful. Dixon v. Western Union Teleg. Co., 3 A. D. 60 (1896); Postal Tel. Co. v. Robertson, 36 Misc. 785 (1901).

When the manager of a telegraph office sends a dispatch to a person, telling the messenger to wait for an answer, and the answer is received by such messenger but remains in his pocket until accidentally discovered the next day, the telegraph company is liable for the omission of the messenger, notwithstanding that the company's blank provides that when a message is sent to its office by one of its messengers, the latter should be deemed the agent of the sender. Will v. Postal Teleg. Cable Co., 3 A. D. 22 (1896).

The unintentional omission, by a receiving telegraph operator, of the word "express" in his transmission of the message, "Ship quick express 20 cases pop corn," is not a violation of the statute requiring telegraph companies to transmit dispatches with impartiality and good faith. Wichelman v. W. U. Telegraph Co., 30 Misc. 450 (1900).

A telephone company's covenant, limiting its rates to $48 per year per instrument, is binding on its successor. Rochester Telephone Co. v. Ross, 195 N. Y. 429 (1909), affg. 125 A. D. 76.

Rights granted by a city to a telephone company in excess of those conferred by its incorporation constitute a sufficient consideration to support the company's covenant, limiting its rates to $48 per year for each instrument. Rochester Telephone Co. v. Ross, 195 N. Y. 429 (1909), affg. 125 A. D. 76.

Where a telegraph company's operators are on a strike to the knowledge of the person offering a telegram for transmission, a refusal to take the message except subject to delay and a refusal to promise delivery within an hour does not subject the company to the penalty. There must be evidence of partiality, bad faith or discrimination. Petze v. Western Union Tel. Co., 128 A. D. 192 (1908).

There can be no recovery of penalty for mere delay in transmitting a message to another State and the fact that the sender paid extra to have the message repeated is not material as the statute applies only to the sending of messages. Hearn v. Western Union Tel. Co., 36 Misc. 557 (1901).

If a telephone company maintains a pay station where the toll was to be deposited in a box, after the receiver is off the hook and the plaintiff deposits the toll when the receiver is on the hook so that the central operator cannot hear the coins drop, the operator's refusal to connect plaintiff to the person with whom he desired to speak does not make the company liable for the penalty. Gifford v. Glen Telephone Co., 54 Misc. 468 (1907).

A contract whereby a telephone company agreed to instal a telephone exchange in defendants' hotel connected with the company's lines, in consideration for which the defendants, among other things, were to give the plaintiff the exclusive right to place telephones in the hotel is not void as against public policy where it does not appear that the rates charged for services are unreasonable, or that the service is unsatisfactory or that the public has suffered from the agreement. Central N. Y. Tel. & Tel. Co. v. Averill, 129 A. D. 752 (1909), revsg. 55 Misc. 346.

Where there is a question whether the premises are to be used for illegal purposes a peremptory mandamus will not issue to require the installation of a telephone. Matter of Cullen v. N. Y. Tel. Co., 106 A. D. 250 (1905).

§ 104. Consolidation of corporations. Any corporation organized under this article may lease, sell or convey its property, rights, privileges and franchises, or any interest therein, or any part thereof to any telegraph or telephone corporation organized under or created by the laws of this or any other state, and may acquire by purchase, lease or conveyance the property rights, privileges and franchises, or any interest therein or part thereof of any such corporation, and may make payments therefor in its own stock, money or property, or receive payment therefor in the stock, money or property of the corporation to which the same may be so sold, leased or conveyed, but no such lease, sale, purchase or conveyance shall be valid until it shall have been ratified and approved by a three-fifths vote of its board of directors or trustees, and by the vote or written consent of stockholders owning at least three-fifths of the capital stock given at a meeting of all the stockholders duly called for that purpose.

Formerly L. 1890, ch. 566, § 104.

§ 105. Special policemen. The police department or board of police of any city may, in addition to the police force now authorized by law, appoint a number of persons, not exceeding two hundred, who may be designated by any corporation operating a system of signaling by telegraph to a central office for police assistance, to act as special patrolmen in connection with such telegraphic system. And the person so appointed shall, in and

about such service, have all the powers possessed by the members of the regular force, except as they may be limited by and subject to the supervision and control of the police department or board of police of such city. No person shall be appointed such special policeman who does not possess the qualifications required by such police department or board of police for such special service; and persons so appointed shall be subject, in case of emergency, to do duty as part of the regular police force of the city. The police department or board of police shall have power to revoke any such appointment at any time, and every person appointed shall wear a badge and uniform, to be furnished by such corporation and approved by the police department or board of police; such uniform shall be designated at the time of the first appointment and shall be the permanent uniform to be worn by such special police, and the pay of such special patrolmen and all expenses connected with their service shall be wholly paid by such corporation, and no expense or liability shall at any time be incurred or paid by the police department or board of police of any city, for or by reason of the services of such person so appointed.

Formerly L. 1890, ch. 566, § 105.

§ 106. Application of article. The provisions of this article shall apply to corporations for the generation and distribution of music electrically; and such corporations shall possess the powers and be subject to all the duties granted to or imposed upon telegraph and telephone companies thereby except that such corporations shall not have or exercise the right of condemnation.

Formerly § 106, added by L. 1907, ch. 310.

ARTICLE 10

Turnpike, Plank-Road and Bridge Corporations

SECTION 120. Incorporation.
121. Restrictions upon location of road.
122. Agreement for use of highway.
123. Application to board of supervisors.
124. Commissioners to lay out road.
125. Possession of and title to real estate.
126. Use of turnpike road by plank-road.
127. Width and construction of road.
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SECTION 129. Certificate of completion of road or bridge.
130. Gates, rates of toll; and exemptions.
131. Toll-gatherers.
132. Penalty for running a gate.
133. Location of gates and change thereof.
134. Inspectors; their powers and duties.
135. Change of route; extensions and branches.
136. Mile-stones, guide-posts and hoist-gates.
137. Location of office of corporation.
138. Consolidation of corporations; sale of franchise.
139. Sale of rights, franchises and property to the county.
140. Surrender of road.
141. Taxation and exemption.
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144. Penalty for fast driving over bridges.
145. Acts of directors prohibited.
146. Actions for penalties.
147. Proof of incorporation.
148. When stockholders to be directors.
149. Dissolution of corporations; road to be a highway.
150. Town must pay for lands not originally a highway.
151. Highway labor upon line of plank-road or turnpike.
152. Extension of corporate existence.

§ 120. Incorporation. Five or more persons may become a corporation for the purpose of constructing, maintaining, and owning a turnpike, plank-road or a bridge, or causeway across any stream or channel of water, or adjoining bay, swamp, marsh, or water to form in connection with such bridge or causeway a continuous roadway across the same, by signing, acknowledging and filing a certificate containing the name of the corporation, its duration, not exceeding fifty years, the amount and number of shares of its capital stock, the number of its directors, and their names and post-office addresses for the first year, the termini of the proposed road, its length, and each town, city or village into or through which it is to pass, or if a bridge, the location and plan thereof, and the post-office address of each subscriber and the number of shares of stock which he agrees to take, the aggregate of which subscriptions shall not be less than five hundred dollars for every mile of road, or if a bridge corporation not less than one-fourth of the amount of the capital stock, and five per centum of which must be actually paid in cash. There shall be indorsed on and annexed to the certificate and made a part thereof the affidavit of at least three of the directors named therein, that

the required amount of capital stock has been subscribed and the prescribed percentage paid in cash.

Formerly L. 1890, ch. 566, § 120.

For forms of certificates of incorporation, see post, Forms Nos. 403, 404.

See the comments under "Incorporators," "Corporate Name," "Objects," "Capital Stock," "Shares of Stock," "Directors," "Additional Powers," "Liability of Stockholders," "Filing and Recording" and "Fees," on pages 591, 592, all of which are applicable to corporations under this article. It should be noted, however, that there is neither a maximum nor a minimum limit as to directors in the foregoing section.

For provisions regulating extension of corporate existence, see section 152.

The power is extended to certain corporations maintaining bridges to operate a railway thereon. See infra.

As to the right of a corporation to maintain toll gates under the franchise of another company after expiration of its own charter, see Peo. v. De Grauw, 133 N. Y. 254, and cases therein cited.

Acquisition of Toll Roads and Bridges.

Roads and bridges, the owners of which are entitled to exact tolls, may be acquired by condemnation proceedings in behalf of the county in which they are located. See the Highway Law (L. 1909, ch. 30), §§ 338–343.

Certain Bridge Companies May Operate a Railway.

Laws of 1893, ch. 225, provides as follows:

Section 1. Any company incorporated for the purpose of constructing and maintaining a bridge or bridges over any river, bay, arm of the sea or other body of water, connecting any city in the state of New York, containing more than one million inhabitants, with any other city in said state, is hereby empowered to lay tracks and operate a railway upon said bridge or bridges.

This act is applicable to the New York and Long Island Bridge Company. Matter of the N. Y. & Long Island Bridge Co. v. Smith, 148 N. Y. 540, affg. 90 Hun 312.

Location and Construction of Bridges.

The County Law (L. 1909, ch. 16), § 62, provides, respecting the construction of bridges, as follows:

§ 62. **Location and construction of bridges.** The board may authorize the location, change of location and construction of any bridge, applied for by any town or towns, jointly, or by other than a municipal corporation, created under a general law, or by any corporation or individual for private purposes; and if a public bridge, erected other than by a municipal corporation, establish the rates of toll for crossing such bridge; but if such bridge is to cross a navigable stream, provision shall be made in the resolution or permission authorizing the same, for the erection and maintenance of a suitable draw, to prevent any obstruction of the navigation of such stream; and if a private bridge, provision shall be made that the draw shall be kept open as may be required to permit all vessels to pass without loss of headway. When such bridge shall be intersected by the line of counties, the action of the board of supervisors of each county shall be necessary to give the jurisdiction herein permitted. But this section shall not apply to a pier bridge erected or to

be erected over the Mohawk river above the state dam by a corporation organized under the transportation corporations law, provided such corporation shall comply with all the provisions of said transportation corporations law applicable thereto; such a corporation, without further proceeding, shall have the right to erect and maintain piers in said river for the purposes of such a bridge.

Formerly L. 1892, ch. 686, as am'd by L. 1898, ch. 225.

For provisions as to construction by county of destroyed bridges and authorizing purchase of toll bridges by counties, see County Law, §§ 64 and 69, respectively.

§ 121. Restrictions upon location of road. No such road shall be laid out through any orchard of the growth of four years or more to the injury or destruction of fruit trees, or through any garden cultivated for four years or more before the laying out of the road, or through any dwelling house or building connected therewith, or any yards or inclosures necessary for its use or enjoyment without the consent of the owner thereof, nor shall any such corporation bridge any stream in any manner that will prevent or endanger the passage of any raft of twenty-five feet in width, or where the same is navigable by vessels or steamboats.

Formerly L. 1890, ch. 566, § 121.

§ 122. Agreement for use of highway. The supervisor and commissioner of highways, or a majority of them if there be more than one of any town, may agree in writing with any such corporation for the use of any part of a public highway therein required for the construction of any such road, and the compensation to be paid by the corporation for taking and using such highway for such purpose on first obtaining consent of at least two-thirds of all the owners of land bounded on or along such highway, which agreement shall be filed and recorded in the town clerk's office of the town. If such agreement can not be made the corporation may acquire the right to take such highway for such purpose by condemnation. The compensation therefor shall be paid to the commissioners of highways, to be expended by them in improving the highways of the town.

Formerly L. 1890, ch. 566, § 122.

§ 123. Application to board of supervisors. If the lands necessary for the construction of the road or bridge of any such corporation in any county have not been procured by gift or purchase, and the right to take and use any part of any highway

therein required by such corporation shall not have been procured by agreement with the supervisor and commissioners of highways of the town in which such highway is situated, the corporation may make application to the board of supervisors of each county in which such bridge or road, or any part thereof, is to be located, for authority to build, lay out and construct the same, and take the necessary real estate for such purpose. Notice of the application shall be published in at least one public newspaper in each county for six successive weeks, specifying the time and place where it will be made, the location, length and breadth of any such bridge, and the length and route of any such proposed road, its charter, and each town, city and village in or through which it is to be constructed. The application may be made at any annual or special meeting of the board, and if the corporation desires a special meeting therefor any three members of the board may fix a time when the same shall be held, and notice thereof shall be served upon each of the other supervisors by delivering the same to him personally or leaving it at his place of residence at least twenty days before the meeting, and the expenses of the special meeting and of notifying the members of the board thereof shall be paid by the corporation. All persons interested therein or owning real estate in any of the towns through which it is proposed to construct the road may appear and be heard upon the hearing of the application. The board may take testimony in respect thereto, or authorize it to be taken by a committee of the board and may adjourn the hearing from time to time. After hearing the application the board may, by an order entered in its minutes, authorize the corporation to construct such bridge or road and to take the real estate necessary for that purpose, and a copy of the order certified by the clerk of the board shall be recorded by the corporation in the office of the clerk of the county in which such bridge or road or any part thereof is to be located before any act shall be done under it.

Formerly L. 1890, ch. 566, § 123.

§ 124. Commissioners to lay out road. If the application for the construction of any such road is granted, the board shall appoint three disinterested persons, not owners of real estate in any town through which the road is to be constructed, or in any adjoining town, commissioners to lay out the road. They shall take the constitutional oath of office, and without unnecessary

delay lay out the route of such road in such manner as in their opinion will best promote the public interests; they shall hear all persons interested who shall apply to be heard and may take testimony in relation thereto, and shall cause an accurate survey and description of the road and the necessary buildings and gates, signed and acknowledged by them, to be recorded in the clerk's office of the county. If the road is situated in more than one county, such survey and description shall be separate as to that portion in each county and filed in the office of the clerk of the county to which it relates. The corporation shall pay each commissioner three dollars for every day spent by him in the performance of his duties and his necessary expenses.

Formerly L. 1890, ch. 566, § 124.

§ 125. Possession of and title to real estate. The route so laid out and surveyed by the commissioners shall be the route of the road, and the corporation may enter upon, take and hold for the purposes of its incorporation, the lands described in such survey as necessary for the construction of its road, and requisite buildings and gates. If for any cause the owner of any of such lands shall be incapable of selling the same or his name or residence can not with reasonable diligence be ascertained or the corporation is unable to agree with the owner for the purchase thereof, it may acquire title thereto by condemnation.

Formerly L. 1890, ch. 566, § 125.

For provisions as to acquisition of property by condemnation proceedings, see the Condemnation Law, post.

§ 126. Use of turnpike road by plank-road. No plank-road shall be made on the roadway of any turnpike corporation without its consent, except for the purpose of crossing the same. Any plank-road corporation may contract with any connecting turnpike corporation for the purchase of its roadway or a part thereof, or of its stock, on such terms as may be mutually agreed upon, and such stock, if purchased, shall be held by the plank-road corporation for the benefit of its stockholders in proportion to the amount of stock held by each, and a transfer of stock in the plank-road corporation shall carry with it its proportional amount of the turnpike stock, and entitle the holder thereof to his share of the dividends derived therefrom. After the purchase of the whole of the stock of any such turnpike corporation by such

plank-road corporation the directors of the plank-road corporation shall be the directors of the turnpike corporation, and shall manage its affairs and render an account of the same annually to the stockholders of the plank-road corporation. If the plank-road corporation is dissolved, its stockholders at the time of dissolution shall be the stockholders of the turnpike corporation in proportion to the amount of stock held by each, and the stock of the turnpike corporation shall thereafter be deemed to be divided into shares equal in number to the shares of stock of the late plank-road corporation, and scrip therefor shall be issued accordingly to each of the last stockholders of the plank-road corporation, and the officers of the turnpike corporation shall be the same in number as provided for in its charter or certificate of incorporation, and shall be chosen by such former stockholders of the plank-road corporation or their assigns. A corporation owning a turnpike road on or adjoining which a plank-road shall have been constructed may abandon that portion of its road on or adjoining the route of which a plank-road is actually constructed and used.

Formerly L. 1890, ch. 566, § 126.

§ 127. Width and construction of road. Every such plank-road shall be so constructed as to make, secure and maintain a smooth and permanent road, the track of which shall be made of timber, plank or other hard material forming a hard and even surface, and every such turnpike road shall be bedded with stone, gravel or such other material as may be found on the line thereof, and faced with broken stone or gravel, forming a hard and even surface with good and sufficient ditches on each side wherever practicable, and all such roads shall be laid out at least four rods wide, and the arch or bed at least eighteen feet wide, and shall be so constructed as to permit carriages and other vehicles conveniently to pass each other, and to pass on and off such road where intersected with other roads. Any corporation which shall have once laid its road with plank may relay the same, or any part thereof, with broken stone, gravel, shells or other hard materials, forming a good and substantial road. Any plank-road or turnpike corporation may lay iron rails on its road suitable for the use of wagons and vehicles drawn by horses or other animals over its road, but no other motive power shall be used thereon.

Formerly L. 1890, ch. 566, § 127.

§ 128. Construction of bridges; obstruction of rafts prohibited. Every bridge constructed by any such corporation shall be built with a good and substantial railing or siding at least four and one-half feet high, and over any stream navigable by rafts the corporation shall keep the channel of the stream above and below the bridge free and clear from all deposits, formed or occasioned by the erection of the bridge, which shall in any wise obstruct the navigation thereof, and shall be liable to all persons unreasonably or unnecessarily delayed or hindered in passing the same for all damages sustained thereby. Nothing in this section shall be construed to authorize the bridging of any river or water course where the tide ebbs and flows, or any waters over which the federal authorities have any control, unless the consent of such federal authorities be first obtained; nor the construction of any bridge within the limits prescribed by any existing law for the erection or maintenance of any other bridge.

Formerly L. 1890, ch. 566, § 128, as am'd by L. 1895, ch. 722; L. 1896, ch. 778.

§ 129. Certificate of completion of road or bridge. When any such corporation shall have completed its bridge or road or any five consecutive miles thereof, it may apply to the commissioners of highways of each town in which the completed road or bridge is situated to inspect the same, and if a majority of the commissioners are satisfied that the road or bridge is made and completed as required by law and in a manner safe and convenient for the public use, they shall make a certificate to that effect, which shall be filed in the office of the county clerk. Each commissioner shall be paid by the corporation two dollars per day for his services and necessary expenses.

Formerly L. 1890, ch. 566, § 129.

For provisions in relation to unsafe toll-bridges, see post, page 658.

§ 130. Gates, rates of toll; and exemptions. Upon filing such certificate such corporation may erect a toll-gate at such bridge or one or more toll-gates upon the road so inspected, and may demand and receive the following rates of toll, a printed list of which shall be conspicuously posted at or over each gate: If a bridge corporation, such sum as shall be from time to time prescribed by the board of supervisors of the county or counties in which the bridge is located. If a turnpike or plank-road, for every vehicle drawn

by one animal, one cent per mile, and one cent per mile for each additional animal; for every vehicle used chiefly for carrying passengers, three cents per mile, and one cent per mile for each additional animal; for every horse rode, led, or driven, three-quarters of a cent per mile; for every score of sheep or swine, one and one-half cents per mile, and for every score of neat cattle, two cents per mile.

When diverging roads strike any plank-road or turnpike at or near any toll-gate, the board of supervisors of the county may direct that the toll charge shall commence from the point of such divergence, and only for the distance traveled on such turnpike or plank-road, but fractions of cents may be made units of cents in favor of the plank-road or turnpike corporation. The corporation may from time to time commute, but not for a longer period than one year at any one time, with any person whose place of abode shall adjoin or be near to the road for the toll payable at the nearest gate on each side thereof, and the commutation may be renewed from year to year. No tolls shall be charged or collected at any gate from any person going to or from public worship, a funeral, school, town meeting or election at which he is a voter to cast his vote, a military parade which he is required by law to attend, any court which he shall be required to attend as a juror or witness, nor when going to or from his required work upon any public highway, nor when transporting troops in the actual service of the United States; and no toll from persons living within one-half mile of the gate by the most usual traveled road when not engaged in the transportation of other persons or property except that persons living within one mile of the gate, by the most usually traveled road, in an incorporated village of over six thousand inhabitants, when not engaged in the transportation of other persons or property shall be exempt from the payment of toll.

Where a different rate is not otherwise prescribed or permitted by law, any corporation maintaining a plank-road, turnpike road or bridge and authorized, or which shall be hereafter authorized, to receive tolls for the passage of vehicles over the same, may charge and receive for each and every motor vehicle propelled by any power other than animal power, passing over the same, a toll rate as prescribed by section three hundred ten of the highway law.

The directors of the several plank-road and turnpike road com-

panies in this state shall annually abate three dollars from the toll of any inhabitant, not an inn-keeper, or all of it if in the aggregate not exceeding that sum, who shall construct on his own land, and keep in repair, a watering trough beside the plank-road or turnpike road as the case may be, well supplied with fresh water, the surface of which shall be two or more feet above the level of the ground, and easily accessible for horses with vehicles; but the commissioners of highways of the towns respectively shall, and they are hereby invested with full power and authority to designate those necessary for the public convenience along said plank-road or turnpike road, as the case may be, and no others than those designated shall be allowed such abatement of toll.

In case the directors of any plank-road or turnpike road company in this state, shall refuse or neglect to abate the toll as aforesaid, any inhabitant having constructed a watering trough in compliance therewith, may notify the commissioner or commissioners of highways, as the case may be, of the town in which the same had been erected, of such neglect or refusal on the part of the directors aforesaid, whose duty it shall be, and who are hereby invested with full power and authority to proceed, without delay, to an examination of said watering trough; and if, upon a full examination of the same, the said commissioner or commissioners, as the case may be, or a majority of them, shall deem it necessary for the convenience of the public that such watering trough ought to be maintained, he or they, as the case may be, shall forthwith notify the said directors accordingly, by serving a written notice on the president of the company, to that effect, in which the necessity of its maintenance shall be clearly expressed; and if the said directors shall still refuse or neglect to abate the toll as aforesaid, and shall demand and take toll, on application for such abatement, in violation of the provisions of the preceding paragraph, for the space of thirty days after the service of such notice, they shall be liable to a penalty of twenty dollars, to be recovered in an action at law at the suit of the person having constructed said watering trough.

The first and second paragraphs of this section were formerly L. 1890, ch. 566, § 130, as am'd by L. 1893, ch. 538. The third paragraph, formerly L. 1907, ch. 127, and fourth and fifth paragraphs, formerly L. 1872, ch. 274, were inserted in this section by L. 1909, ch. 219.

This section applies to turnpike companies organized under the general act only, in providing that persons living within one-half mile of the gate should be exempt from the payment of toll, but does not amend special acts in which

there is no such exemption clause. Aurora & Buff. Plank Road Co. v. Schrot, 90 Hun 56 (1895); Monticello & Fallsburgh Turnpike Road Co. v. Leroy, 72 A. D. 241 (1902).

The exemptions in this section apply only to toll-gates upon roads organized under the general law, and will not apply to a company incorporated by a special act, in which other and less liberal exemptions were provided. Aurora & Buffalo Plank Road Co. v. Schrot, 90 Hun 56 (1895); Great Western Turnpike Co. v. Shafer, 57 A. D. 331 (1901).

Where a person claims exemption from toll, he must establish the fact that he "lived within one mile of the gate by the most usually traveled road," and, also, that when toll was exacted he was "not engaged in the transportation of other persons or property." Conly v. Clay, 90 Hun 20 (1895).

An oral agreement that on closing a private road the occupants of a certain farm should be forever free from tolls at a particular gate was not within the statute of frauds, as granting an interest in lands. Great Western Turnpike Co. v. Shafer, 57 A. D. 331 (1901). After recognizing the agreement for forty years the corporation cannot question the authority of the person who made it on behalf of the corporation. Id.

Laws of 1898, ch. 151, amending Laws of 1882, ch. 92, by striking therefrom the provision permitting a turnpike corporation to charge toll for bicycles, thereby reducing the earning capacity of the corporation twenty-five per cent. is unconstitutional. Rochester & Charlotte T. Road Co. v. Joel, 41 A. D. 43 (1899).

Regulation of Toll Rates.

The County Law (L. 1909, ch. 16), § 72, empowers boards of supervisors to alter and reduce tolls of toll roads, toll bridges and ferries. Said section reads as follows:

§ 72. **Regulation of toll rates.**— Such boards shall have power by a vote of two-thirds of all the members elected to authorize an alteration, reduction or change of the rates of toll charged or received by any turnpike, plank or gravel road, or other toll road within such county, or by any bridge company or ferry within such county, or, if within more than one county, then by joint action with the supervisors of such counties, provided such alteration shall be asked for by the directors, trustees or owners of such road, bridge or ferry; but that no increase of toll shall be so authorized unless notice of intention to apply for such increase shall have been published in each of the newspapers published in such county, once in each week for six successive weeks next before the annual election of supervisors in such county; and any alteration in rates of toll authorized by any board of supervisors may be changed or modified by any subsequent board, on their own motion, by a like vote of two-thirds of all the members elected to such board; but nothing herein contained shall affect or abridge the powers of any city.

A company authorized by its charter to collect tolls for the passage of animals and certain specified vehicles may not demand tolls for the passage of automobiles. Its power to collect toll is measured by its charter. Mallory v. Saratoga Lake Bridge Co., 53 Misc. 446 (1907).

Unsafe Toll Bridges.

Provisions in relation to unsafe toll bridges are contained in the Highway Law (L. 1909, ch. 30); § 72, as follows:

§ 72. **Unsafe toll bridges.**— Whenever complaint in writing, on oath, shall

be made to the town superintendent, of any town in which shall be in whole or in part any toll bridge belonging to any person or corporation, representing that such toll bridge has from any cause become and is unsafe for the public use, such town superintendent shall forthwith make a careful and thorough examination of such toll bridge, and if upon the examination thereof he shall be of the opinion that the same has from any cause become dangerous or unsafe for public use, he shall thereupon give immediate notice to the owners of such toll bridge, or to any agent of such owners, acting as such agent in respect to such bridge, that he has, on complaint made, carefully and thoroughly examined the bridge, and found it to be unsafe for public use. Such owners shall thereupon immediately commence repairing the same, and cause such repairs to be made within one week from the day of such notice given, or such reasonable time thereafter as may be necessary to thoroughly repair the bridge, so as to make it in all respects safe and convenient for public use. For neglect to take prompt and effective measures so to repair the bridge, its owners shall forfeit twenty-five dollars, and shall not demand or receive any toll for using the bridge until the same shall be fully repaired. The town superintendent shall cause such repairs to be made and the owners of the bridge shall be liable for the expense thereof, and for the services of the superintendent, and upon the neglect or refusal to pay the same upon presentation of an account therefor, the town superintendent may recover the same by action, in the name of the town. Highway Law (L. 1909, ch. 30), § 72; formerly L. 1890, ch. 568, § 13.

§ 131. Toll-gatherers. Every such corporation may appoint toll-gatherers to collect toll at each gate, who may detain and prevent from passing through the gate, any person riding, leading or driving animals or vehicles, subject to the payment of toll, until the toll is paid, but if he shall unreasonably hinder or delay any traveler or passenger liable to the payment of toll, or shall demand or receive from any person more toll than he is authorized by law to collect, he shall forfeit to such person the sum of five dollars for every offense, and the corporation employing him shall be liable for the payment thereof, and for any damages sustained by any person for acts done or omitted to be done by him in his capacity of toll-gatherer, if, on recovery of judgment against the toll-gatherer therefor, execution thereon shall be returned nulla bona.

Formerly L. 1890, ch. 566, § 131.

§ 132. Penalty for running a gate. Any person who, with intent to avoid the payment of toll, shall pass any gate, without paying the toll required by law, or shall, with his team, carriage or horse, turn out of a turnpike or plank-road and pass any gate thereon on ground adjacent thereto, shall forfeit for each offense the sum of ten dollars to the corporation injured.

Formerly L. 1890, ch. 566, § 132.

§ 133. Location of gates and change thereof. No such corporation shall erect any toll-gate, house or other building within ten rods of the front of any dwelling house, barn or other out house, without the written consent of the owner, and the county judge of the county in which the same is located shall, on application, order any building so erected to be removed, and if a majority of the commissioners of highways of any town, in which a toll-gate shall be located, or in an adjoining town, shall deem the location of any gate unjust to the public interests by reason of the proximity of diverging roads or otherwise, they may, on fifteen days' written notice to the president or secretary of the corporation, apply to the county court of the county in which the gate is located, for an order to alter or change its location. On hearing such application, and viewing the premises, if deemed necessary, the court may make such order in the matter as may be just and proper. Either party may, within fifteen days thereafter, appeal to the appellate division of the supreme court from such order, on giving such security as the county judge, making the order, may prescribe. Upon such appeal the supreme court, on motion of either party and on due notice, shall appoint three disinterested persons who are not residents of any town through or into which such road shall run, or to or from which it is the principal thoroughfare, or any adjoining town, as referees to hear, try and determine the appeal. Such referees shall view the premises and the location of the gate, and hear the parties in the same manner as on the trial of an issue of fact by a referee in a civil action in the supreme court, and report their decision thereon and the reasons therefor, and the evidence taken thereon to the supreme court, and such court shall review the report and render judgment thereon as justice and equity shall require, which shall be final and conclusive. The referee shall be entitled to the same fees as referees in civil actions in the supreme court, to be paid in the first instance by the party in whose favor their report or decision shall be, and the supreme court shall award judgment therefor, with such costs and expenses as it may deem reasonable, to the successful party on the appeal, which judgment shall be entered with the order affirming or reversing the order appealed from, and may be enforced by execution as a judgment of a court of record. If the order of the county court is not appealed from, it may be enforced, as the court may direct, and the court may allow such costs as may be deemed just and equitable.

Formerly L. 1890, ch. 566, § 133.

§ 134. Inspectors; their powers and duties. The commissioners of highways of the several towns and the trustees or other officers in the incorporated cities and villages of the state, who perform the duties of commissioners of highways in such cities and villages, shall be inspectors of plank-roads and turnpikes, in their respective towns, cities and villages. They shall inspect or cause to be inspected by one or more of them the whole of such turnpike or plank-road as lies in their respective towns, villages or cities, at least once in each month, and whenever written complaint shall be made to any inspector, that any part of such road lying in the town, city or village of such inspector is out of repair he shall, without delay, view and examine the part complained of. If such turnpike or plank-road shall be found to be out of repair or in condition not to be conveniently used by the public, such inspectors or either of them, or the one to whom such complaint shall have been made, shall give written notice to the toll-gatherer, or person attending the gate nearest the place out of repair or in bad condition, to cause the same to be put in good condition before a time therein designated not less than forty-eight hours after the service of such notice, or to appear before the county court of the county in which that part of the road is situated, at a time in said notice designated, and show cause why such turnpike or plank-road should not be repaired or put in good condition as in said notice directed. If such road shall not have been theretofore repaired or put in good condition as in said notice directed, then the county court shall, upon the return of such notice, hear the allegations and proofs of the parties, and it shall always be open for that purpose; and if the court shall find such road to be out of repair or in bad condition it may give additional time for the repair thereof, or it may order the gate nearest the place out of repair or in bad condition to be immediately upon the service of the order, or at a time therein specified, thrown open and to remain open until the road shall be fully repaired at the place directed to be repaired as aforesaid. Such order shall be served in the manner therein specified upon the keeper of the gate so ordered to be thrown open. Any inspector within the town, city or village where such road has been repaired pursuant to notice or order as aforesaid, may certify that such road has been duly repaired. The fees of the inspector for the services above mentioned shall be two dollars for each day actually

employed, together with necessary witness fees, to be paid by the corporation or person whose road is so inspected, if the gates are ordered to be thrown open, but otherwise to be charged, audited and paid in the same manner as other fees of commissioners of highways. Any inspector who neglects to perform his duties shall forfeit to the party aggrieved the sum of twenty-five dollars for each offense. Every keeper of a gate ordered to be thrown open, not immediately obeying such order or not keeping such gate open until such road shall be fully repaired or until a certificate that such road has been duly repaired is granted, or hindering or delaying any person in passing, or taking any tolls from any person passing such gate during the time it ought to be open, shall forfeit to the party aggrieved the sum of ten dollars for each offense, and the corporation or person owning the road, who shall refuse or neglect to obey the requirements of any such order, shall forfeit to the people of the state the sum of two hundred dollars for each offense.

Formerly L. 1890. ch. 566. § 134, as am'd by L. 1896, ch. 343.

§ 135. Change of route; extensions and branches. Any such corporation may, with the written consent of the owners of two-thirds of its capital stock and of a majority of the commissioners of highways of the town or towns in which any change or extension is proposed to be made, construct branches to its main line or extend the same, or change the route of its road or any part thereof, and acquire the right of way for the same in the same manner as for the original or main line, and may, by any of its officers, agents or servants, enter upon lands for the purpose of making any examination, survey or map, doing no unnecessary damage; but before entering upon, taking or using such lands, the corporation shall make a survey and map thereof, designating thereon the lands of each owner or occupant intended to be taken or used, which shall be signed and acknowledged by the engineer making the same and the president of the corporation and filed in the office of the clerk of the county in which the land is situated.

Formerly L. 1890, ch. 566, § 135.

§ 136. Mile-stones, guide-posts and hoist-gates. A milestone or post shall be erected and maintained by every such cor-

poration on each mile of its road, on which shall be fairly and legibly marked or inscribed the distance of such stone or post from the place of commencement of the road, and when the road shall commence at the end of any other road having mile-stones or posts on which the distance from any city or town is marked, a continuation of that distance shall in like manner be inscribed. A guide-post shall also be erected at the intersection of every public road leading into or from every turnpike or plank-road, on which shall be inscribed the name of the place to which such intersecting road leads in the direction to which the name on the guide-post shall point. No plank-road or turnpike corporation shall erect or put up any hoist-gate on its road. Any person who shall wilfully break, cut down, deface or injure any mile-stone, post or gate on such road, or dig up, or injure any part of the road, or anything belonging thereto, shall forfeit to the corporation twenty-five dollars for each offense, in addition to the damages resulting from the act.

Formerly L. 1890, ch. 566, § 136.

§ 137. Location of office of corporation. Within two weeks after the formation of any such corporation its directors shall designate some place within a county in which its road or bridge or some part thereof shall be constructed, as its office, and shall give public notice thereof by publishing the same once in each week for three successive weeks in a public newspaper in the county, and shall file a copy of the notice in the office of the county clerk of every county in which any part of the road or bridge is, or is to be constructed, and if the location of such office shall be changed, like notice of the change shall be published and filed, in which shall be specified the time of making the change, before it shall take effect. Every notice, summons or other paper required by law to be served on the corporation may be served by leaving the same at such office with any person having charge thereof, at any time between nine o'clock in the forenoon and five o'clock in the afternoon of any day except Sunday or a legal holiday.

Formerly L. 1890, ch. 566, § 137.

§ 138. Consolidation of corporations; sale of franchise. Any two or more of such corporations may consolidate into one

corporation on such terms as the persons owning two-thirds of the stock of each corporation may agree upon, and may change the name of the road on filing in the office where the original certificates of incorporation were filed, a certificate containing the names of the roads so consolidated, and the name by which such road shall thereafter be known. Any plank-road or turnpike corporation may, with the consent of the owners of sixty per centum of its stock, sell and convey the whole or any part of its rights, property and franchise to any other domestic plank-road or turnpike corporation, and such sale and conveyance shall vest the rights, property and franchises thereby transferred in the corporation to which they are conveyed for the term of its corporate existence.

Formerly L. 1890, ch. 566, § 138.

§ 139. Sale of rights, franchises and property to the county. Any turnpike, plank-road or bridge corporation may by the affirmative vote of stockholders owning a majority of the stock thereof, expressed in writing, or at a special meeting of the stockholders of such corporation held upon written notice of at least ten days to all the stockholders thereof, authorize its board of directors or trustees, to dispose of the rights, franchises and property of such corporation within a county, pursuant to sections three hundred and thirty-eight to three hundred and forty-two, inclusive, of the highway law, for a specified sum; and thereupon the board of directors or trustees of such corporation may convey and sell such rights, franchises and property to the county accordingly.

New section, formerly L. 1899, ch. 594, as am'd by L. 1905, ch. 120; L. 1907, ch. 104.

§ 140. Surrender of road. The directors of any plank-road or turnpike corporation may abandon the whole or any part of its road at either or both ends thereof, upon obtaining the written consent of the stockholders, owning two-thirds of the stock of the corporation, which surrender shall be by a declaration in writing to that effect, attested by the seal of the corporation and acknowledged by the president and secretary. Such declaration and consent shall be filed and recorded in the clerk's office of the county in which any part of the road abandoned shall be situated, and the road so abandoned shall cease to be the road or the property

of the corporation, and shall revert and belong to the several towns, cities and villages through which it was constructed, and the corporation shall no longer be liable to maintain it or to be assessed thereon, or permitted to collect tolls for traveling over the same, but without impairing its right to take toll on the remaining part of its road at the rate prescribed by law. And whenever any turnpike or plank-road company, now existing or hereafter created, shall abandon all or any part of its road within this state, in the manner above provided, or whenever the charter or franchise of such company shall be annulled or revoked, the road of such turnpike or plank-road company shall revert to and belong to the several towns, cities and villages through which such road shall pass. And it shall be the duty of the several towns, cities and villages acquiring any road under this section to immediately lay out and declare the same a free public highway. And it shall be the duty of the several towns, cities and villages, to maintain and work every road acquired under the provisions of this section in the same manner as the other roads of such towns, cities and villages are maintained and worked. And any town, city or village may borrow money in the manner provided by law for the purpose of improving or repairing the same.

Formerly L. 1890, ch. 566, § 139.

The policy of the State is that public roads, constructed by turnpike or other corporations under special charters or general statutes, shall, on dissolution of the companies which constructed them, or their abandonment by such companies, become and be thereafter treated as public highways. Peo. ex rel. Keene v. Supervisors of Queens Co., 151 N. Y. 190, affg. 91 Hun 241.

§ 141. Taxation and exemption. So much of any bridge or toll-house of any bridge corporation as may be within any town, city or village, shall be liable to taxation therein as real estate. Toll-houses and other fixtures and all property belonging to any plank-road or turnpike corporation shall be exempt from assessment and taxation for any purpose until the surplus annual receipts of tolls on its road over necessary repairs and a suitable reserve fund for repairs or relaying of plank, shall exceed seven per centum per annum on the first cost of the road. If the assessors of any town, village or city and the corporation disagree concerning any exemption claim, the corporation may appeal to the county judge of the county in which such assessment is proposed to be made, who shall, after due notice to both parties, examine the books and vouchers of the corporation, and take such further proof as he

shall deem proper, and decide whether such corporation is liable to taxation under this section, and his decision shall be final.

Formerly L. 1890, ch. 566, § 140.

The Legislature under its reserve power to alter corporate charters may withdraw the exemption. Peo. ex rel. Cayadutta Plank Rd. Co. v. Cummings, 166 N. Y. 110 (1901); the enactment of a city charter authorizing an assessment is such withdrawal. Id.

§ 142. Hauling logs and timber. Any person who shall draw or haul or cause to be drawn or hauled, any logs, timber or other material upon the bed of any plank or turnpike road, unless the same shall be entirely elevated above the surface of the road on wheels or runners, and the road-bed shall be injured thereby, or who shall do or cause to be done any act by which the road-bed, or any ditch, sluice, culvert or drain appertaining to any turnpike or plank-road shall be injured or obstructed, or shall divert or cause to be diverted, any stream of water so as to injure or endanger any part of such road, shall forfeit to the corporation the sum of five dollars for every offense in addition to the damages resulting from the wrongful act.

Formerly L. 1890, ch. 566, § 141.

§ 143. Encroachment of fences. Whenever the president or secretary of any turnpike or plank-road corporation shall notify any inspector of such roads in the county where situated that any person is erecting or has erected any fence or other structure upon any part of the premises lawfully set apart for any such turnpike or plank-road, the inspector shall examine into the facts and order the fence or other structure to be removed if it shall appear to be upon any part of any such road, and any person neglecting or refusing to remove the same within twenty days or such further time not exceeding three months, as may be fixed by the inspector, shall forfeit to the corporation the sum of five dollars for every day, during which the fence or other structure shall remain upon such road, but no such order shall require the removal of any fence, previously erected, between the first day of December and the first day of April.

Formerly L. 1890, ch. 566, § 142.

§ 144. Penalty for fast driving over bridges. Any plank-road, turnpike or bridge corporation may put up and maintain at conspicuous places at each end of any bridge, owned or maintained by it, the length of whose span is not less than twenty-five feet, a notice with the following words in large characters:

"One dollar fine for riding or driving over this bridge faster than a walk." Whoever shall ride or drive faster than a walk, over any bridge, upon which such notice shall have been placed, and shall then be, shall forfeit to the corporation the sum of one dollar for every such offense.

Formerly L. 1890, ch. 566, § 143.

§ 145. Acts of directors prohibited. No director of any such corporation shall be concerned, directly or indirectly, in any contract for making or working any road belonging to it during the time he shall be a director. No contractor for the making of such road, or any part thereof, shall make a new contract for the performance of his work, or any part of it, other than by hiring hands, teams, carriages or utensils to be superintended and paid by himself, unless such new contract and its terms be laid before the board of directors and be approved by them.

Formerly L. 1890, ch. 566, § 144.

§ 146. Actions for penalties. No action to recover any penalty against any turnpike or plank-road corporation, shall be commenced or maintained against it, or any of its officers or agents, unless commenced within thirty days after the penalty was incurred.

Formerly L. 1890, ch. 566, § 145.

§ 147. Proof of incorporation. In any action brought by or against any domestic turnpike or plank-road corporation, which shall have been in actual operation, and in possession of a road upon which it has taken toll for five consecutive years, next preceding the commencement of the action, parol proof of such corporate existence and use shall be sufficient to establish the incorporation of the corporation, for all the purposes of the action, unless the opposing party shall set up a claim in his complaint or answer duly verified of title in himself to the road, or some part thereof stating the nature of his title, and right to the immediate possession and use thereof.

Formerly L. 1890, ch. 566, § 146.

§ 148. When stockholders to be directors. When the whole number of stockholders in any turnpike or plank-road corporation shall not exceed the number of directors specified in the certificate of incorporation, each stockholder shall be a director of such corporation, and the stockholders shall constitute the board of

directors, whatever may be their number, and a majority thereof shall be a quorum for the transaction of business.

Formerly L. 1890, ch. 566, § 147.

§ 149. Dissolution of corporation; road to be a highway. Every turnpike, plank-road or bridge corporation may be dissolved by the legislature when, by the income arising from tolls, it shall have been compensated for all moneys expended in purchasing, making, repairing and taking care of its road, and have received in addition thereto an average annual interest at the rate of ten per centum, and on such dissolution all the rights and property of the corporation shall vest in the people of the state. Any such corporation, which shall not within two years from the filing of its certificate of incorporation, have commenced the construction of its road or bridge and actually expended thereon ten per centum of its capital, or which shall not within five years from such filing have completed its road or bridge, or, in case such bridge is destroyed, shall not rebuild the same within five years, or which for a period of five consecutive years shall have neglected or omitted to exercise its corporate functions, shall be deemed dissolved. Where the corporation has neglected or omitted for five years to exercise its corporate functions, and its road-bed or right of way shall have been used as a public highway for that period, or where any such corporation shall have become dissolved, or where the road or any part of it of a turnpike or plank-road corporation, or the bridge of any bridge corporation, shall have been discontinued, such road-bed or right of way, and such discontinued road or bridge, and the road or bridge of any such dissolved corporation, shall thereafter be a public highway, with the same effect as if laid out by the commissioners of highways of the town, and be subject to the laws relating to highways and the erection, repairing and preservation of bridges thereon.

Formerly L. 1890, ch. 566, § 148.

The question whether a forfeiture clause is or is not self-executing depends wholly upon the language employed by the Legislature. Matter of New York & Long Island Bridge Co. v. Smith, 148 N. Y. 540 (1896). It requires strong and unmistakable language to authorize the court to hold that it was the intention to dispense with judicial proceedings on the intervention of the Attorney-General. Id. Where the words of forfeiture were, "the corporation shall be dissolved," default did not work dissolution ipso facto, but proceedings were necessary to accomplish an actual dissolution. People v. Buffalo Stone & Cement Co., 131 N. Y. 140 (1892). A forfeiture clause which provides that, in case of default by the corporation, "its corporate existence and powers shall cease," is self-executing. In re Brooklyn, Winfield & New-

town R. R. Co., 72 N. Y. 245 (1878). Corporate existence ceased by the failure of a corporation to perform acts imposed by charter, in which the words of forfeiture were, "this act and all the powers, rights and franchises herein and hereby granted shall be deemed forfeited and terminated." Brooklyn Steam T. Co. v. Brooklyn, 78 N. Y. 524 (1879). But, where it was provided that in case of default, the company should "forfeit the rights acquired by it," it was held that the provision did not ex proprio vigore put an end to the corporate life in case of default, but simply exposed the company to proceedings on behalf of the State. In re Brooklyn Elevated R. R. Co., 125 N. Y. 434 (1895). The words, "all rights and privileges granted hereby shall be null and void," do not render a forfeiture clause self-executing. 148 N. Y. 540, supra (1896).

The land cannot revert to the company's grantor. Heath v. Barmore, 50 N. Y. 302 (1872); Tefft v. City of Buffalo, 82 N. Y. 204 (1880); Kennedy v. Mineola, H. & F. Traction Co., 178 N. Y. 508, 513 (1904).

§ 150. Town must pay for lands not originally a highway. When the corporate existence of any plank-road or turnpike corporation shall have ceased by limitation of time, or where any judgment of ouster or dissolution, or restraining the exercise of its franchises, has been rendered in any action against it, such portion of the line of its road as was built over lands which were originally purchased by it and not previously a public highway shall not be used as a public highway, nor be taken possession or control of by the town in which the same may be, or by any of the authorities thereof, or be claimed or worked or used as a public highway until the town shall pay over to the treasurer, receiver or other legal representatives of the corporation, or its assigns, the principal sum of the amounts paid by it for such lands, as shown by the deeds of conveyance thereof to it, and every such judgment shall provide accordingly. Such payments shall be made within three months after the expiration of the corporate existence of the corporation, or if any such judgment has been or shall be rendered within three months after service of written notice of the entry thereof on the supervisor of the town, and the person receiving such payment shall execute a proper discharge therefor and a conveyance to the town of all the title and interest which the corporation had in such lands at the expiration of its corporate existence.

Formerly L. 1890, ch. 566, § 149.

§ 151. Highway labor upon line of plank-road or turnpike. Every person liable for highway labor living or owning property on the line of any plank-road or turnpike may, on written application to the commissioners of highways of the town, on any day previous to making out the highway warrant by the commissioners,

be assessed for the highway labor upon his property upon the line of such road, in the discretion of the commissioners to be worked out upon the line of such road as a separate road district, and the commissioners shall make a separate list of the persons and property so assessed, as for a separate road district, and deliver the same to one of the directors of the corporation owning such road, who shall cause such highway labor to be worked out on such road in the same manner that overseers of highways are required to do, and such directors shall possess the powers and have the authority to compel the performance of such highway labor or the payment of the tax therefor as such overseers now have by law, and shall make like returns to the commissioner of highways, and any person so assessed may commute for the highway labor assessed upon him or his property by paying the sum now fixed by law as the commutation for such highway labor.

Formerly L. 1890, ch. 566, § 150.

§ 152. Extension of corporate existence. No turnpike, plank-road or bridge corporation shall extend its corporate existence, pursuant to the provisions of the general corporation law, without the written consent of the persons owning at least two-thirds of its capital stock, nor without the consent of the board of supervisors of each county in which any part of its road or bridge is situated, which consent shall be given by a resolution of the board adopted at any regular or special meeting, and a copy of such resolution, certified by the clerk of the board, or verified by the affidavit of some member thereof, together with such consent of the stockholders, and a statement verified by the affidavit of the president and treasurer of the corporation, showing the actual capital expended upon the construction of the road, exclusive of repairs, the name of each town or ward through or into which the road passes, and, if any part of the road shall have been abandoned, the actual cost of the remaining part, exclusive of repairs, shall be filed with the certificate of the continuance of the corporate existence. No further abandonment of any road belonging to a corporation whose corporate existence has been so extended shall be made, except with the consent of a majority of the board of supervisors of the county in which the abandoned portion of the road may lie, which consent shall be filed in the office of the clerk of the county.

Formerly L. 1890, ch. 566, § 151.

For form of certificate of extension, see post, Forms No. 405–407.

ARTICLE 10-A

[New article added by L. 1911, ch. 778.]

Freight Terminal Corporations.

§ 153. Definitions. Whenever used in this article unless otherwise expressly stated:

(a) "Local authority" means in the city of New York the board of estimate and apportionment of said city; and in every other case the local authority or authorities in control of the streets, roads, bridges, viaducts, highways, avenues, boulevards, driveways, parks, parkways, docks, bulkheads, wharves, piers, or other public grounds and waters, that under this article may be taken or used or affected.

(b) "Terminal docks" means any dock or docks, pier or piers, wharf or wharves, marginal wharf, bulkhead or bulkheads, basin or basins, mooring place, anchorage or other place at which shipping of any sort may receive or discharge freight or be itself berthed, detained, protected or operated in connection with other terminal facilities.

(c) "Terminal basins" means basin or basins, harbor or harbors, graving or loading dock or docks that may be provided by the inclosure, natural or artificial, of water for the flotation, protection or handling of shipping or freight, or for transport service of any class.

(d) "Terminal ways" means a way or ways constructed or operated under the provisions of this article for the transport of freight to, from, across or along any water-front or marginal wharf of the city or terminal stations or terminal stores adjacent or in proximity thereto or any extension or extensions, branch or branches, approach or approaches, siding or sidings thereof, upon, lying upon, above, or below any street, avenue, road, highway, park or parkway, bridge, viaduct or public place or water-front property in the city, including all equipment and terminal facilities, of every kind used, operated or owned by or in connection with any such way so constructed or operated under this article.

(e) "Terminal stations" means a building or buildings, structure or structures erected or acquired or occupied or used under the provisions of this article in connection with terminal ways

for the receipt, handling, delivery or shipment of freight, including terminal stores and appurtenances and appliances necessary for the operation thereof, whether such buildings and other structures or portions thereof are used exclusively for terminal stations or terminal stores or in part for warehousing, manufacturing or other purposes.

(f) "Terminal stores" means a building or buildings or space being a part of or adjacent to a terminal station for the temporary storage of freight while in the process of delivery, shipment or transport.

(g) "Terminal warehousing" means the storage, retention and protection of property either for other purposes than as an incident of delivery, shipment or transport, or under contract for a longer period at any time than ten days from the making of the contract therefor, as carried on in premises physically connected with or adjacent to terminal railways, basins or stations.

(h) "Terminal factories" means the space used for manufacture and the storage incidental thereto of materials, supplies and products, together with such power, light, machinery, and other facilities therefor as may be supplied in connection therewith in promises physically connected with or adjacent to terminal ways, basins or stations.

(i) "Terminal facilities" means any or all terminal way or ways, terminal station or stations, marginal wharf, terminal basin or basins, terminal store or stores, water-front property, and transportation of property thereon, thereby, thereto or therefrom by this article provided for or mentioned and equipment thereof and therefor.

(j) "Equipment" means elevators, conveyors and conveying apparatuses, hoists, chutes, float-bridges, transfer-bridges and appliances for lighting, heating or refrigerating, roadbed, tracks, switches, cross-overs, spurs, signals, telphers, cars, motors, engines and rolling stock of all description; tugs, floats and lighters; power plant, substations and transformers, appliances for transmission of power by third rail, overhead wires or other means; telephone and telegraph wires and other means of communication; together with all appurtenances and appliances appertaining thereto, connected therewith, or used in the operation thereof.

(k) "Street" includes avenue, road, alley, lane, highway, viaduct, bridge, tunnel, subway, park, parkway and every class of public road, square and place, except marginal wharf.

(1) The term "transportation" includes any service in connection with the receipt, delivery, carriage, elevation, transfer in transit, sorting and handling of property transported, and also the handling of goods on or in terminal basins, terminal ways, terminal stations, terminal stores or water-front property by mechanical apliances or other means.

Added by L. 1911, ch. 778.

§ 154. Incorporation. Three or more persons may become a corporation for the supply, maintenance and operation of freight terminal facilities — including docks, wharves, bulkheads, basins, tugs, floats, lighters and other shipping, and wharfage and lighterage for the receipt, delivery, storage or handling of freight; terminal ways for initial or final local transport of freight received for shipment or delivery in or from the locality in which the business of such corporation shall be carried on; terminal stations and stores for the receipt, storage, handling, protection and preservation of freight; terminal warehousing; freight collection, delivery and express service to and from terminal docks, terminal ways, terminal stations, terminal stores and warehouses of and for freight for transport, handling, storage, warehousing, carriage, manufacture or use thereby, thereat or in such locality; terminal factory facilities, including room, power, heat, light and machinery for the use, manufacture, handling, display, sale and shipment of such supplies, materials and products as at such locality shall or may be received or shipped as freight from or by any terminal wharf, way, station, store, warehouseman, manufacturer, or carrier doing business at such locality; and equipment for such docks, ways, stations, stores, warehouses, service and factories — by making, signing, acknowledging and filing a certificate stating the name of the corporation — which shall include the words "freight terminal company;" its objects as above set forth; the amount of its capital stock, not less than one million dollars if its principal place of business is to be in the borough of Manhattan, five hundred thousand dollars if in the borough of Brooklyn, two hundred and fifty thousand dollars if in either of the boroughs of the Bronx, Queens or Richmond, in the city of New York, and one hundred thousand dollars if in any other locality of the state; the number of its directors, not less than three nor more than thirteen; the names and places of residence of the directors for

the first year; and a statement of the place and the limits of the locality in which such corporation shall do business.

Provided, that nothing in this article shall be so construed as to permit any freight terminal company to engage in manufacture or production except of supplies for its own use, including power, heat, light and equipment for such terminal docks, ways, stations, stores, warehouses and factories, and nothing herein contained shall be deemed to include any right or privilege to carry on the business of generating, selling or distributing electricity for light, heat and power purposes, nor shall the right, operation and use of such privileges be extended beyond the streets or marginal streets bounding or occupied by the terminal docks, ways, stations, stores, warehouses and factories operated by any freight terminal company. No railroad corporation, and no corporation or joint-stock association engaged in carrying on what is known as an express business, shall either directly or indirectly, or through the medium of a holding company or otherwise, purchase, acquire or hold any of the stocks or any bonds or other evidences of indebtedness issued by any corporation which is formed under the provisions of this article.

Added by L. 1911, ch. 778.

The Secretary of State is not required to file a certificate for formation under the Business Corporations Law of a corporation, the purposes of which include a freight terminal business, because corporations of that character must be formed in compliance with this article. Opinion of Atty. Genl. (1913), Vol. 2, p. 115.

§ 155. Rates. Subject to the regulation of the proper public service commission, such company may establish a classification of its business, and rates for each class thereof, as well as for any combination of two or more classes of such service and the further terms and conditions on which such freight terminal service shall be furnished. Up to the maximum capacity of its plant and facilities therefor, and without any discrimination whatever for any cause or on any pretext except such as may be prescribed by such classification or regulation, any such freight terminal company shall impartially serve all requiring its service within the locality described in its certificate of incorporation. As to all freight, goods or property entrusted to it for any service within the purposes of its incorporation as defined by this act — except terminal warehousing and provision for terminal factories —

every such corporation shall be liable as a common carrier. No receipt, certificate or order of any kind shall be made, accepted or issued by any such corporation for any commodity unless such commodity thereby represented is actually in possession of such corporation at the time of making, issuance or acceptance thereof.

Added by L. 1911, ch. 778.

§ 156. Supervision of public service commission. Every such freight terminal corporation shall be subject to the supervision, control and regulation of the public service commission of the district wherein it does business to the same extent as are railroads and street railroads wholly or partly within said district so far as the provisions of the public service commission act are applicable to the case and business of any such freight terminal company.

Provided, however, that any freight terminal company, the limits of the locality in which it is organized to do business include any portion of the city of New York, shall be subject to the supervision, control and regulation of the public service commission of the first district.

Added by L. 1911, ch. 778.

§ 157. Powers and duties. Subject to the approval of the public service commission of the proper district:

(a) Any freight terminal corporation may issue stocks, bonds, notes or other evidences of indebtedness, payable at periods of more than twelve months after the date thereof, when necessary for the acquisition of property, the construction, completion, extension, improvement or equipment of its plant, or the improvement or maintenance of its service, or for the discharge or lawful refunding of its obligations, and may mortgage its property, privileges and franchises to secure its bonds, whether convertible into stock or otherwise, and increase or decrease its capital stock:

Provided, and not otherwise, that as to any such issue or increase, there shall have been secured from such public service commission an order stating that, in the opinion of the commission, the use of the capital to be secured by the issue of such stock, bonds, notes or other evidences of indebtedness is reasonably required for the said purposes of the corporation, specifying the amount of the issue of each such evidence of indebtedness approved and authorizing such issue.

(b) Any two or more corporations organized under this article or any general or special law of the state for the purpose of carrying on any business included within that which a corporation organized under this article might carry on may consolidate themselves into a single corporation, and any corporation organized under this article may, with the like permission or approval, be merged with any other such corporation upon complying with the provisions of the business corporations law relating to the consolidation of business corporations and the stock corporations law relating to the merger of stock corporations.

But no freight terminal company or any corporation with which such company shall have been consolidated or merged shall undertake any business not included in the objects for which such freight terminal companies may be incorporated as set forth in this article; and no such freight terminal company shall purchase, acquire or hold the stocks, bonds or other evidences of indebtedness of any other corporation, domestic or foreign, except by the express permission of the public service commission of the proper district.

(c) Each such freight terminal company shall have the right and is vested with the power and authority to acquire such real estate, including the right of way through any property; as may be necessary for the purposes of its incorporation, hereby declared to be a public use, in the manner and form prescribed by the general condemnation law of the state.

Such permission or approval shall be given only after the public service commission's certificate of the public need for freight terminal accommodations to provide which such condemnation is asked. Provided that such right to acquire by condemnation shall not be used to acquire property devoted to public use for streets, ferries, terminals, or otherwise, and whether operated by the public authorities or not, except by permission of and subject to such conditions as may be imposed by the local authority.

Should the state or any municipal corporation thereafter proceed to acquire such property or any part thereof by condemnation for similar or other public use, the public use in behalf of which the power to acquire by condemnation is hereby given any such freight terminal company shall not be or be set up as an obstacle to such acquisition by condemnation by the state or other municipal corporation.

(d) Each such freight terminal company may acquire, use and enjoy the privilege to cross or otherwise use the streets adjacent to any terminal way or terminal station on such terms as the local authority may impose.

Provided that this shall be by permission at any time revocable upon notice of a year or specified less time, and that no such privilege shall be permitted any such company except upon the certificate of the public service commission of the proper district (1) that such privilege is needed for public use, (2) that the terms thereof are such as still to leave such street in the main available for ordinary street uses, and (3) that, with such privilege permitted, such street or place will be of greater public service for or in substitution of street uses than if such privilege were not permitted; also that such privilege shall be revocable by the city only with the approval of such public service commission and upon its certificate either that (1) such privilege is no longer needed for public use, or (2) that with such privilege permitted such street or place will not be of so great service for or in substitution of street uses as if such privilege were not permitted.

Added by L. 1911, ch. 778.

§ 158. Subject to local authorities. In construction and operation of its plant and equipment and in the transaction of its business, any such freight terminal company shall be subject to all regulations as to construction, fire, health and safety imposed by law, ordinance or local authority.

Added by L. 1911, ch. 778.

§ 159. Inconsistent acts not to apply. The provisions of any act and parts of acts, including the charter of Greater New York and the charter of any other city of the state, which are inconsistent with this act, and in so far only as they are inconsistent with this act shall have no application to the rights, powers and obligations conferred or created by and under authority of this act or to any proceedings thereunder.

Added by L. 1911, ch. 778.

ARTICLE 11

Laws Repealed; When to Take Effect

SECTION 160. Laws repealed.
161. When to take effect.

§ 160. Laws repealed. Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

In re-enacting this section by L. 1909, ch. 219, part of the old section was omitted because it is embodied in the Gen. Construction Law.

§ 161. When to take effect. This chapter shall take effect immediately.

The Consolidated Laws of 1909 omitted from this act former §§ 161 and 162, containing saving and construction clauses because they are covered by the General Construction Law.

SCHEDULE OF LAWS REPEALED

Revised Statutes.....Part 1, chapter 18, title 1, ...All

Laws of	Chapter	Section
1803....	30....	All
1804....	81....	All
1806....	160....	All
1807....	38....	All
1808....	67....	All
R.L. 1813	91....	All
1817....	117....	1
1817....	195....	All
1817....	273....	1
1818....	65....	All
1819....	149....	All
1819....	236....	1–4
1821....	45....	All
1824....	286....	All
1828....	20....	15, ¶¶ 13–15 (2d Meet.)
1828....	21....	1, ¶¶ 72, 141, 230, 235, 249, 281, 421 (2d Meet.)
1836....	284....	All
1836....	385....	All
1838....	161....	All
1838....	262....	All
1845....	243....	All
1847....	210....	All
1847....	287....	All
1847....	398....	All
1848....	37....	All
1848....	45....	All
1848....	259....	All
1848....	265....	All
1848....	360....	All
1849....	250....	All
1849....	362....	All
1850....	71....	All
1851....	98....	All
1851....	107....	All
1851....	487....	All
1852....	228....	All
1852....	372....	All
1853....	124....	All
1853....	135....	All
1853....	245....	All
1853....	471....	All
1853....	626....	All
1854....	3....	All
1854....	87....	All
1854....	120....	All
1854....	232....	All
1854....	312....	All
1855....	104....	All
1855....	390....	All
1855....	485....	All
1855....	495....	All
1855....	546....	All

Transportation Corporations Law.

Laws of	Chapter	Section
1855....	559....	All
1856....	65....	All
1857....	83....	All
1857....	202....	All
1857....	261....	1
1857....	482....	All
1857....	643....	All
1858....	10....	All
1858....	193....	All
1859....	209....	All
1859....	288....	1
1859....	311....	All
1859....	461....	All
1860....	116....	All
1861....	215....	All
1861....	238....	All
1862....	205....	All
1862....	248....	All
1862....	425....	All
1863....	134....	All
1865....	691....	All
1865....	776....	All
1865....	780....	All
1866....	322....	All
1866....	780....	All
1867....	95....	3
1867....	419....	All
1867....	480....	All
1867....	524....	All
1867....	974....	All
1868....	253....	All
1868....	327....	All
1869....	234....	All
1870....	443....	All
1870....	491....	All
1870....	568....	All
1871....	95....	All
1871....	697....	All
1872....	128....	All
1872....	274....	2, 3
1872....	283....	All
1872....	374....	All
1872....	779....	All
1872....	780....	All
1873....	440....	All
1873....	516....	3
1873....	699....	All
1873....	737....	All
1874....	224....	All
1874....	332....	All
1875....	4....	All
1875....	113....	All
1875....	120....	All
1875....	319....	All
1875....	445....	All
1875....	530....	All
1876....	135....	All
1876....	373....	All
1876....	415....	All
1876....	416....	All
1876....	435....	All
1877....	164....	All
1877....	171....	All
1877....	440....	All
1878....	121....	All
1878....	176....	All
1878....	203....	All
1878....	394....	All
1879....	214....	All
1879....	253....	All
1879....	377....	All
1879....	397....	All
1879....	441....	All
1879....	512....	All
1880....	90....	All
1880....	137....	All
1880....	484....	All
1881....	77....	All
1881....	117....	All
1881....	213....	All
1881....	311....	All
1881....	313....	All
1881....	321....	All
1881....	337....	All
1881....	464....	All
1881....	483....	All
1881....	674....	All
1882....	73....	All
1882....	289....	All
1883....	216....	All
1883....	323....	All
1883....	409....	All
1883....	482....	All
1883....	483....	All
1883....	497....	All
1884....	386....	All
1885....	141....	All
1885....	153....	All
1885....	267....	9, 10
1885....	422....	All
1885....	423....	All
1886....	248....	All
1886....	321....	All
1886....	322....	All

Transportation Corporations Law.

Laws of	Chapter	Section
1887....	570....	All
1888....	462....	All
1889....	332....	All
1889....	369....	All
1889....	489....	All
1890....	566....	1–61, 65–163
1892....	617....	All
1893....	385....	All
1893....	538....	All
1893....	549....	All
1894....	230....	All
1895....	722....	All
1895....	972....	All
1896....	343....	All
1896....	446....	All
1896....	678....	All
1896....	778....	All
1896....	935....	All
1896....	964....	All
1897....	486....	All
1898....	364....	All
1899....	565....	All
1899....	732....	All
1900....	575....	All
1900....	657....	All
1901....	483....	1
1902....	596....	All
1903....	121....	All
1905....	120....	1, part amending L. 1899, ch. 594, § 1, last sentence
1905....	210....	All
1906....	455....	All
1907....	104....	1, part amending L. 1899, ch. 594, § 1, last sentence; 2
1907....	310....	All
1907....	629....	All

MISCELLANEOUS PROVISIONS

AFFECTING VARIOUS TRANSPORTATION CORPORATIONS

SUPPLEMENTAL TO THE TRANSPORTATION CORPORATIONS LAW

In addition to numerous acts and parts of acts inserted for convenient use in the body of the Transportation Corporations Law, under the particular sections to which they respectively apply, there are other provisions applicable to said law as follows:

§ 206. Certificate to policemen and firemen; free transportation; use of telegraph lines and telephones. The mayor of each city of this state and the president of each incorporated village may issue, under the seal of his office, to each policeman and fireman appointed by the duly-constituted authorities of such city or village, a certificate of the appointment and qualification of such policeman or fireman as such, and specifying the duration of his term of office; and it shall thereupon be the duty of every street surface and elevated railroad company carrying on business within such city or village, to transport every such policeman or fireman free of charge while he is traveling in the course of the performance of the duties of his office. Every telegraph or telephone company engaged in business within such city or village, shall afford to such policeman or fireman the use of its telegraph lines or telephones for the purpose of making and receiving reports and communications in the course of the performance of his official duties.

Gen. Municipal Law (L. 1909, ch. 29), § 206; formerly L. 1895, ch. 417, § 1.

§ 207. Penalty for improper use of certificates. Every policeman or fireman who shall permit any other person to use the certificate issued to him as provided by the last section, or shall present or make use of the same, except while acting in the course of the performance of his official duties, or who shall use such certificate after the expiration of his term of office or his resignation or removal therefrom, shall be deemed guilty of a misdemeanor.

Gen. Municipal Law (L. 1909, ch. 29); formerly L. 1895, ch. 417, § 2.

Applicable only to New York City.

L. 1897, ch. 683, entitled: "An act to regulate the exercise of their franchises by certain public corporations by requiring them to afford facilities for the transaction of the public business to certain public officers and employees of the city of New York."

§ 1. The mayor of the city of New York may issue under the seal of his office to each policeman and fireman appointed by the duly constituted authorities of said city a certificate of the appointment and qualification of such policeman or fireman as such, and specifying the duration of his term of office; and it shall be thereupon the duty of every street surface, elevated railroad or railroad company operating cars by steam or electricity and carrying on business within said city to transport every such policeman or fireman free of charge while he is traveling in the course of the performance of the duties of his office within said city limits. Every telegraphic or telephone company engaged in business within such city or village, shall afford to such policeman or fireman the use of its telegraph lines or telephones for the purpose of making and receiving reports and communications in the course of the performance of his official duty.

§ 2. Every policeman or fireman who shall permit any other person to use the certificate issued to him as provided by this act, or to present or make use of the same, except while as acting in the course of the performance of his official duties, or who shall use such certificate after the expiration of his term of office or his resignation or removal therefrom, shall be deemed guilty of a misdemeanor.

Not Applicable to New York City.

§ 304. **Standard and storage of illuminating oils.** No person shall manufacture or have in his possession or sell or give away for illuminating or heating purposes in lamps or stoves within this state, any oil or burning fluid wholly or partly composed of naphtha, coal oil, petroleum or products thereof, or of other substances or materials emitting an inflammable vapor which will flash at a temperature below one hundred degrees Fahrenheit, according to the instruments and tests approved by the state board of health.

No such oil or fluid which will ignite at a temperature below three hundred degrees Fahrenheit shall be burned or be carried as freight in any passenger or baggage car or passenger boat moved by steam or electric power in this state, or in any stage or street car, however propelled, except that coal oil, petroleum and its products may be carried, when securely packed in barrels or metallic packages, in passenger boats propelled by steam when there are no other public means of transportation.

* * * * * * * * * *

Any person violating any provision of this section shall forfeit to the city or village, or if not in a city or village to the town in which the violation occurs, the sum of one hundred dollars for every such violation, and for every day or part of a day that such violation occurs.

This section shall not apply to the city of New York, and shall not supersede but shall be in addition to the ordinances or regulations of any city or village made pursuant to law for the inspection or control of combustible materials therein.

Gen. Business Law (L. 1909, ch. 25), § 304; formerly part of L. 1896, ch. 376, § 24.

PUBLIC SERVICE COMMISSIONS LAW

Laws of 1910, Chap. 480.

AN ACT in relation to public service commissioners, constituting chapter forty-eight of the consolidated laws.

Section 1. Chapter four hundred and twenty-nine of the laws of nineteen hundred and seven, entitled "An act to establish the public service commissions and prescribing their powers and duties, and to provide for the regulation and control of certain public service corporations and making an appropriation therefor," is hereby amended and revised to read as follows, and as so amended and revised to be known as chapter forty-eight of the consolidated laws.

CHAPTER 48 OF THE CONSOLIDATED LAWS

The Public Service Commissions Law

Article I. Public service commissions; general provisions (§§ 1–24).
II. Provisions relating to railroads, street railroads and common carriers (§§ 25–40).
III. Provisions relating to the powers of the commissions in respect to railroads, street railroads and common carriers (§§ 45–59).
IV. Provisions relating to gas and electric corporations; regulation of price of gas and electricity (§§ 64–77).
V. Commissions and offices abolished; saving clause; repeal (§§ 80–87).

ARTICLE I

Public Service Commissions; General Provisions

Section 1. Short title.
2. Definitions.
3. Public service districts.
4. Commissions established; appointment; removal; terms of office.
5. Jurisdiction of commissions.
6. Counsel to the commissions.
7. Secretary to the commissions.
8. Additional officers and employees.
9. Oath of office; eligibility of commissioners and officers.
10. Offices of commissions; meetings; official seal; stationery.
11. Quorum; powers of a commissioner.
12. Counsel to the commissions; duties.

SECTION 13. Salaries and expenses.
14. Payment of salaries and expenses.
15. Certain acts prohibited.
16. Reports of commissions.
17. Certified copies of papers filed to be evidence.
18. Fees to be charged and collected by the commissions.
19. Attendance of witnesses and their fees.
20. Practice before the commissions; immunity of witnesses.
21. Court proceedings; preference.
22. Rehearing before commission.
23. Service and effect of orders.
24. Actions to recover penalties or forfeitures.

§ 1. Short title. This chapter shall be known as the "Public Service Commissions Law," and shall apply to the public services herein described and to the commissions hereby created.

§ 2. Definitions. 1. The term "commission," when used in this chapter, means either public service commission hereby created, which by the terms of this chapter is vested with the power or charged with the duty in question.

2. The term "commissioner," when used in this chapter, means one of the members of such commission.

3. The term "corporation," when used in this chapter, includes a corporation, company, association and joint-stock association.

4. The word "person," when used in this chapter, includes an individual, and a firm or copartnership.

5. The term "street railroad," when used in this chapter, includes every railroad by whatsoever power operated, or any extension or extensions, branch or branches thereof, for public use in the conveyance of persons or property for compensation, being mainly upon, along, above or below any street, avenue, road, highway, bridge or public place in any city, village or town, and including all equipment, switches, spurs, tracks, right of trackage, subways, tunnels, stations, terminals and terminal facilities of every kind used, operated or owned by or in connection with any such street railroad; but the said term "street railroad," when used in this chapter, shall not include a railroad constituting or used as part of a trunk line railroad system.

6. The term "railroad," when used in this chapter, includes every railroad, other than a street railroad, by whatsoever power operated for public use in the conveyance of persons or property for compensation, with all bridges, ferries, tunnels, equipment,

switches, spurs, tracks, stations and terminal facilities of every kind used, operated or owned by or in connection with any such railroad.

7. The term "street railroad corporation," when used in this chapter, includes every corporation, company, association, joint-stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating or managing any street railroad or any cars or other equipment used thereon or in connection therewith.

8. The term "railroad corporation," when used in this chapter, includes every corporation, company, association, joint-stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating or managing any railroad or any cars or other equipment used thereon or in connection therewith.

9. The term "common carrier," when used in this chapter, includes all railroad corporations, street railroad corporations, express companies, car companies, sleeping-car companies, freight companies, freight-line companies, baggage companies and transfer companies, and every corporation, company, association, joint-stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating or managing any such agency for public use in the conveyance of persons, or property within this state; but the said term common carrier when used in this chapter shall not include an express company, baggage company or transfer company unless the same is operated wholly or in part upon or in connection with a railroad or street railroad.

Thus am'd by L. 1913, ch. 344.

The term "common carrier" has been extended to include stage routes in the city of New York, and also in certain other cities (Transp. Corp. Law, §§ 24, 25), and the jurisdiction of the Public Service Commission has been extended by said sections to persons or corporations operating such routes.

9-a. The term "baggage company" shall apply to those companies engaged under contract or agreement with a railroad company or street railroad company in the checking of baggage, or in the collection and delivery of baggage between railroad stations, or between railroad stations and hotels, residences, business places or steamer docks; and the term "transfer company" shall apply to companies engaged under contract or agreement with a railroad

company or street railroad company in the transfer of passengers or property between railroad stations, or between railroad stations and hotels, residences, business places or steamer docks.

Thus am'd by L. 1913, ch. 344.

10. The term "gas plant," when used in this chapter, includes all real estate, fixtures and personal property operated, owned, used or to be used for or in connection with or to facilitate the manufacture, distribution, sale or furnishing of gas (natural or manufactured) for light, heat or power.

11. The term "gas corporation," when used in this chapter, includes every corporation, company, association, joint-stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating or managing any gas plant except where gas is made or produced and distributed by the maker on or through private property solely for its own use or the use of its tenants and not for sale to others.

12. The term "electric plant," when used in this chapter, includes all real estate, fixtures and personal property operated, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power: and any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power.

13. The term "electrical corporation," when used in this chapter, includes every corporation, company, association, joint-stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever (other than a railroad or street railroad corporation generating electricity solely for railroad or street railroad purposes or for the use of its tenants and not for sale to others) owning, operating or managing any electric plant except where electricity is generated or distributed by the producer solely on or through private property for railroad or street railroad purposes or for its own use or the use of its tenants and not for sale to others.

14. The term "transportation of property," when used in this chapter, includes any service in connection with the receiving, delivery, elevation, transfer in transit, ventilation, refrigeration, icing, storage and handling of the property transported.

15. The term "line," when used in this chapter, includes "route."

16. The term "municipality," when used in this chapter, includes a city, village, town or lighting district, organized as provided by a general or special act.

17. The term "telephone corporation," when used in this chapter, includes every corporation, company, association, joint-stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating or managing any telephone line or part of telephone line used in the conduct of the business of affording telephonic communication for hire; excepting, however, any corporation, company, association, joint-stock association, partnership or person, their lessees, trustees or receivers having property actually used in the public service within the state of a value not exceeding ten thousand dollars, or which do not operate the business of affording telephonic communication for profit.

New subdivision, added by L. 1910, ch. 673.

18. The term "telephone line," when used in this chapter, includes conduits, ducts, poles, wires, cables, crossarms, receivers, transmitters, instruments, machines, appliances and all devices, real estate, easements, apparatus, property and routes used, operated or owned by any telephone corporation to facilitate the business of affording telephonic communication.

New subdivision, added by L. 1910, ch. 673.

19. The term "telegraph corporation," when used in this chapter, includes every corporation, company, association, joint-stock association, partnership and person, their lessees, trustees or receivers, appointed by any court whatsoever, owning, operating or managing any telegraph line or part of telegraph line used in the conduct of the business of affording for hire communication by telegraph.

New subdivision, added by L. 1910, ch. 673.

20. The term "telegraph line," when used in this chapter, includes conduits, ducts, poles, wires, cables, crossarms, instruments, machines, appliances and all devices, real estate, ease-

ments, apparatus, property and routes used, operated or owned by any telegraph corporation to facilitate the business of affording communication by telegraph.

New subdivision, added by L. 1910, ch. 673.

21. The term "steam plant," when used in this chapter, includes all real estate, fixtures and personal property operated, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of steam for heat or power.

New subdivision, added by L. 1913, ch. 505.

21. The term "stock yard," when used in this chapter, includes all real estate, fixtures and personal property owned, used or to be used in connection with the business of affording facilities for the shipment of live stock and for the care thereof for such purpose prior to the time that transportation begins; and the term "stock yard company" includes every corporation, association, joint-stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, operating or managing a stock yard.

New subdivision, added by L. 1913, ch. 506, and numbered the same as preceding subdivision through legislative inadvertence.

22. The term "steam corporation," when used in this chapter, includes every corporation, company, association, joint-stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever owning, operating or managing any steam plant, except where steam is made or produced and distributed by the maker, on or through private property solely for the maker's own use or the use of the maker's tenant and not for sale to others.

New subdivision, added by L. 1913, ch. 505.

A corporation engaged in the transportation of freight exclusively by water, although a common carrier at common law, is not a common carrier as defined by section 2 of the Public Service Commissions Law, and is not subject to the jurisdiction and supervision of the Public Service Commission. Matter of Murray's Line v. The D. & H. Co., 2nd Dist., July 8, 1909.

§ 3. Public service districts. There are hereby created two public service districts, to be known as the first district and the

second district. The first district shall include the counties of New York, Kings, Queens and Richmond. The second district shall include all other counties of the state.

The creation of new civil divisions is constitutional. Peo. v. Shepard, 36 N. Y. 285. See, also, to same effect, Peo. ex rel. Wood v. Draper, 15 N. Y. 532, affg. 25 Barb. 344.

§ 4. Commissions established; appointment; removal; terms of office. There shall be a public service commission for each district, and each commission shall possess the powers and duties hereinafter specified, and also all powers necessary or proper to enable it to carry out the purposes of this chapter. The commission of the first district shall consist of five members and the commission of the second district shall consist of five members, to be appointed by the governor, by and with the advice and consent of the senate, one of whom designated by the governor shall, during his term of office, be the chairman of the commission of which he is a member. Each commissioner shall be a resident of the district for which he is appointed.

The governor may remove any commissioner for inefficiency, neglect of duty or misconduct in office, giving to him a copy of the charges against him, and an opportunity of being publicly heard in person or by counsel in his own defense, upon not less than ten days notice. If such commissioner shall be removed the governor shall file in the office of the secretary of state a complete statement of all charges made against such commissioner, and his findings thereon, together with a complete record of the proceedings.

Of the members of the commission in each district first appointed hereunder, one shall hold office until February first, nineteen hundred and nine, one until February first, nineteen hundred and ten, one until February first, nineteen hundred and eleven, one until February first, nineteen hundred and twelve, and one until February first, nineteen hundred and thirteen; the term of office of each commissioner so appointed shall begin on the first day of July, nineteen hundred and seven. Upon the expiration of each of such terms, the term of office of each commissioner thereafter appointed shall be five years from the first of February. Vacancies shall be filled by appointment for the unexpired term.

The Legislature may delegate the power to fix maximum rates to a commission. Village of Saratoga v. Saratoga Gas, E. L. & P. Co., 191 N. Y. 123, revsg. 122 A. D. 203.

The creation of a commission to regulate public service corporations does not violate the U. S. Constitution. Mobile, J. & K. C. R. Co. v. Mississippi, 210 U. S. 187.

§ 5. Jurisdiction of commissions. 1. The jurisdiction, supervision, powers and duties of the public service commission in the first district shall extend under this chapter:

a. To railroads and street railroads lying exclusively within that district, and to the persons or corporations owning, leasing or operating the same;

b. To street railroads any portion of whose lines lies within that district, to all transportation of persons or property thereon within that district or from a point within either district to a point within the other district, and to the persons or corporations owning, operating or leasing the said street railroads; provided, however, that the commission for the second district shall have jurisdiction over such portion of the lines of said street railroads as lies within the second district, and over the persons or corporations owning, operating or leasing the same, so far as concerns the construction, maintenance, stationary equipment, terminal facilities, stations, and local transportation facilities of said street railroads within the second district;

c. To such portion of the lines of any other railroad as lies within that district, and to the person or corporation owning, leasing or operating the same, so far as concerns the construction, maintenance, stationary equipment, terminal facilities, stations and local transportation facilities, and local transportation of persons or property within that district;

d. To any common carrier other than a railroad corporation or street railroad corporation operating or doing business within that district, so far as concerns operations exclusively within that district;

e. To the manufacture, sale or distribution of gas and electricity for light, heat or power in the first district, to gas plants and to electric plants therein, and to the persons or corporations owning, leasing or operating the same.

h. To the manufacture, holding, distribution, transmission, sale or furnishing of steam for heat or power in the first district, to steam plants therein and to the persons or corporations owning, leasing or operating the same.

Added by ch. 505, L. 1913.

2. And in addition thereto, the commission in the first district shall have and exercise all powers heretofore conferred upon the board of rapid transit railroad commissioners under chapter four of the laws of eighteen hundred and ninety-one, entitled "An act to provide for rapid transit railways in cities of over one million inhabitants," and the acts amendatory thereof, together with such other and necessary powers as may be requisite to the efficient performance of the duties imposed upon said board by said act.

3. All jurisdiction, supervision, powers and duties under this chapter not specifically granted to the public service commission of the first district shall be vested in, and be exercised by, the public service commission of the second district, including the regulation and control of all transportation of persons or property, and the instrumentalities connected with such transportation, on any railroad other than a street railroad from a point within either district to a point within the other district.

4. A corporation or person owning or holding a majority of the stock of a common carrier, gas corporation or electrical corporation subject to the jurisdiction of the commission shall be subject to the supervision of the same commission in respect of the relations between such common carrier, gas corporation or electrical corporation and such owners or holders of a majority of the stock thereof in so far as such relations arise from or by reason of such ownership or holding of stock thereof or the receipt or holding of any money or property thereof or from or by reason of any contract between them; and in respect of such relations shall in like manner and to the same extent as such common carrier, gas corporation or electrical corporation be subject to examination of accounts, records and memoranda, and shall furnish such reports and information as the commission shall from time to time direct and require, and shall be subject to like penalties for default therein.

5. The jurisdiction, supervision, powers and duties of the public service commission in the second district shall extend, under this chapter, to every telephone line which lies wholly within the state of New York and that part within the state of New York of every telephone line which lies partly within and partly without the state of New York and to the persons or corporations owning, leasing or operating any such telephone line.

6. The jurisdiction, supervision, powers and duties of the public service commission in the second district shall extend, under

this chapter, to every telegraph line which lies wholly within the state of New York and that part within the state of New York of every telegraph line which lies partly within and partly without the state of New York and to the persons or corporations owning, leasing or operating any such telegraph line.

7. Corporations formed to acquire property or to transact business which would be subject to the provisions of this chapter, and corporations possessing franchises for any of the purposes contemplated by this chapter, shall be deemed to be subject to the provisions of this chapter although no property may have been acquired, business transacted or franchises exercised.

Subdivisions 5, 6 and 7 added by ch. 673, L. 1910.

8. The jurisdiction, supervision, powers and duties of the public service commission in either district, under this chapter, shall extend to every stock yard lying wholly within the district and to the stock yard company owning, leasing or operating the same, to the same extent and in respect to the same objects and purposes as such jurisdiction extends, under the provisions of this chapter, to depots, freight houses and shipping stations of a common carrier, including the duty of such stock yard company to submit reports and be subjected to investigation as if it were a common carrier, and the powers and duties of such commission to fix charges and make and enforce orders relating to adequate service by such company.

Added by ch. 506, L. 1913.

It does not violate any principle of "home rule" to delegate to State officers powers which, while exercised in only a portion of the State, are not exclusively local in character. Peo. ex rel. Metropolitan St. Ry. Co. v. Tax Comrs., 174 N. Y. 417.

In the absence of constitutional restrictions the State may resume powers which it has delegated to local authorities and enter into direct control. Peo. ex rel. Morrill v. Supervisors, 112 N. Y. 585.

§ 6. Counsel to the commissions. Each commission shall appoint as counsel to the commission an attorney and counselor-at-law of the state of New York, who shall hold office during the pleasure of the commission. Each counsel to the commission shall, subject to the approval of the commission, have the power to appoint, and at pleasure remove, attorneys and counselors-at-law, to assist him in the performance of his duties, and also to employ and remove stenographers and process-servers.

§ 7. Secretary to the commissions. Each commission shall have a secretary to be appointed by it and to hold office during its pleasure. It shall be the duty of the secretary to keep a full and true record of all proceedings of the commission, of all books, maps, documents and papers ordered filed by the commission and of all orders made by a commissioner and of all orders made by the commission or approved and confirmed by it and ordered filed, and he shall be responsible to the commission for the safe custody and preservation of all such documents at its office. The record of the proceedings of the commission kept by the secretary as aforesaid and printed as the minutes of the commission and the printed minutes of the board of rapid transit railroad commissioners transferred to the public service commission for the first district, pursuant to this chapter, and in the possession of the said commission, shall be prima facie evidence of the proceedings of the commission and of the said board of rapid transit railroad commissioners respectively. Under the direction of the commission the secretary shall have general charge of its office, superintend its clerical business and perform such other duties as the commission may prescribe. He shall have power and authority to administer oaths in all parts of the state, so far as the exercise of such power is properly incidental to the performance of his duty or that of the commission. The secretary shall designate, from time to time, one of the clerks appointed by the commission to perform the duties of secretary during his absence and, during such time, the clerk so designated shall at the office possess the powers of the secretary of the commission.

Thus am'd by ch. 597, L. 1913.

§ 8. Additional officers and employees. Each commission shall have power to employ, during its pleasure, such officers, clerks, inspectors, experts and employees as it may deem to be necessary to carry out the provisions of this chapter, or to perform the duties and exercise the powers conferred by law upon the commission.

§ 9. Oath of office; eligibility of commissioners and officers. Each commissioner and each person appointed to office by a commission or by counsel to a commission shall, before entering upon the duties of his office, take and subscribe the constitutional oath of office. The oaths of office other than those of a commissioner,

the counsel and secretary shall be filed in the office of the commission. No person shall be eligible for appointment or shall hold the office of commissioner or be appointed by a commission or by counsel to a commission to, or hold, any office or position under a commission, who holds any official relation to any person or corporation subject to the supervision of either commission, or who owns stocks or bonds of any such corporation.

§ 10. Offices of commissions; meetings; official seal; stationery, etc. 1. The principal office of the commission of the first district shall be in the borough of Manhattan, city of New York; and the office of the second district shall be in the city of Albany, in rooms designated by the trustees of public buildings. Each commission shall hold stated meetings at least once a month during the year at its office. Each shall have an official seal to be furnished and prepared by the secretary of state as provided by law. The offices shall be supplied with all necessary books, maps, charts, stationery, office furniture, telephone and telegraph connections and all other necessary appliances, to be paid for in the same manner as other expenses authorized by this chapter.

2. The offices of each commission shall be open for business between the hours of eight o'clock in the morning and eleven o'clock at night every day in the year, and one or more responsible persons, to be designated by the commission or by the secretary under the direction of the commission, shall be on duty at all times in immediate charge thereof.

§ 11. Quorum; powers of a commissioner. A majority of the commissioners shall constitute a quorum for the transaction of any business, for the performance of any duty or for the exercise of any power of the commission, and may hold meetings of the commission at any time or place within the state. Any investigation, inquiry or hearing which either commission has power to undertake or to hold may be undertaken or held by or before any commissioner. All investigations, inquiries, hearings and decisions of a commissioner shall be and be deemed to be the investigations, inquiries, hearings and decisions of the commission and every order made by a commissioner, when approved and confirmed by the commission and ordered filed in its office, shall be and be deemed to be the order of the commission.

§ 12. Counsel to the commissions; duties. It shall be the duty of counsel to a commission to represent and appear for the people of the state of New York and the commission in all actions and proceedings involving any question under this chapter, or within the jurisdiction of the commission under the railroad law, or under or in reference to any act or order of the commission, and, if directed to do so by the commission, to intervene, if possible, in any action or proceeding in which any such question is involved; to commence and prosecute all actions and proceedings directed or authorized by the commission, and to expedite in every way possible final determination of all such actions and proceedings; to advise the commission and each commissioner when so requested in regard to all matters in connection with the powers and duties of the commission and of the members thereof, and generally to perform all duties and services as attorney and counsel to the commission which the commission may reasonably require of him.

The general rule is that a board exercising judicial functions has no interest in maintaining its decisions and no right to appear by counsel on proceedings to review its orders. So held in case of State Railroad Commission to the powers of which the Public Service Commission succeeded. Peo. ex rel. Steward v. Board of R. R. Comrs., 160 N. Y. 202.

§ 13. Salaries and expenses. The annual salary of each commissioner shall be fifteen thousand dollars ($15,000). The annual salary of counsel to a commission shall be ten thousand dollars ($10,000). The annual salary of a secretary to a commission shall be six thousand dollars ($6,000). All officers, clerks, inspectors, experts and employees of a commission, and all persons appointed by the counsel to a commission, shall receive the compensation fixed by the commission.

The commissioners, counsel to the commission and the secretary, and their officers, clerks, inspectors, experts and other employees, shall have reimbursed to them all actual and necessary traveling and other expenses and disbursements incurred or made by them in the discharge of their official duties.

§ 14. Payment of salaries and expenses. 1. The salaries of the commissioners, the counsel to the commission, and the secretary to the commission in the first district shall be audited and allowed by the state comptroller, and paid monthly by the state treasurer upon the order of the comptroller out of the funds provided therefor. All other salaries and expenses of the commis-

sion of the first district shall be audited and paid as follows: The board of estimate and apportionment of the city of New York, or other board or public body on which is imposed the duty and in which is vested the power of making appropriations of public moneys for the purposes of the city government shall, from time to time, on requisition duly made by the public service commission of the first district, appropriate such sum or sums of money as may be requisite and necessary to enable it to do and perform, or cause to be done and performed, the duties in this or in any other act prescribed, and to provide for the expenses and the compensation of the employees of such commission, and such appropriation shall be made forthwith upon presentation of a requisition from the said commission, which shall state the purposes for which such moneys are required by it. In case the said board of estimate and apportionment, or such other board or public body, fail to appropriate such amount as the said commission deems requisite and necessary, the said commission may apply to the appellate division of the supreme court in the first department, on notice to the board of estimate and apportionment or such other board or public body aforesaid, to determine what amount shall be appropriated for the purposes so required and the decision of said appellate division shall be final and conclusive; and the city shall not be liable for any indebtedness incurred by the said commission in excess of such appropriation or appropriations. It shall be the duty of the auditor and comptroller of said city, after such appropriation shall have been duly made, to audit and pay the proper expenses and compensation of the employees of said commission other than its counsel and secretary, upon vouchers therefor, to be furnished by the said commission, which payments shall be made in like manner as payments are now made by the auditor, comptroller or other public officers of claims against and demands upon such city; and for the purpose of providing funds with which to pay the said sums, the comptroller or other chief financial officer of said city, is hereby authorized and directed to issue and sell revenue bonds of such city in anticipation of receipt of taxes and out of the proceeds of such bonds to make the payments in this section required to be made. The amount necessary to pay the principal and interest of such bonds shall be included in the estimates of moneys necessary to be raised by taxation to carry on the business of said city, and shall be made a

part of the tax levy for the year next following the year in which such appropriations are made. The said comptroller shall pay the proper salaries and the expenses of the said commission upon its requisition, for the remainder of the fiscal year after July first, nineteen hundred and seven, from any funds that may have been heretofore appropriated for the board of rapid transit railroad commissioners, which appropriation is hereby transferred to the credit of the public service commission of the first district. In case the said appropriation shall not be sufficient to meet such salaries and expenses, the comptroller of said city is hereby authorized and directed to issue and sell revenue bonds of said city, in anticipation of receipts of taxes, as hereinbefore provided.

2. All salaries and expenses of the commission in the second district shall be audited and allowed by the state comptroller and paid monthly by the state treasurer upon the order of the comptroller, out of the funds provided therefor.

The provision for payment of salaries of employees in the first district by the city of New York does not render the act a "local act" and hence unconstitutional as covering more than one subject not expressed in the title. Peo. ex rel. Gubner v. McClellan, 130 A. D. 716 (1909).

§ 15. Certain acts prohibited. Every commissioner, counsel to a commission, the secretary of a commission, and every person employed or appointed to office, either by a commission or by the counsel to a commission, is hereby forbidden and prohibited to solicit, suggest, request or recommend, directly or indirectly, to any corporation or person subject to the supervision of either commission, or to any officer, attorney, agent or employee thereof, the appointment of any person to any office, place, position or employment. And every such corporation and person, and every officer, attorney, agent and employee thereof, is hereby forbidden and prohibited to offer to any commissioner, to counsel to a commission, to the secretary thereof, or to any person employed by a commission or by the counsel to a commission, any office, place, appointment or position, or to offer or give to any commissioner, to counsel to a commission, to the secretary thereof, or to any officer employed or appointed to office by the commission or by the counsel to the commission, any free pass or transportation or any reduction in fare to which the public generally are not entitled or free carriage for property or any present, gift or gratuity of any kind. If any commissioner, counsel to a commission, the

secretary thereof or any person employed or appointed to office by a commission or by counsel to a commission, shall violate any provision of this section he shall be removed from the office held by him. Every commissioner, counsel to the commission, the secretary thereof and every person employed or appointed to office by the commission or by counsel to the commission, shall be and be deemed to be a public officer.

All persons appointed to discharge public duties for compensation are "public officers." Rowland v. Mayor, 83 N. Y. 372; Peo. ex rel. Henry v. Nostrand, 46 N. Y. 375.

§ 16. Reports of commissions. 1. All proceedings of each commission and all documents and records in its possession shall be public records, and each commission shall make an annual report to the legislature on or before the second Monday of January in each year, which shall contain copies of all orders issued by it, and any information in the possession of the commission which it shall deem of value to the legislature and the people of the state. Five hundred copies of each report, together with abstracts of the reports to such commission of corporations and persons subject to its supervision, in addition to the regular number prescribed by law, shall be printed as a public document of the state, bound in cloth, for the use of the commissioners and to be distributed by them in their discretion to corporations and persons interested therein.

2. Either commission shall conduct a hearing and take testimony relative to any pending legislation with respect to any person, corporation or matter within the jurisdiction of the commission, if requested to do so by the legislature or by either branch thereof or by a standing committee of either branch thereof or by the governor or by any such person or corporation, and shall report its conclusions to the legislature. The commission may also recommend the enactment of such legislation with respect to any matter within its jurisdiction as it deems wise or necessary in the public interest.

§ 17. Certified copies of papers filed to be evidence. Copies of all official documents and orders filed or deposited according to law in the office of either commission, certified by a commissioner or by the secretary of the commission to be true copies of

the originals, under the official seal of the commission, shall be evidence in like manner as the originals.

To be admissible in evidence certified copies of public documents must be officially sealed. City of N. Y. v. Vandeveer, 91 A. D. 303.

§ 18. Fees to be charged and collected by the commissions. Each commission shall charge and collect the following fees: For copies of papers and records not required to be certified or otherwise authenticated by the commission, ten cents for each folio; for certified copies of official documents and orders filed in its office, fifteen cents for each folio, and one dollar for every certificate under seal affixed thereto; for certifying a copy of any report made by a corporation to the commission, two dollars; for each certified copy of the annual report of the commission, one dollar and fifty cents; for certified copies of evidence and proceedings before the commission, fifteen cents for each folio. No fees shall be charged or collected for copies of papers, records or official documents, furnished to public officers for use in their official capacity, or for the annual reports of the commission in the ordinary course of distribution, but the commission may fix reasonable charges for publications issued under its authority. All fees charged and collected by the commission of the first district shall belong to the city of New York, and shall be paid monthly, accompanied by a detailed statement thereof, into the treasury of the city to the credit of the general fund, and all fees charged and collected by the commission of the second district shall belong to the people of the state, and shall be paid monthly, accompanied by a detailed statement thereof, into the treasury of the state to the credit of the general fund.

SOURCE: L. 1890, ch. 565, § 165.

§ 19. Attendance of witnesses and their fees. 1. All subpoenas shall be signed and issued by a commissioner or by the secretary of a commission and may be served by any person of full age. The fees of witnesses required to attend before a commission, or a commissioner, shall be two dollars for each day's attendance, and five cents for every mile of travel by the nearest generally traveled route in going to and from the place where attendance of the witness is required, such fees to be paid when the witness is excused from further attendance; and the disbursements made in the payment of such fees shall be audited and paid

in the first district in the same manner provided for the payment of expenses of the commission. Whenever a subpoena is issued at the instance of a complainant, respondent, or other party to any proceeding before the commission, the cost of service thereof and the fee of the witness shall be borne by the party at whose instance the witness is summoned. A subpoena issued as aforesaid shall be served in the same manner as a subpoena issued out of a court of record.

2. If a person subpoenaed to attend before a commission or a commissioner fails to obey the command of such subpoena, without reasonable cause, or if a person in attendance before a commission or commissioner shall, without reasonable cause, refuse to be sworn or to be examined or to answer a question or to produce a book or papers, when ordered so to do by the commission, or a commissioner, or to subscribe and swear to his deposition after it has been correctly reduced to writing, he shall be guilty of a misdemeanor and may be prosecuted therefor in any court of competent criminal jurisdiction.

If a person in attendance before a commission or a commissioner refuses without reasonable cause to be examined or to answer a legal and pertinent question or produce a book or paper, when ordered so to do by a commission or a commissioner, the commission may apply to any justice of the supreme court upon proof by affidavit of the facts for an order returnable in not less than two nor more than five days directing such person to show cause before the justice who made the order, or any other justice of the supreme court, why he should not be committed to jail; upon the return of such order the justice before whom the matter shall come on for hearing shall examine under oath such person whose testimony may be relevant, and such person shall be given an opportunity to be heard; and if the justice shall determine that such person has refused without reasonable cause or legal excuse to be examined, or to answer a legal and pertinent question, or to produce a book or paper which he was ordered to bring, he may forthwith, by warrant, commit the offender to jail, there to remain until he submits to do the act which he was so required to do or is discharged according to law.

§ 20. Practice before the commissions; immunity of witnesses. All hearings before a commission or a commissioner shall be governed by rules to be adopted and prescribed by the

commission. And in all investigations, inquiries or hearings the commission or a commissioner shall not be bound by the technical rules of evidence. No person shall be excused from testifying or from producing any books or papers in any investigation or inquiry by or upon any hearing before a commission or any commissioner, when ordered to do so by the commission, upon the ground that the testimony or evidence, books or documents required of him may tend to incriminate him or subject him to penalty or forfeiture, but no person shall be prosecuted, punished or subjected to any penalty or forfeiture for or on account of any act, transaction, matter or thing concerning which he shall under oath have testified or produced documentary evidence; provided, however, that no person so testifying shall be exempt from prosecution or punishment for any perjury committed by him in his testimony. Nothing herein contained is intended to give, or shall be construed as in any manner giving unto any corporation immunity of any kind.

For rules adopted under authority of this section see pp. 804–836, post.

§ 21. Court proceedings; preferences. All actions and proceedings under this chapter, and all actions and proceedings commenced or prosecuted by order of either commission, and all actions and proceedings to which either commission or the people of the state of New York may be parties, and in which any question arises under this chapter, or under the railroad law, or under or concerning any order or action of the commission, shall be preferred over all other civil causes except election causes in all courts of the state of New York and shall be heard and determined in preference to all other civil business pending therein excepting election causes, irrespective of position on the calendar. The same preference shall be granted upon application of counsel to the commission in any action or proceeding in which he may be allowed to intervene.

§ 22. Rehearing before commission. After an order has been made by a commission any corporation or person interested therein shall have the right to apply for a rehearing in respect to any matter determined therein, and the commission shall grant and hold such a rehearing if in its judgment sufficient reason therefor be made to appear; if a rehearing shall be granted, the same shall be determined by the commission within thirty days

after the same shall be finally submitted. An application for such a rehearing shall not excuse any corporation or person from complying with or obeying any order or any requirement of any order of the commission, or operate in any manner to stay or postpone the enforcement thereof except as the commission may by order direct. If, after such rehearing and a consideration of the facts, including those arising since the making of the order, the commission shall be of opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or change the same. An order made after any such rehearing abrogating or changing the original order shall have the same force and effect as an original order but shall not affect any right or the enforcement of any right arising from or by virtue of the original order.

§ 23. Service and effect of orders; stay. 1. Every order of a commission shall be served upon every person or corporation to be affected thereby, either by personal delivery of a certified copy thereof, or by mailing a certified copy thereof, in a sealed package with postage prepaid, to the person to be affected thereby or, in the case of a corporation, to any officer or agent thereof upon whom a summons may be served in accordance with the provisions of the code of civil procedure. It shall be the duty of every person and corporation to notify the commission forthwith, in writing, of the receipt of the certified copy of every order so served, and in the case of a corporation such notification must be signed and acknowledged by a person or officer duly authorized by the corporation to admit such service. Within a time specified in the order of the commission every person and corporation upon whom it is served must if so required in the order notify the commission in like manner whether the terms of the order are accepted and will be obeyed. Every order of a commission shall take effect at a time therein specified and shall continue in force either for a period which may be designated therein or until changed or abrogated by the commission, unless such order be unauthorized by this chapter or any other act or be in violation of a provision of the constitution of the state or of the United States.

2. No order staying or suspending an order of the commission fixing any rate, fare or charge or joint rate, fare or charge shall be made by the supreme court otherwise than upon notice and after hearing; and if the order of the commission is suspended,

the order suspending the same shall contain a specific finding based upon evidence submitted to the court and identified by reference thereto, that great and irreparable damage would otherwise result to the petitioner and specifying the nature of the damage.

Thus am'd by L. 1914, ch. 240.

§ 24. **Actions to recover penalties or forfeitures.** An action to recover a penalty or a forfeiture under this chapter or to enforce the powers of the commission under the railroad law may be brought in any court of competent jurisdiction in this state in the name of the people of the state of New York, and shall be commenced and prosecuted to final judgment by counsel to the commission. In any such action all penalties and forfeitures incurred up to the time of commencing the same may be sued for and recovered therein, and the commencement of an action to recover a penalty or forfeiture shall not be, or be held to be, a waiver of the right to recover any other penalty or forfeiture; if the defendant in such action shall prove that during any portion of the time for which it is sought to recover penalties or forfeitures for a violation of an order of the commission the defendant was actually and in good faith prosecuting a suit, action or proceeding in the courts to set aside such order, the court shall remit the penalties or forfeitures incurred during the pendency of such suit, action or proceeding. All moneys recovered in any such action, together with the costs thereof, shall be paid into the state treasury to the credit of the general fund. Any such action may be compromised or discontinued on application of the commission upon such terms as the court shall approve and order.

For similar provisions see section 16 of Interstate Commerce Act.

ARTICLE II

Provisions Relating to Railroads, Street Railroads and Common Carriers

SECTION 25. Application of article.
26. Adequate service; just and reasonable charges.
27. Switch and side-track connections; powers of commissions.
28. Tariff schedules; publication.
29. Changes in schedule; notice required.

SECTION 30. Concurrence in joint tariffs; contracts, agreements or arrangements between any carriers.
31. Unjust discrimination.
32. Unreasonable preference.
33. Transportation prohibited until publication of schedules; rates as fixed to be charged; passes prohibited.
34. False billing, et cetera, by carrier or shipper.
35. Discrimination prohibited; connecting lines.
36. Long and short haul.
37. Distribution of cars.
38. Liability for damage to property in transit.
39. Continuous carriage.
40. Liability for loss or damage by violation of this chapter.

§ 25. Application of article. The provisions of this article shall apply to the transportation of passengers or property, from one point to another within the state of New York, and to any common carrier performing such service.

For definition of "common carrier" as used in this law, see § 2.

§ 26. Safe and adequate service; just and reasonable charges. Every corporation, person or common carrier performing a service designated in the preceding section, shall furnish, with respect thereto, such service and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such corporation, person or common carrier for the transportation of passengers or property or for any service rendered or to be rendered in connection therewith, as defined in section two of this chapter, shall be just and reasonable and not more than allowed by law or by order of the commission having jurisdiction and made as authorized by this chapter. Every unjust or unreasonable charge made or demanded for any such service or transportation of passengers or property or in connection therewith or in excess of that allowed by law or by order of the commission is prohibited.

Unfortunate or improvident management of its finances and neglect in the maintenance of its equipment, does not exempt a carrier from reasonable compliance with the statutory requirements of safe, adequate and proper service. Matter of Pt. Jervis Elec. Light, Power, Gas & R. R. Co., 2nd Dist., May 12, 1908.

A railroad corporation which holds the sole mortgage on the entire property of another, which mortgage has been for a long time in default, and which further owns all the capital stock of the mortgagor with no intervening lienors of any kind, and which has entered into possession of the mortgaged property and has for a long time managed it and operated it as part of its own system, paying all expenses and taking all revenues without accounting

to the mortgagor therefor, is the corporation responsible to the Commission for the operation of the railroad and cannot evade liability by showing the technical legal separation of the two corporations. Matter of the Complaint of the Citizens of Lakeland v. Erie R. R. Co., 2nd Dist., April 2, 1909.

The provision for safe and adequate service is simply declaratory of the common law obligation. Peo. ex rel. Ohlen v. N. Y., L. E. & W. R. Co., 22 Hun 532.

The reservation of one car on subway trains exclusively for women would, in the opinion of the Commission, impair rather than improve service. Transportation Com. of Fifty of Woman's Municipal League v. Interborough Rapid Transit Co., 1st Dist., August 3, 1909.

The fixing of rates by the Commission is a judicial or quasi-judicial act and reviewable by writ of certiorari. Peo. ex rel. Central Park, North & East River R. R. Co. v. Willcox, 194 N. Y. 383 (1909). To same effect see Peo. ex rel. Joline et al. v. Willcox et al., 129 A. D. 267 (1908).

Sections 26 and 51 empower the Commission to compel the installation of passenger service upon a branch line theretofore used only for freight. Where no service has been rendered it is impossible to determine what is reasonable and the Commission is justified in fixing an arbitrary schedule to be readjusted if it proves inadequate or unreasonably burdensome. Matter of Citizens of Washington County v. Greenwich & Johnsonville Railway Co., 2nd Dist., April 28, 1909.

The Commission has power to order temporary changes or additions to service for the purpose of making a test to see whether such proposed changes and additions are reasonable and necessary. Matter of Merville et al. v. Buffalo, Rochester & Pittsburgh Railway Co., 2nd Dist., August 3, 1909.

A rule of an express company which requires its agent at a common point to refuse shipments destined to an exclusive office of another company also having an office at the point of shipment and then provides that the shipment shall not be refused if the shipper insists upon it being forwarded and tenders prepayment of all charges of the two or more connecting companies is unlawful because it is contradictory in its terms and certain in practice to have discriminating effect as between shippers who insist upon the transportation and those who do not. The right of shippers to have the privileges of public transportation cannot lawfully be made to depend upon offer, denial, insistence and acceptance as thus described. Matter of Herendeen v. U. S. Express Co., 2nd Dist., Feb. 19, 1908.

§ 27. Switch and side track connections; powers of commissions. 1. A railroad corporation, upon the application of any shipper tendering traffic for transportation, shall construct, maintain and operate upon reasonable terms a switch connection or connections with a lateral line of railroad or private sidetrack owned, operated or controlled by such shipper, and shall, upon the application of any shipper, provide upon its own property a sidetrack and switch connection with its line of railroad, whenever such sidetrack and switch connection is reasonably practicable, can be put in with safety and the business therefor is sufficient to justify the same.

2. If any railroad corporation shall fail to install or operate any such switch connection with a lateral line of railroad or any such sidetrack and switch connection as aforesaid, after written application therefor has been made to it, any corporation or person interested may present the facts to the commission having jurisdiction by written petition, and the commission shall investigate the matter stated in such petition, and give such hearing thereon as it may deem necessary or proper. If the commission be of opinion that it is safe and practicable to have a connection, substantially as prayed for, established or maintained, and that the business to be done thereon justifies the construction and maintenance thereof, it shall make an order directing the construction and establishment thereof, specifying the reasonable compensation to be paid for the construction, establishment and maintenance thereof, and may in like manner upon the application of the railroad corporation order the discontinuance of such switch connection.

A carrier is liable for damages if it discriminates against a particular shipper in granting switching and terminal facilities. Kellog v. Sowerby, 93 A. D. 124.

§ 28. Tariff schedules; publication. Every common carrier shall file with the commission having jurisdiction and shall print and keep open to public inspection schedules showing the rates, fares and charges for the transportation of passengers and property within the state between each point upon its route and all other points thereon; and between each point upon its route and all points upon every route leased, operated or controlled by it; and between each point on its route or upon any route leased, operated or controlled by it and all points upon the route of any other common carrier, whenever a through route and joint rate shall have been established or ordered between any two such points. If no joint rate over a through route has been established, the several carriers in such through route shall file, print and keep open to public inspection, as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid shall plainly state the places between which property and passengers will be carried, and shall also contain the classification of passengers or property in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the com-

mission may require to be stated, all privileges or facilities granted or allowed, and any rules or regulations which may in anywise change, affect or determine any part or the aggregate of, such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee. Such schedules shall be plainly printed in large type, and a copy thereof shall be kept by every such carrier readily accessible to and for convenient inspection by the public in every station or office of such carrier where passengers or property are respectively received for transportation, when such station or office is in charge of an agent, and in every station or office of such carrier where passenger tickets for transportation or tickets covering sleeping or parlor car or other train accommodation are sold or bills of lading or receipts for property are issued. All or any of such schedules kept as aforesaid shall be immediately produced by such carrier for inspection upon the demand of any person. A notice printed in bold type and stating that such schedules are on file with the agent and open to inspection by any person and that the agent will assist any such person to determine from such schedules any transportation rates or fares or rules or regulations which are in force shall be kept posted by the carrier in two public and conspicuous places in every such station or office. The form of every such schedule shall be prescribed by the commission and shall conform in the case of railroad corporations as nearly as may be to the form of schedule required by the interstate commerce commission under the act of congress entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven and the acts amendatory thereof and supplementary thereto. Where any similar schedule is required by law to be filed with both commissions they shall agree upon an identical form for such schedule. The commission shall have power, from time to time, in its discretion, to determine and prescribe by order such changes in the form of such schedules as may be found expedient, and to modify the requirements of this section in respect to publishing, posting and filing of schedules either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

Compare Interstate Commerce Act, § 6.

§ 29. Changes in schedule; notice required; power of suspension by the commission. Unless the commission otherwise

orders no change shall be made in any rate, fare or charge, or joint rate, fare or charge, which shall have been filed and published by a common carrier in compliance with the requirements of this chapter, except after thirty days' notice to the commission and publication for thirty days as required by section twenty-eight of this chapter, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the changed rate, fare or charge will go into effect; and all proposed changes shall be shown by printing, filing and publishing new schedules or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. The commission, for good cause shown, may allow changes in rates without requiring the thirty days' notice and publication herein provided for, by duly filing and publishing in such manner as it may direct an order specifying the change so made and the time when it shall take effect; all such changes shall be immediately indicated upon its schedules by the common carrier. Whenever there shall be filed with the commission by any common carrier as defined in this act any schedule stating a new individual or joint rate, fare or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare or charge, the commission shall have and it is hereby given authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, charge, fare, classification, regulation or practice; and pending such hearing and decision thereon, the commission upon filing with such schedule, and delivering to the carrier or carriers affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, fare, charge, classification, regulation or practice would otherwise go into effect; and after full hearing whether completed before or after the rate, fare, charge, classification, regulation or practice goes into effect, the commission may make such order in reference to such rate, fare, charge, classification, regulation or practice, as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation or practice had be-

come effective. Provided, that if any such hearing cannot be concluded within the period of suspension, as above stated, the commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. At any hearing involving a rate increased after the first day of January, nineteen hundred and fourteen, or of a rate sought to be increased after this section as amended takes effect, the burden of proof to show that the increase in rate or proposed increase in rate is just and reasonable shall be upon the common carrier; and the commission may give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Thus am'd by L. 1914, ch. 240.

Compare Interstate Commerce Act, § 6.

The statute is a reversal of the common law rule. Harp v. Choctaw, O. & G. R. Co., 125 Fed. 445.

§ 30. Concurrence in joint tariffs; contracts, agreements or arrangements between any carriers. 1. The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the commission; and where such evidence of concurrence or acceptance is filed, it shall not be necessary for the carriers filing the same also to file copies of the tariffs in which they are named as parties.

2. Every common carrier shall file with the commission sworn copies of every contract, agreement or arrangement with any other common carrier or common carriers relating in any way to the transportation of passengers or property.

Compare Interstate Commerce Act, § 6.

§ 31. Unjust discrimination. No common carrier shall, directly or indirectly, by any special rate, rebate, drawback, or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation

for doing a like and contemporaneous service in the transportation of a like kind of traffic under the same or substantially similar circumstances and conditions.

Compare Elkins Act and Interstate Commerce Act, §§ 2, 3.

The sale of reduced rate commutation tickets to school children does not violate this section. Matter of Reduced Transportation Rates to School Children, 2nd Dist., Oct. 28, 1907.

Where conditions of service are similar a carrier may not unjustly discriminate in favor of one or against another. Lough v. Outerbridge, 143 N. Y. 271, affg. 68 Hun 486.

§ 32. Unreasonable preference. No common carrier shall make or give any undue or unreasonable preference or advantage to any person or corporation or to any locality or to any particular description of traffic in any respect whatsoever, or subject any particular person or corporation or locality or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Compare Interstate Commerce Act, § 3.

This section was intended to prohibit undue preference between patrons of the road or their traffic or places which the carrier serves and does not apply in the case of an individual baggage expressman complaining in his own interest of preference in the use of the railroad station for the purpose of soliciting business. Matter of Everts v. Lehigh Valley R. R. Co., 2nd Dist., July 8, 1908.

The Public Service Commissions Law contains no provision requiring a railroad company to throw open its stations or cars to all persons who may desire to solicit from passengers the handling of their baggage or prohibit the making by the carrier of a contract with a particular company or person giving the latter exclusive right to solicit. Id.

§ 33. Transportation prohibited until publication of schedules; rates as fixed to be charged; passes prohibited. 1. No common carrier subject to the provision of this chapter shall after the first day of November, nineteen hundred and seven, engage or participate in the transportation of passengers or property, between points within the state, until its schedules of rates, fares and charges shall have been filed and published in accordance with the provisions of this chapter. No common carrier shall charge, demand, collect or receive a greater or less or different compensation for transportation of passengers or property, or for any service in connection therewith, than the rates, fares and charges applicable to such transportation as specified in its schedules filed and in effect at the time; nor shall any such carrier refund or remit in any manner or by any device any portion of

the rates, fares, or charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are regularly and uniformly extended to all persons and corporations under like circumstances.

2. No common carrier subject to the provisions of this chapter shall, directly or indirectly, issue or give any free ticket, free pass or free transportation for passengers or property between points within this state, except to its officers, employees, agents, surgeons, physicians, attorneys-at-law, and their families; to ministers of religion, officers and employees of railroad young men's Christian associations, inmates of hospitals, charitable and eleemosynary institutions and persons exclusively engaged in charitable and eleemosynary work; and to indigent, destitute and homeless persons and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the national homes or state homes for disabled volunteer soldiers and of soldiers' and sailors' homes, including those about to enter and those returning home after discharge, and boards of managers of such homes; to necessary care takers of property in transit; to employees of sleeping-car companies, express companies, telegraph and telephone companies doing business along the line of the issuing carrier; to railway mail service employees, post-office inspectors, mail carriers in uniform, customs inspectors and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation or proceeding in which the common carrier is interested, persons injured in accidents or wrecks and physicians and nurses attending such person; to the carriage free or at reduced rates of persons or property for the United States, state or municipal governments, or of property to or from fairs and expositions for exhibit thereat.

Thus am'd by L. 1914, ch. 38; L. 1914, ch. 116.

3. Nothing in this chapter shall be construed to prohibit the interchange of free or reduced transportation between common carriers of or for their officers, agents, employees, attorneys, surgeons, and their families, and their household and personal effects, nor to prohibit any common carrier from carrying passengers or property free, with the object of providing relief in cases of general epidemic, pestilence or other calamitous visitation; nor to prohibit any common carrier from transporting per-

sons or property as incident to or connected with contracts for construction, operation or maintenance, and to the extent only that such free transportation is provided for in the contract for such work, nor to prevent any common carrier from transporting children under five years of age free. Provided further, that nothing in this chapter shall prevent the issuance of mileage, excursion, school or family commutation, commutation passenger tickets, half fare tickets for the transportation of children under twelve years of age, or any other form of reduced rate passenger tickets, or joint interchangeable mileage tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand miles or more. But before any common carrier subject to the provision of this chapter shall issue any such mileage, excursion, school or family commutation, commutation, half fare, or any other form of reduced rate passenger tickets, or joint interchangeable mileage ticket, with special privileges as aforesaid, it shall file with the commission copies of the tariffs of rates, fares or charges on which such tickets are to be based, together with the specifications of the amount of free baggage permitted to be carried under such joint interchangeable mileage ticket, in the same manner as common carriers are required to do with regard to other rates by this chapter. Nor shall anything in this chapter prevent the issuance of passenger transportation in exchange for advertising space in newspapers at full rates.

The term "employees" as used in subdivisions two and three of this section, when referring to employees of a common carrier, shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in such subdivision shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died, while in the service of such common carrier.

Thus am'd by L. 1911, ch. 546; L. 1914, ch. 38.

4. Nothing in this section or in any other provision of law shall be deemed to limit the power of the commission to require

the sale of, and upon investigation prescribe reasonable and just fares as the maximum to be charged for, commutation, school or family commutation, mileage tickets over railroads or street railroads, joint interchangeable mileage tickets, round trip excursion tickets, or any other form of reduced rate passenger tickets over such railroads or street railroads; provided that all special round trip excursion tickets, the sale of which is limited to less than thirty days, except round trip excursion tickets to the State Fair and return during the holding thereof, shall be deemed exempt from such regulation by the commission.

Thus am'd by L. 1911, ch. 546.

Constitutionality of Subdivision 4.

Subdivision 4 of the foregoing section empowering the Commission to regulate railroad fares is constitutional. Peo. ex rel. N. Y., N. H. & H. R. R. Co. v. Pub. Serv. Com., 159 A. D. 531 (1914).

Burden of Proof Respecting Increased Rates.

The fact that a railroad corporation increased its rates does not raise a presumption that they are unjust and unfair, and the burden of proof is upon the complainants. Peo. ex rel. N. Y., N. H. & H. R. R. Co. v. Pub. Serv. Com., 159 A. D. 531 (1914).

Right to Issue Passes.

Where a grant of land is made to a railroad company subject to the condition that the company, its successors and assigns will issue a pass to the grantor, an action will lie against a successor corporation to compel the issuance of the pass. Munro v. Syracuse, L. S. & N. R. R. Co., 200 N. Y. 224 (1910), revsg. 128 A. D. 388.

Commutation Rates.

Under subdivision 4 of this section the Commission has power to reduce the commutation rates of railroads. Peo. ex rel. N. Y. Central & H. R. R. R. Co. v. Pub. Serv. Com., 159 A. D. 546 (1914).

Where it has been shown that the increased commutation rates of a railroad were substantially the same as those of other companies, and that the rates prescribed by the Commission were lower than those which have been approved by the Interstate Commerce Commission for similar service the order of the Commission should be annulled. N. Y. Central & H. R. R. R. Co. v. Pub. Serv. Com., 159 A. D. 546 (1914).

Jurisdiction of Appellate Division to Fix Rates.

The Appellate Division has no power to fix railroad fares, but may merely determine whether the record presented to it satisfactorily establishes the former rates to have been unreasonable and unjust and the fixed rate to be reasonable and fair. N. Y. Central & H. R. R. R. Co. v. Pub. Serv. Com., 159 A. D. 546 (1914).

Compare Interstate Commerce Act, § 1.

§ 34. False billing, etc., by carrier or shipper. No common carrier or any officer or agent thereof or any person acting for or employed by it, shall assist, suffer or permit any person or corporation to obtain transportation for any passenger or property between points within this state at less than the rates then established and in force in accordance with the schedules filed and published in accordance with the provisions of this chapter, by means of false billing, false classification, false weight or weighing, or false report of weight, or by any other device or means. No person, corporation or any officer, agent or employee of a corporation, who shall deliver property for transportation within the state to a common carrier, shall seek to obtain or obtain such transportation for such property at less than the rates then established and in force therefor, as aforesaid, by false billing, false or incorrect classification, false weight or weighing, false representation of the contents of a package, or false report or statement of weight, or by any other device or means, whether with or without the consent or connivance of the common carrier, or any of its officers, agents or employees.

Compare Interstate Commerce Act, § 10.

False billing is a form of unjust discrimination. Matter of Underbilling, 1 Interstate Commerce Rep. 813.

§ 35. Discrimination prohibited; connecting lines. Every common carrier is required to afford all reasonable, proper and equal facilities for the interchange of passenger and property traffic between the lines owned, operated, controlled or leased by it and the lines of every other common carrier, and for the prompt transfer of passengers and for the prompt receipt and forwarding of property to and from its said lines; and no common carrier shall in any manner discriminate in respect to rates, fares or charges or in respect to any service or in respect to any charges or facilities for any such transfer in receiving or forwarding between any two or more other common carriers or between passengers or property destined to points upon the lines of any two or more other common carriers, or in any respect with reference to passengers or property transferred or received from any two or more other common carriers. This section shall not be construed to require a common carrier to permit or allow any other common carrier to use its tracks or terminal facilities. Every common carrier, as such, is required to receive from every other common carrier, at a connecting point, freight cars of proper standard, and haul the

same through to destination, if the destination be upon a line owned, operated or controlled by such common carrier, or if the destination be upon a line of some other common carrier, to haul any car so delivered through to the connecting point upon the line owned, operated, controlled or leased by it, by way of route over which such car is billed, and there to deliver the same to the next connecting carrier. Nothing in this section shall be construed as in anywise limiting or modifying the duty of a common carrier to establish joint rates, fares and charges for the transportation of passengers and property over the lines owned, operated, controlled and leased by it and the lines of other common carriers, nor as in any manner limiting or modifying the power of the commission to require the establishment of such joint rates, fares and charges. A railroad corporation and a street railroad corporation shall not be required to interchange cars except on such terms and conditions as the commission may direct.

Compare Interstate Commerce Act, § 3.

§ 36. Long and short haul. No common carrier, subject to the provisions of this act, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or of a like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any such common carrier to charge and receive as great a compensation for a shorter as for a longer distance or haul. Upon application of a common carrier the commission may by order authorize it to charge less for longer than for shorter distances for the transportation of passengers or property in special cases after investigation by the commission, but the order must specify and prescribe the extent to which the common carrier making such application is relieved from the operation of this section, and only to the extent so specified and prescribed shall any common carrier be relieved from the operation and requirements of this section.

Compare Interstate Commerce Act, § 4, for almost identical provisions.

Under the corresponding section of the Interstate Commerce Act it has been held that it is impossible to formulate a general rule by which to determine what constitute violations. Each case must depend upon its facts. Danville v. So. R. Co., 8 Interstate Commerce Rep. 409.

§ 37. Distribution of cars. 1. Every railroad corporation or other common carrier engaged in the transportation of property shall, upon reasonable notice, furnish to all persons and corporations who may apply therefor, and offer property for transportation, sufficient and suitable cars for the transportation of such property in car-load lots. Every railroad corporation and street railroad corporation shall have sufficient cars and motive power to meet all requirements for the transportation of passengers and property which may reasonably be anticipated, unless relieved therefrom by order of the commission. In case, at any particular time, a common carrier has not sufficient cars to meet all requirements for the transportation of property in car-load lots, all cars available to it for such purposes shall be distributed among the several applicants therefor, without discrimination between shippers, localities or competitive or non-competitive points, but preference may always be given in the supply of cars for shipment of livestock or perishable property.

2. The commission shall have power to make, and by order shall make, reasonable regulations for the furnishing and distribution of freight cars to shippers, for the switching of the same, for the loading and unloading thereof, for demurrage charges in respect thereto, and for the weighing of cars and property offered for shipment or transported by any common carrier.

Compare Interstate Commerce Act, § 23.

Cars for Grain and Farm Produce.

All carriers of bulk shipments, such as grain, potatoes, etc., are required to furnish cars equipped with inside or grain doors, bulkheads or other proper devices in order that loading and unloading may be easily accomplished; or, if the carrier and shipper deem it best, the carrier may make an allowance, in its published tariffs, and permit the shipper to equip the car with proper doors. Loomis v. Lehigh Valley R. R. Co., 208 N. Y. 312 (1913), modfg. 147 A. D. 195.

Sections 28, 31 and 49, of this act, do not change the common law rule requiring carriers to furnish safe and sufficient cars for the purpose for which they are intended. Consequently, the rule that a shipper of grain or produce might equip a car door properly for loading and unloading grain and charge the carrier the reasonable cost thereof remains in effect. Loomis v. Lehigh Valley R. R. Co., 203 N. Y. 312 (1913), modfg. 147 A. D. 195.

§ 38. Liability for damage to property in transit. Every common carrier, baggage company, transfer company, railroad corporation and street railroad corporation shall, upon demand, issue either a receipt or bill of lading for all property delivered

to it for transportation. No contract, stipulation or clause in any receipt or bill of lading shall exempt or be held to exempt any common carrier, baggage company, transfer company, railroad corporation or street railroad corporation from any liability for loss, damage or injury caused by it to property from the time of its delivery for transportation until the same shall have been received at its destination and a reasonable time shall have elapsed after notice to consignee of such arrival to permit of the removal of such property. Every common carrier, baggage company, transfer company, railroad corporation and street railroad corporation shall be liable for all loss, damage or injury to property caused by delay in transit due to negligence while the same is being carried by it, but in any action to recover for damages sustained by delay in transit the burden of proof shall be upon the defendant to show that such delay was not due to negligence. Every common carrier, baggage company, transfer company, and railroad corporation shall be liable for loss, damage and injury to property carried as baggage whether in connection with the transportation of the owner or not, up to the full value and regardless of the character thereof, but the value in excess of one hundred and fifty dollars shall be stated upon delivery to the carrier, and a written receipt stating the value shall be issued by the carrier, who may make a reasonable charge for the assumption of such liability in excess of one hundred and fifty dollars and for the carriage of baggage exceeding one hundred and fifty pounds in weight upon a single ticket or receipt. Nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

Thus am'd by L. 1913, ch. 344.

For penalties see post, § 56.

For almost identical provisions of Interstate Commerce Act, § 20.

The duty to give a bill of lading is purely statutory. Johnson v. Stoddard, 100 Mass. 306.

Common Law Liability as Bailee.

At common law, a carrier's liability as insurer of baggage was limited to articles properly constituting baggage, but it was also liable as bailee for negligence even though the relation of passenger and carrier did not exist. Robinson v. N. Y. C. & H. R. R. R. Co., 145 A. D. 391 (1911), affd., 203 N. Y. 627, and cases cited.

Limitation of Carrier's Liability May Be Waived.

The provision, requiring excess value to be stated and enabling the carrier to charge for the greater liability, is for its benefit and may be waived, and its instructions to its agents not to inquire as to value is a waiver of such benefit. Robinson v. N. Y. C. & H. R. R. R. Co., 145 A. D. 391 (1911), affd., 203 N. Y. 627, and cases cited.

Baggage Not to Include Express Parcels.

This section relates to property "carried as baggage" and does not apply to property carried as express apart from the person. Morgan v. Woolverton, 203 N. Y. 52 (1911), affg. 136 A. D. 351.

Special Contract Limiting Liability.

Mere delivery and acceptance of a receipt for baggage containing a special contract limiting liability does not make the limiting clause part of the contract unless the acceptor's attention is called thereto so that he may make himself acquainted therewith. Morgan v. Woolverton, 136 A. D. 351 (1910), affd., 203 N. Y. 52; followed in Meister v. Woolverton, 140 A. D. 926, and Wesslau v. L. I. R. R. Co., 150 A. D. 931.

Section Not Applicable to Baggage Transfer Company.

The provisions of this section, limiting the liability of common carriers for loss of baggage, apply only to carriers who transport baggage without charge in connection with carrying the owner, and are not applicable to a transfer company engaged in transporting baggage only. Morgan v. Woolverton, 203 N. Y. 52 (1911), affg. 136 A. D. 351; Hiddink v. Woolverton, 67 Misc. 611 (1910).

§ 39. Continuous carriage. No common carrier shall enter into or become a party to any combination, contract, agreement or understanding, written or oral, express or implied, to prevent by any arrangement or by change of arrangement of time schedule, by carriage in different cars or by any other means or device whatsoever the carriage of property from being continuous from the place of shipment to the place of destination. No breakage of bulk, stoppage or interruption of carriage made by any common carrier shall prevent the carriage of property from being treated as one continuous carriage from the place of shipment to the place of destination. Nor shall any such breakage of bulk, stoppage or interruption of carriage be made or permitted by any common carrier except it be done in good faith for a necessary purpose without intention to avoid or unnecessarily interrupt or delay the continuous carriage of such property or to evade any of the provisions of law, of this chapter or of an order of the commission.

Compare Interstate Commerce Act, § 7.

For a definition of "continuous carriage" see Interstate Commerce Com. v. C., N. O. & T. P. R. Co., 56 Fed. 925.

A railroad company has no right to demand that a connecting carrier break bulk as a condition to accepting the latter's freight. Hudson Valley R. Co. v. Boston and Maine R. Co., 45 Misc. 520.

§ 40. Liability for loss or damage caused by violation of this chapter. In case a common carrier shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done, either by any law of the state of New York, by this chapter or by an order of the commission, such common carrier shall be liable to the persons or corporations affected thereby for all loss, damage or injury caused thereby or resulting therefrom, and in case of recovery, if the court shall find that such act or omission was wilful, it may in its discretion fix a reasonable counsel or attorney's fee, which fee shall be taxed and collected as part of the costs in the case. An action to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any such person or corporation.

Compare Interstate Commerce Act, § 8.

ARTICLE III

Provisions Relating to the Powers of the Commissions in Respect to Common Carriers, Railroads and Street Railroads

SECTION 45. General powers and duties of commissions in respect to common carriers, railroads and street railroads.
46. Reports of common carriers, railroad corporations and street railroad corporations.
47. Investigation of accidents.
48. Investigations by commission.
49. Rates and service to be fixed by the commissions.
50. Power of commissions to order repairs or changes.
51. Power of commissions to order changes in time schedules; running of additional cars and trains.
52. Uniform system of accounts, access to accounts, et cetera; forfeitures.
53. Franchises and privileges.
54. Transfer of franchises or stocks.
55. Approval of issues of stock, bonds and other forms of indebtedness.
55-a. Reorganizations.
56. Forfeiture; penalties.
57. Summary proceedings.
58. Penalties for other than common carriers.
59. Duties of commissions as to interstate traffic.

§ 45. General powers and duties of commissions in respect to common carriers, railroads and street railroads. 1. Each commission and each commissioner shall have power and authority to administer oaths, in all parts of the state, to witnesses summoned to testify in any inquiry, investigation, hearing or proceeding; and also to administer oaths in all parts of the state whenever the exercise of such power is incidentally necessary or proper to enable the commission or a commissioner to perform a duty or to exercise a power.

2. Each commission shall have the general supervision of all common carriers, railroads, street railroads, railroad corporations and street railroad corporations within its jurisdiction as hereinbefore defined, and shall have power to and shall examine the same and keep informed as to their general condition, their capitalization, their franchises and the manner in which their lines and property, owned, leased, controlled or operated, are managed, conducted and operated, not only with respect to the adequacy, security and accommodation afforded by their service, but also with respect to their compliance with all provisions of law, orders of the commission and charter requirements. Each commission shall have power, either through its members or responsible engineers or inspectors duly authorized by it, to enter in or upon and to inspect the property, equipment, buildings, plants, factories, power-houses and offices of any of such corporations or persons, including the right for such inspection purpose to ride upon any freight locomotive or train or any passenger locomotive or train while in service; and to have upon reasonable notice the use of an inspection locomotive or special locomotive and inspection car for a physical inspection once annually of all the lines and stations of each common carrier under its supervision; and to the extent that such facilities for inspection involve transportation each commissioner and each such employee shall pay the published one-way fare established by the common carrier for the transportation of persons by regular passenger trains over the distance covered by such inspection. The cost of such transportation, if the commission so elects, may be paid upon bill rendered to the commission after the transportation has been furnished and the amount thereof ascertained.

3. Each commission and each commissioner shall have power to examine all books, contracts, records, documents and papers of any

person or corporation subject to its supervision, and by subpoena duces tecum to compel production thereof. In lieu of requiring production of originals by subpoena duces tecum, the commission or any commissioner may require sworn copies of any such books, records, contracts, documents and papers or parts thereof to be filed with it.

In exercise of the authority granted by subdivision 3, the Commission of the First District has required the filing of the following documents by railroads and street railways operating in the district, to wit:

1. Certificate of incorporation.
2. Supplemental or amended certificates of incorporation.
3. Certificate of extension of route.
4. Certificate relative to capital stock, whether increase or decrease.
5. Consolidation agreements.
6. Consents of local authorities, constituting franchise rights.
7. Consents of local authorities relative to change in motive power.
8. Certificates of the Board of Railroad Commissioners as to public convenience and a necessity.
9. Certificates of the Board of Railroad Commissioners relative to change in motive power.
10. Certificates of the Board of Railroad Commissioners relative to changes in the capital stock, securities and bonds.
11. Certificates of abandonment of route.
12. Leases.
13. Deeds and other documents in the chain of title.
14. Location of all real property owned in fee.
15. Location of all real property leased.
16. All traffic and trackage agreements, including agreements with express companies or other companies operating upon any portion of their lines.
17. Affidavits of employees that necessary property owners' consents have been secured in each instance where necessary.
18. Copies of all agreements with dock department, bridge commissioners or other municipal or Federal authorities.
19. A statement giving description of same, date of filing and in what office filed, as to each map filed by the company in the office of the county clerk or in the office of the register.
20. A copy of all the proceedings of the Rapid Transit Commissioners affecting the company, including orders, determinations and locations of routes.
21. Enumeration of the various lines operated.
22. A map drawn to a scale of at least 2,500 feet to an inch, showing all routes operated.
23. A reference to all court decisions affecting the validity of any franchises.
24. A copy of any other documents constituting a link in the chain of muniments of title.

Under this order several thousand documents have been collected. All these are open to inspection by the public under reasonable regulations during office hours.

"All Provisions of Law" Refers Only to This Act; Abatement of Nuisances.

The provision granting the Commission general supervision with respect to the compliance by carriers with "all provisions of law" refers only to

those provisions contained in this act and not to all the provisions of the statute or common law. Peo. ex rel. N. Y., N. H. & H. R. R. Co. v. Willcox, 200 N. Y. 423 (1911), revsg. 138 A. D. 330.

Jurisdiction Respecting Nuisances.

This section does not give the Commission power to interfere with matters in the jurisdiction of boards of health and confers no jurisdiction to order the abatement of a nuisance affecting health in a railroad terminal. Peo. ex rel. N. Y., N. H. & H. R. R. Co. v. Willcox, 200 N. Y. 423 (1911), revsg. 138 A. D. 330.

§ 46. Reports of common carriers, railroad corporations and street railroad corporations. 1. Every common carrier, railroad corporation and street railroad corporation shall file an annual report with the commission verified by the oath of the president, treasurer, general manager or receiver, if any, of such corporation, or by the person required to file the same. The verification shall be made by said official holding office at the time of the filing of the said report, and if not made upon the knowledge of the person verifying the same shall set forth the sources of his information and the grounds of his belief as to any matters not stated to be verified upon his knowledge. The commission shall prescribe the form of such reports and the character of the information to be contained therein, and may from time to time make such changes and such additions in regard to form and contents thereof as it may deem proper, and on or before June thirtieth in each year shall furnish a blank form for such annual reports to every such corporation and person. The contents of such report and the form thereof shall conform in the case of railroad corporations as nearly as may be to that required of common carriers under the provisions of the act of congress entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and the acts amendatory thereof and supplementary thereto. The commission may require such report to contain information in relation to rates or regulations concerning fares or freights, agreements or contracts affecting the same, so far as such rates or regulations pertain to transportation within the state. When the report of any such corporation or person is defective, or believed to be erroneous, the commission shall notify the corporation or person to amend the same within a time prescribed by the commission. The originals of the reports, subscribed and sworn to as prescribed by law, shall be preserved in the office of the commission. The commission may also require such corporations and persons

to file periodic reports in the form, covering the period and at the time prescribed by the commission. The commission may require of any such corporation or person specific answers to questions upon which the commission may need information. The annual report required to be filed by a common carrier, railroad or street railroad corporation shall be so filed on or before the thirtieth day of September in each year. The commission may extend the time for making and filing such report for a period not exceeding sixty days. If such corporation or person shall fail to make and file the annual report within the time above specified or within the time as extended by the commission, or shall fail to amend such report within such reasonable time as may be prescribed by the commission, or shall fail to make specific answer to any question, or shall fail to make the periodic reports when required by the commission as herein provided, within the time and in the form prescribed by the commission for the making and filing of any such report or answer, such corporation or person shall forfeit to the state the sum of one hundred dollars for each and every day it shall continue to be in default with respect to such annual report, amendment, answer or periodic report. Such forfeiture shall be recovered in an action brought by the commission in the name of the people of the state of New York. The amount recovered in any such action shall be paid into the state treasury and credited to the general fund. Any railroad corporation or common carrier other than a street railroad corporation operating partly within the second district and partly within the first district shall report to the commission of the second district; but the commission of the first district may, upon reasonable notice, require a special report from such railroad corporation or common carrier. Any street railroad corporation operating partly within the first district and partly within the second district shall report to the commission of the first district; but the commission of the second district may, upon reasonable notice, require a special report from such street railroad corporation.

§ 47. Investigation of accidents. Each commission shall investigate the cause of all accidents on any railroad or street railroad within its district which result in loss of life or injury to persons or property, and which in its judgment shall require investigation. Every common carrier, railroad corporation and street

railroad corporation is hereby required to give immediate notice to the commission of every accident happening upon any line of railroad or street railroad owned, operated, controlled or leased by it, within the territory over which such commission has jurisdiction in such manner as the commission may direct. Such notice shall not be admitted as evidence or used for any purpose against such common carrier, railroad corporation or street railroad corporation giving such notice in any suit or action for damages growing out of any matter mentioned in said notice.

Compare Interstate Commerce Act, § 20.

§ 48. Investigations by commission. 1. Each commission may, of its own motion, investigate or make inquiry, in a manner to be determined by it, as to any act or thing done or omitted to be done by any common carrier, railroad corporation or street railroad corporation, subject to its supervision, and the commission must make such inquiry in regard to any act or thing done or omitted to be done by any such common carrier, railroad corporation or street railroad corporation in violation of any provision of law or in violation of any order of the commission.

2. Complaints may be made to the proper commission by any person or corporation aggrieved, by petition or complaint in writing setting forth any thing or act done or omitted to be done by any common carrier, railroad corporation or street railroad corporation in violation, or claimed to be in violation, of any provision of law or of the terms and conditions of its franchise or charter or of any order of the commission. Upon the presentation of such a complaint the commission shall cause a copy thereof to be forwarded to the person or corporation complained of, accompanied by an order, directed to such person or corporation, requiring that the matters complained of be satisfied, or that the charges be answered in writing within a time to be specified by the commission. If the person or corporation complained of shall make reparation for any injury alleged and shall cease to commit, or to permit, the violation of law, franchise or order charged in the complaint, and shall notify the commission of that fact before the time allowed for answer, the commission need take no further action upon the charges. If, however, the charges contained in such petition be not thus satisfied, and it shall appear to the commission that there are reasonable grounds therefor, it

shall investigate such charges in such manner and by such means as it shall deem proper, and take such action within its powers as the facts justify.

3. Whenever either commission shall investigate any matter complained of by any person or corporation aggrieved by any act or omission of a common carrier, railroad corporation or street railroad corporation under this section it shall be its duty to make and file an order either dismissing the petition or complaint or directing the common carrier, railroad corporation or street railroad corporation complained of to satisfy the cause of complaint in whole or to the extent which the commission may specify and require.

Compare Interstate Commerce Act, §§ 12–14.

Construction and Application.

This section and section 57 are supplementary to each other and not inconsistent and the Commission may proceed under either or both simultaneously. This section enables the Commission to acquaint itself with the facts so that it may form an opinion whether to prosecute or dismiss. Such investigation may be the foundation for summary proceedings taken under section 57, but action may be taken under section 57 either with or without previous investigation. An action taken under section 48 does not bar proceedings under section 57. Willcox v. Richmond Lt. & R. R. Co., 142 A. D. 44 (1910), affd., 202 N. Y. 515.

§ 49. Rates and service to be fixed by the commission. 1. Whenever either commission shall be of opinion, after a hearing had upon its own motion or upon a complaint, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier, railroad corporation or street railroad corporation subject to its jurisdiction for the transportation of persons or property within the state, or that the regulations or practices of such common carrier, railroad corporation or street railroad corporation affecting such rates are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in anywise in violation of any provision of law, or that the maximum rates, fares or charges, chargeable by any such common carrier, railroad or street railroad corporation are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall with due regard among other things to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservation out of income for surplus and contingencies, determine the just and

reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, notwithstanding that a higher rate, fare or charge has been heretofore authorized by statute, and shall fix the same by order to be served upon all common carriers, railroad corporations or street railroad corporations by whom such rates, fares and charges are thereafter to be observed.

Whenever either commission shall be of the opinion, after a hearing had upon its own motion, or upon a complaint, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier, railroad corporation or street railroad corporation subject to its jurisdiction for excursion, school or family commutation, commutation passenger tickets, half fare tickets for the transportation of children under six years of age, or any other form of reduced rate tickets for the transportation of persons within the state, or joint interchangeable mileage tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand miles or more within the state, or that the regulations or practices of such common carrier, railroad corporation or street railroad corporation affecting such rates are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in anywise in violation of any provision of law, or that the maximum rates, fares or charges collected or charged for any of such forms of reduced fare passenger transportation tickets by any such common carrier, railroad or street railroad corporation are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, and whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon a complaint, and upon investigation, that the sale of any form or forms of reduced fare passenger ticket heretofore sold or used upon any railroad or street railroad within the state of New York, the use or sale of which ticket or tickets has been discontinued within five years prior to the time this act takes effect, will be just and reasonable and not in violation of any provision of this act or other provision of law, the commission shall, with due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservation out of income for surplus and contingencies, determine the just and reasonable rates, fares

and charges to be thereafter observed and enforced as the maximum to be charged for such mileage, excursion, school or family commutation, commutation, half fare or any other form of reduced rate tickets for the transportation of persons, or joint interchangeable mileage tickets with special privileges as aforesaid, and shall order the sale and use thereof to be restored, of any of the kinds of tickets herein specified or any other form of reduced rate ticket for the transportation of persons within the state, upon any railroad or street railroad within this state, upon which railroad or street railroad any such form of ticket or tickets for the transportation of persons within the state, have, within five years prior to the time this act takes effect, been sold or used, and shall determine and prescribe the reasonable and just rates, fares and charges to be thereafter observed and enforced as the maximum to be charged for any of such form of ticket or tickets for the transportation of persons within the state, all of which acts fixing such rates, fares and charges or requiring the restoration of, sale and use of any of such forms of ticket or tickets, shall be by order to be served upon all common carriers, railroad corporations and street railroad corporations by whom such rates, fares and charges or restoration of, sale or use of, such ticket or tickets are thereafter to be observed.

Thus am'd by L. 1911, ch. 546.

2. Whenever the commission shall be of opinion, after a hearing, had upon its own motion or upon complaint, that the regulations, practices, equipment, appliances, or service of any such common carrier, railroad corporation or street railroad corporation in respect to transportation of persons or property within the state are unjust, unreasonable, unsafe, improper or inadequate, the commission shall determine the just, reasonable, safe, adequate and proper regulations, practices, equipment, appliances and service thereafter to be in force, to be observed and to be used in such transportation of persons and property and so fix and prescribe the same by order to be served upon every common carrier, railroad corporation and street railroad corporation to be bound thereby; and thereafter it shall be the duty of every common carrier, railroad corporation and street railroad corporation to observe and obey each and every requirement of every such order so served upon it, and to do everything neces-

sary or proper in order to secure absolute compliance with and observance of every such order by all of its officers, agents and employees.

3. The commission shall have power by order to require any two or more common carriers, railroad corporations or street railroad corporations, whose lines, owned, operated, controlled or leased, from a continuous or connecting line of transportation or could be made to do so by the construction and maintenance of switch connection or interchange track at connecting points, or by transfer of property or passengers at connecting points, to establish through routes and joint rates, fares and charges for the transportation of passengers and property within the state as the commission may, by its order, designate; and in case such through routes and joint rates be not established by the common carriers, railroad corporations and street railroad corporations named in any such order within the time therein specified, the commission shall establish just and reasonable rates, fares and charges to be charged for such through transportation, and declare the portion thereof to which each common carrier, railroad corporation or street railroad corporation affected thereby shall be entitled and the manner in which the same shall be paid and secured; and the commission shall also have power in the same proceeding, or in a separate proceeding involving any rates, fares or charges, to prescribe joint rates and fares and charges as the maximum to be exacted for the transportation by them of passengers and property within the state, and to require such common carriers, railroad corporations and street railroad corporations affected thereby to make within a specified time an agreement between them as to the portion of such joint rates, fares or charges to which each of them shall be entitled; and in case such agreement be not so made within the time so specified the commission may declare by supplemental order the portion thereof to which each common carrier, railroad corporation or street railroad corporation affected thereby shall be entitled and the manner in which the same shall be paid and secured; such supplemental order shall take effect as part of the original order from the time such supplemental order shall become effective.

4. If the commission shall be of the opinion that through cars for the transportation of property should be operated over the tracks of said common carriers, railroad corporations and street railroad corporations and that switch connection or interchange

track at a connecting point, if not already existing, should be constructed and maintained by such common carriers, railroad corporations and street railroad corporations, to the end that property may be carried without change of cars, the commission shall have power after a hearing to require by order said common carriers, railroad corporations and street railroad corporations to receive from each other and transport for each other such cars over each other's tracks by way of such switch connection or interchange track, and if no such switch connection or interchange track exist to construct and maintain said switch connection or interchange track, and to make within a specified time not less than thirty days an agreement between them as to the terms of such receipt and transportation of cars, and if so required as to the division of the expense of such construction and maintenance of switch connection or interchange track; and in case such agreement be not so made within the time so specified, the commission shall after a hearing declare by supplemental order the terms and conditions upon which such cars shall be received and transported, and if so required the portion of such expense to which each common carrier or corporation affected thereby shall be entitled and the manner in which any sums of money to which any such common carrier or corporation is entitled shall be paid and secured, and such supplemental order shall take effect as part of the original order from the time such supplemental order shall become effective. Nothing in this subdivision shall be construed to require a through route between railroad corporations and street railroad corporations between points reached by such railroad corporations.

5. Whenever the case shall relate to a joint rate, fare or charge, or a through route composed of a street railroad wholly in the second district and a street railroad wholly in the first district, or partly in the first and partly in the second district, the proceeding shall be deemed pending before both commissions. In such case and in every other case arising under this chapter wherein it appears to both commissions that separate jurisdiction has not been conferred, a joint hearing shall be fixed and had by members of both commissions, and the determination shall be by joint order, which shall be effective when concurred in by not less than three members of each commission, anything in this chapter to the contrary notwithstanding. In any such case the proceeding may be instituted by or before either commission and the entry and service of preliminary orders may be by such commission.

6. Whenever the commission shall be of the opinion after a hearing that the practices and service and the rules and regulations affecting the same of any street railroad corporation which is within its jurisdiction are as to transportation upon the street surface railroads of said corporation by use of transfers given to each passenger paying one single fare unjust and unreasonable either as to persons transported upon said street surface railroads or as to any such street railroad corporation, the commission shall determine and prescribe by order the just and reasonable service and rules and regulations affecting the same thereafter to be maintained and observed by said street railroad corporation (a) as to the distance over which a passenger shall by such transfer be transported by it upon said street surface railroads for a single fare; (b) the number of successive transfers to be given by it to a passenger paying one single fare for transportation over said street surface railroads; and (c) as to the prompt use by each passenger of such transfer given him for one single fare paid by him in making his continuous trip over said street surface railroads. And it shall thereupon be the duty of every such street railroad corporation to obey each requirement of every such order served upon it and to do everything necessary and proper in order to secure compliance with and observance of every such order by all of its officers, agents and employees. But nothing herein contained shall affect or modify the terms of a certain contract bearing date January first, eighteen hundred and ninety-two, entered into by and between the city of Buffalo and the various street surface railroad corporations therein named in said contract.

7. Until and except as the public service commission shall otherwise prescribe as to any street railroad corporation or corporations pursuant to the provisions of this chapter, every street surface railroad corporation entering into a contract with another such corporation as provided in section seventy-eight of the railroad law shall carry or permit any other party thereto to carry between any two points on the railroads or portions thereof embraced in such contract any passenger desiring to make one continuous trip between such points for one single fare, not higher than the fare lawfully chargeable by either of such corporations for an adult passenger. Every such corporation shall upon demand, and without extra charge, give to each passenger paying one single fare a transfer entitling such passenger to one continuous trip to any point or portion of any railroad embraced in

such contract, to the end that public convenience may be promoted by the operation of the railroads embraced in such contract substantially as a single railroad with a single rate of fare. For every refusal to comply with the requirements of this subdivision the corporation so refusing shall forfeit fifty dollars to the aggrieved party. The provisions of this subdivision shall only apply to railroads wholly within the limits of any one incorporated city or village.

8. No passenger joint rate, fare, charge, through route or transfer shall be required between any rapid transit railroad and any other rapid transit railroad or any railroad operated as a street surface railroad, nor between a street surface railroad and any railroad operated wholly by steam, or any railroad operated a distance of over fifty miles partly by steam and partly by electricity.

The fixing of rates is a judicial or quasi-judicial function and reviewable by certiorari. Peo. ex rel. Joline v. Willcox, 129 A. D. 267 (1908); Peo. ex rel. Central Park, N. & E. R. R. R. Co. v. Willcox, 194 N. Y. 383 (1909).

The Commission has power under this section to require a sufficient number of men to be employed upon any railroad train to operate it with proper dispatch and with due regard to the safety of the public and of employees of the company; to require proper examinations by the company of all persons prior to their entering its employment in order to insure the selection of competent persons; to require the discharge of incompetent persons. Matter of Evans v. Erie R. R. Co., 2nd Dist., Nov. 26, 1907.

Ten cent rate between Watertown and Glen Park considered and ordered reduced to five cents. Matter of Black River Traction Co., 2nd Dist., May 12, 1908.

Fare charged by the New York and Long Island Traction Co. considered and ordered reduced to conform with the company's franchise obligations. Edwards v. N. Y. & L. I. Trac. Co., 2nd Dist., Feb. 27, 1908.

The zone system of fares upon street railways is not improper. In such a system mileage is only one factor in making the rate. Fares charged by the United Traction Co. examined and sustained. Matter of Citizens' Com. of Watervliet v. United Traction Co., 2nd Dist., Oct. 14, 1908.

The Commission has no power under this section to order a common carrier subject to its jurisdiction to establish through routes and joint rates with a common carrier conducting its operations exclusively by water and not subject to such jurisdiction and supervision. Matter of Murray's Line v. The D. & H. Co., 2nd Dist., July 8, 1909.

Delegation of Rate Fixing Power; Constitutionality.

The provision authorizing the Commission to determine the maximum price to be charged for service by lighting companies is not such a delegation of legislative powers that it is violative of any express or implied provision of the State Constitution relating to the subject. Matter of Vil. of Saratoga Springs v. Saratoga Gas, El. Lt. & Power Co., 191 N. Y. 123 (1908).

Reduction of Rate Fixed by Statute.

Notwithstanding a special law authorizing a railroad company to charge a fixed rate of fare, the Public Service Commission, acting under its power to fix railroad rates, may reduce the rate of fare allowed by said statute for the reason that under the State Constitution and various statutes the power to amend or repeal corporate charters is reserved to the people. Peo. ex rel. Delaware & Hudson Co. v. Public Service Com., 140 A. D. 839 (1910).

Review by Certiorari.

The return of the Commission to a writ of certiorari to review an order directing the establishment of through rates may include testimony taken by the Commission upon an ex parte hearing and such testimony will not be stricken out in advance of the hearing as it may then be disregarded if irrelevant. Peo. ex rel. Joline v. Willcox, 198 N. Y. 433 (1910), revsg. 134 A. D. 563.

An order of the Commission requiring two connecting railroads to establish through rates is quasi-judicial and may be reviewed by certiorari. Peo. ex rel. Joline v. Willcox, 198 N. Y. 433 (1910); Peo. ex rel. Central Park, etc., R. R. Co. v. Willcox, 194 N. Y. 383 (1909).

Municipal Ordinances in Conflict with Orders of the Commission.

Since the Public Service Commission was established to provide uniformity and consistency in relation to public service corporations, and to constitute a tribunal to direct and supervise their relations with the public, a municipality has no power to disregard the orders of the Commission by passing ordinances in conflict therewith. Troy v. United Traction Co., 202 N. Y. 333 (1911), affg. 137 A. D. 935; Peo. ex rel. South Shore Traction Co. v. Willcox, 196 N. Y. 212 (1909).

Refusal to Issue Transfer over Leased Line.

In an action under this section because of the refusal of the street railway to give a transfer over a leased line the plaintiff is entitled to show that said lease was made pursuant to the provisions of section 78 of the Railroad Law. Lowenstein v. Internat'l Ry. Co., 75 Misc. 357 (1912).

§ 50. Power of commissions to order repairs or changes. If in the judgment of the commission having jurisdiction, additional tracks, switches, terminals or terminal facilities, stations, motive power, or any other property, construction, apparatus, equipment, facilities or device for use by any common carrier, railroad corporation or street railroad corporation in or in connection with the transportation of passengers or property ought reasonably to be provided, or any repairs or improvements to or changes in any thereof in use ought reasonably to be made, or any additions or changes in construction should reasonably be made thereto in order to promote the security or convenience of the public or employees, or in order to secure adequate service or facilities for the transportation of passengers or property, the commission shall.

after a hearing either on its own motion or after complaint, make and serve an order directing such repairs, improvements, changes or additions to be made within a reasonable time and in a manner to be specified therein, and every common carrier, railroad corporation and street railroad corporation is hereby required and directed to make all repairs, improvements, changes and additions required of it by any order of the commission served upon it. If any repairs, improvements, changes or additions which the commission has determined to order require joint action by two or more of said corporations, the commission shall, before entry and service of order, notify the said corporations that such repairs, improvements, changes or additions will be required and that the same shall be made at their joint cost, and thereupon the said corporations shall have thirty days or such longer time as the commission may grant within which to agree upon the part or division of cost of such repairs, improvements, changes or additions which each shall bear. If at the expiration of such time such corporations shall fail to file with the commission a statement that an agreement has been made for a division or apportionment of such repairs, improvements, changes or additions the commission shall have authority, after further hearing, to fix in its order the proportion of such cost or expense to be borne by each corporation and the manner in which the same shall be paid and secured. But this section shall not be construed to authorize the commission to require two or more railroad corporations to unite in the erection of a union station.

Rates for Checking Parcels.

In a proceeding before the Public Service Commission to compel a railroad corporation to reduce the charges for checking parcels in one of its stations, the privilege for maintaining a parcel room having been leased to an individual, the Commission has no power to interrogate the lessee or to hold him in contempt of court for failure to answer questions or produce his books and papers. Matter of Pub. Serv. Com., 162 A. D. 371 (1914).

Under the power conferred by this section the Commission has authority to order the erection of a new passenger station where the existing station is inadequate and unfit, having in mind the proper accommodation and convenience of passengers who necessarily use the station. Matter of the Complaint of Residents of the Village of Sandy Hill v. The Delaware and Hudson Co., 2nd Dist., Oct. 13, 1908.

In ordering new structures the Commission feels that it has the power to require that they present a decent and reputable appearance; that they should not be an eyesore to the community in which they are placed; that they should not be a source of reproach and shame to the people whom they serve. Matter of Station at Collins, 2nd Dist., Oct. 21, 1908.

A cinder platform is unfit for use at a passenger station. Matter of Station at Collins, 2nd Dist., Oct. 21, 1908.

This section does not abrogate or supersede the provisions of the Railroad Law relating to the elimination of highway grade crossings. The Commission will not, therefore, order an undercrossing to be constructed by a railroad company upon a right of way which it owns in fee and outside the limits of a public highway, at the expense of the company, such undercrossing to be used by pedestrians when travel along the adjacent highway is obstructed by the lawful passage of trains. Matter of the Complaint of the City of Elmira v. Erie R. R. Co., 2nd Dist., April 1, 1909.

Facts considered and company ordered to abandon use of freight car body for freight station purposes and to erect a suitable freight house. Matter of Complaint of the Citizens of Rockland County v. New Jersey and New York R. R. Co., 2nd Dist., April 16, 1908.

§ 51. Power of commissions to order changes in time schedules; running of additional cars and trains. If, in the judgment of the commission having jurisdiction, any railroad corporation or street railroad corporation does not run trains enough or cars enough or possess or operate motive power enough, reasonably to accommodate the traffic, passenger and freight, transported by or offered for transportation to it, or does not run its trains or cars with sufficient frequency or at a reasonable or proper time having regard to safety, or does not run any train or trains, car or cars, upon a reasonable time schedule for the run, the commission shall, after a hearing either on its own motion or after complaint, have power to make an order directing any such railroad corporation or street railroad corporation to increase the number of its trains or of its cars or its motive power or to change the time for starting its trains or cars or to change the time schedule for the run of any train or car or make any other suitable order that the commission may determine reasonably necessary to accommodate and transport the traffic, passenger or freight, transported or offered for transportation.

Compare Interstate Commerce Act, § 23.

Conditions held to justify discontinuance of service during winter months. Matter of Residents of the Towns on the Far Rockaway Branch v. The Long Island R. R., 2nd Dist., Feb. 10, 1908.

It is the settled policy of the Commission that local traffic must be taken care of in a reasonable manner and not sacrificed to through travel. Matter of Petition of the Inhabitants of Castleton, 2nd Dist., Dec. 10, 1907.

Where a petition asks that a railroad be directed to stop a train at a particular point, the fact that the railroad can make the stop and yet keep its scheduled time is not controlling. A railroad is entitled in the first instance to schedule its trains as it sees fit. The Commission should not interfere with its arrangements unless the change asked for will serve the convenience of a considerable number of people and will not inconvenience a greater number;

also that it will not seriously interfere with the running of trains and with the general operation of the road. Matter of the Complaint of the Village of Marathon v. D., L. & W. R. R. Co., 2nd Dist., May 12, 1909.

§ 52. Uniform system of accounts; access to accounts, et cetera; forfeitures. Each commission may, whenever it deems advisable, establish a system of accounts to be used by railroad and street railroad corporations or other common carriers which are subject to its supervision, or may classify the said corporations and other carriers and prescribe a system of accounts for each class, and may prescribe the manner in which such accounts shall be kept. It may also in its discretion prescribe the forms of accounts, records and memoranda to be kept by such corporations, including the accounts, records and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. Notice of alterations by the commission in the required method or form of keeping a system of accounts shall be given to such persons or corporations by the commission at least six months before the same are to take effect. The system of accounts established by the commission and the forms of accounts, records and memoranda prescribed by it as provided above shall conform in the case of railroad corporations as nearly as may be to those from time to time established and prescribed by the interstate commerce commission under the provisions of the act of congress entitled "An act to regulate commerce" approved February fourth, eighteen hundred and eighty-seven, and the acts amendatory thereof or supplementary thereto. The commission shall at all times have access to all accounts, records and memoranda kept by railroad and street railroad corporations and by common carriers, and may designate any of its officers or employees who shall thereupon have authority under the order of the commission to inspect and examine any and all accounts, records and memoranda kept by such corporations. The commission may, after hearing, prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited. Where the commission has prescribed the forms of accounts, records and memoranda to be kept by such corporations it shall be unlawful for them to keep any other accounts, records or memoranda than those so prescribed, or those prescribed by or under authority of the United States. Any employee or agent of the commission who divulges any fact or information which may come to his knowledge during the

course of any such inspection or examination except in so far as he may be directed by the commission, or by a court or judge thereof, or authorized by law, shall be guilty of a misdemeanor.

§ 53. Franchises and privileges. Without first having obtained the permission and approval of the proper commission no railroad corporation, street railroad corporation or common carrier shall begin the construction of a railroad or street railroad, or any extension thereof, for which prior to the time when this act becomes a law a certificate of public convenience and necessity shall not have been granted by the board of railroad commissioners or where prior to said time said corporation or common carrier shall not have become entitled by virtue of its compliance with the provisions of the railroad law to begin such construction; nor, except as above provided in this section, shall any such corporation or common carrier exercise any franchise or right under any provision of the railroad law, or of any other law, not heretofore lawfully exercised, without first having obtained the permission and approval of the proper commission. The commission within whose district such construction is to be made, or within whose district such franchise or right is to be exercised, shall have power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the franchise or privilege is necessary or convenient for the public service. And if such construction is to be made, or such franchise to be exercised in both districts, the approval of both commissions shall be secured.

History of legislative policy embodied in the provisions of this section is detailed at great length in the opinion of Commissioner Stevens in Matter of the Application of the Buffalo, Rochester and Eastern R. R. Co., 2nd Dist., March 15, 1909.

An operating railway or trolley company should not be permitted to divest itself, in favor of another corporation, of the obligation to perform any of the public services for which it was incorporated, unless it can clearly show that public necessity so demands, or public convenience can be better served thereby. This test applied to the application of the Interurban Electric Express Co. of Syracuse for permission to exercise rights as an express company on certain railroads and petition denied. Matter of Interurban Elec. Exp. Co., 2nd Dist., July 16, 1908.

In determining whether a certificate will be issued under this section the Commission may not consider the terms imposed by the municipality in granting the franchise. As to those matters the local authority is sovereign. All that the Commission has to decide is the public convenience and necessity for the road. Peo. ex rel. South Shore Traction Co. v. Willcox et al., A. D., 1st Dept., decided June 1909, not yet reported.

The provisions of this section have no application to the statute (Railroad Law, L. 1890, ch. 565, § 12, as am'd by L. 1892, ch. 676), making it the duty of railroad companies, whose tracks cross each other, to intersect their tracks for the benefit of the public, since the Legislature has in this case, by express enactment, itself determined the question of convenience and necessity in such cases. The Commission is not required to issue a certificate nor to determine the point or manner in which the intersection of the tracks of a steam railroad and an electric street railway, which cross each other at grade upon a public street of an incorporated village, shall be made. Village of Ft. Edward v. Hudson Valley Ry. Co., 192 N. Y. 139 (1908), affg. 122 A. D. 903.

Application of Sections 53 and 54.

The provisions of sections 53 and 54 are not directed against corporations particularly, but against corporations and individuals alike. Section 53 expressly excepts franchises held prior to the creation of the Railroad Commission. This exception and the inability of the Legislature to interfere with the rights of bondholders or purchasers indicate that the provisions of sections 53 and 54 were not intended to apply to a corporation formed on the reorganization of a foreclosed railroad. Peo. ex rel. Third Ave. Ry. Co. v. Public Service Com., 203 N. Y. 299 (1911), affg. 145 A. D. 318.

Erroneous Determination by Commission.

Where the Commission has determined that public interest required the construction and operation of a railroad upon the route over which a franchise had been acquired, but withheld its approval because of limitations upon the franchise imposed by the municipal authorities in conflict with the provisions of this law; held, that the statute must prevail and the Commission had no authority to refuse the certificate provided for in this section. Peo. ex rel. South Shore Traction Co., 196 N. Y. 212 (1909), affg. 133 A. D. 556. If the municipal authorities impose conditions in the construction of a proposed road which are in conflict with the provisions of the Public Service Law, the statute must prevail and such conditions are nugatory. Id.

Right of Commission to Appeal from Order of Appellate Division.

The Commission is entitled to prosecute an appeal from an order of the Appellate Division which annulled its determination denying an application for permission to construct and operate an extension of a railroad. Peo. ex rel. South Shore Traction Co., 196 N. Y. 212 (1909).

§ 54. Transfer of franchises or stocks. 1. No franchise nor any right to or under any franchise, to own or operate a railroad or street railroad shall be assigned, transferred or leased, nor shall any contract or agreement with reference to or affecting any such franchise or right be valid or of any force or effect whatsoever, unless the assignment, transfer, lease, contract or agreement shall have been approved by the proper commission. The permission and approval of the commission, to the exercise of a franchise under section fifty-three, or to the assignment, transfer or lease

of a franchise under this section shall not be construed to revive or validate any lapsed or invalid franchise, or to enlarge or add to the powers and privileges contained in the grant of any franchise, or to waive any forfeiture.

2. No railroad corporation, street railroad corporation, or electrical corporation, domestic or foreign, shall hereafter purchase or acquire, take or hold, any part of the capital stock of any railroad corporation or street railroad corporation or other common carrier organized or existing under or by virtue of the laws of this state, unless authorized so to do by the commission empowered by this act to give such consent; and save where stock shall be transferred or held for the purpose of collateral security only with the consent of the commission empowered by this chapter to give such consent, no stock corporation of any description, domestic or foreign, other than a railroad corporation, street railroad corporation, or electrical corporation, shall purchase or acquire, take, or hold, more than ten per centum of the total capital stock issued by any railroad corporation or street railroad corporation or other common carrier organized or existing under or by virtue of the laws of this state, except that a corporation now lawfully holding a majority of the capital stock of any railroad corporation or street railroad corporation may with the consent of the commission acquire and hold the remainder of the capital stock of such railroad corporation or street railroad corporation or any portion thereof. Nothing herein contained shall be construed to prevent the holding of stock heretofore lawfully acquired, or to prevent, upon the surrender or exchange of said stock pursuant to a reorganization plan, the purchase, acquisition, taking or holding of a proportionate amount of stock of any new corporation organized to take over, at foreclosure or other sale, the property of any corporation whose stock has been thus surrendered or exchanged, or subject to approval by the commission, of any further issue of stock provided such further issue does not increase the proportion of stock held by such stock corporation. Every contract, assignment, transfer or agreement for transfer of any stock by or through any person or corporation to any corporation, in violation of any provision of this chapter, shall be void and of no effect, and no such transfer or assignment shall be made upon the books of any such railroad corporation or street railroad corporation, or shall be recognized as effective for any purpose. The power conferred by this section to approve or disapprove a trans-

action relating to franchises, rights or stock of any railroad corporation or street railroad corporation, or other common carrier, shall be exercised by the commission which is authorized by this act to approve the issue of stock by such railroad corporation or street railroad corporation.

Thus am'd by L. 1911, ch. 788; L. 1914, ch. 220.

The purchase of the stock of one railroad company by another will be approved where obvious public advantage can be shown. Matter of The Application of the New York Central R. R. Co. for leave to purchase the stock of the Spuyten Duyvil & Port Morris R. R. Co., 2nd Dist., Jan. 22, 1909.

The consent of the Commission is necessary to merger or consolidation of companies subject to its jurisdiction by reason of the provisions of this section and section 70. Matter of Watertown Light & Power Co., 2nd Dist., March 9, 1909.

§ 55. Approval of issues of stock, bonds and other forms of indebtedness. A common carrier, railroad corporation or street railroad corporation organized or existing, or hereafter incorporated, under or by virtue of the laws of the state of New York, may issue stocks, bonds, notes or other evidence of indebtedness payable at periods of more than twelve months after the date thereof, when necessary for the acquisition of property, the construction, completion, extension or improvement of its facilities, or for the improvement or maintenance of its service or for the discharge or lawful refunding of its obligations or for the reimbursement of moneys actually expended from income, or from any other moneys in the treasury of the corporation not secured by or obtained from the issue of stocks, bonds, notes or other evidence of indebtedness of such corporation, within five years next prior to the filing of an application with the proper commission for the required authorization, for any of the aforesaid purposes except maintenance of service and except replacements in cases where the applicant shall have kept its accounts and vouchers of such expenditure in such manner as to enable the commission to ascertain the amount of moneys so expended and the purposes for which such expenditure was made; provided and not otherwise that there shall have been secured from the proper commission an order authorizing such issue, and the amount thereof and stating the purposes to which the issue or proceeds thereof are to be applied, and that, in the opinion of the commission, the money, property or labor to be procured or paid for by the issue of such stock, bonds, notes or other evidence of indebtedness is or has been reasonably required for the purposes specified in the order, and that except as otherwise

permitted in the order in the case of bonds, notes, and other evidence of indebtedness, such purposes are not, in whole or in part, reasonably chargeable to operating expenses or to income; but this provision shall not apply to any lawful issue of stock, to the lawful execution and delivery of any mortgage or to the lawful issue of bonds thereunder, which shall have been duly approved by the board of railroad commissioners before July first, nineteen hundred and seven. Nothing herein contained shall prohibit the commission from giving its consent to the issue of bonds, notes or other evidence of indebtedness for the reimbursement of moneys heretofore actually expended from income for any of the aforesaid purposes, except maintenance of service and replacements, prior to five years next preceding the filing of an application therefor, if in the judgment of the commission such consent should be granted; provided application for such consent shall be made prior to January first, nineteen hundred and twelve. For the purpose of enabling it to determine whether it should issue such an order, the commission shall make such inquiry or investigation, hold such hearings and examine such witnesses, books, papers, documents or contracts as it may deem of importance in enabling it to reach a determination. Such corporation shall not without the consent of the commission apply said issue or any proceeds thereof to any purpose not specified in such order. Such common carrier, railroad corporation or street railroad corporation may issue notes, for proper corporate purposes and not in violation of any provision of this chapter or any other act, payable at periods of not more than twelve months without such consent, but no such notes shall, in whole or in part, directly or indirectly be refunded, by any issue of stock or bonds or by any evidence of indebtedness running for more than twelve months without the consent of the proper commission. Provided, however, that the commission shall have no power to authorize the capitalization of any franchise to be a corporation or to authorize the capitalization of any franchise or the right to own, operate or enjoy any franchise whatsoever in excess of the amount (exclusive of any tax or annual charge) actually paid to the state or to a political subdivision thereof as the consideration for the grant of such franchise or right; nor shall the capital stock of a corporation formed by the merger or consolidation of two or more other corporations, exceed the sum of the capital stock of the corporations so consolidated, at the par value thereof, or such sum and any additional sum actually paid in cash; nor shall any contract for consolidation

or lease be capitalized in the stock of any corporation whatever; nor shall any corporation hereafter issue any bonds against or as a lien upon any contract for consolidation or merger. Whenever it shall happen that any railroad corporation shall own or operate its lines in both districts it shall, under this section, apply to the commission of the second district. Whenever it shall happen that any street railroad corporation shall own or operate its lines in both districts, it shall, under this section, apply to the commission of the first district. Any other common carrier not operating exclusively in the first district shall apply to the commission of the second district.

Application of Sections 55 and 69.

Sections 55 and 69 of this statute are in effect the same, the one applying to railroads and common carriers; the other to other public service corporations. The language of the two sections establishes the conclusion that the Commission may not authorize the issue of securities upon the application of a corporation which has not received the permission and approval required in sections 68 or 53. These sections cannot be evaded by securing an order under sections 69 or 55. The Commission must be satisfied that the applicant has the right to accomplish the uses or purposes for which the securities are authorized. Peo. ex rel. N. Y. Edison Co. v. Willcox, 207 N. Y. 86 (1912), revsg. 151 A. D. 832: see, also, Peo. ex rel. Long Acre El. & P. Co. v. Public Service Com., 137 A. D. 81 (1910).

Purpose of the Statute.

The purpose of the Public Service Commissions Law is the protection and enforcement of the rights of the public. Its aim is to correct the evil of worthless securities by enabling the Commission to prevent the issue of such stock, and bonds, if it is found that they are not for the purpose enumerated in the statute. It was not designed to make the commissioners the financial managers of the corporation or to permit them to exercise their judgment as to the wisdom of a transaction, or as to the internal management of the corporation. Peo. ex rel. D. & H. Co. v. Stevens, 197 N. Y. 1 (1909), affg. 134 A. D. 99.

Permission to Issue Securities, Agreement Evading Law; Penalty.

The object of the statute being to protect the public and, perhaps, the stockholders from an issue of securities which represent useless and unnecessary expenditure, railroad corporations may not avoid the provisions of the section by agreeing with a trust company that the latter should hold the legal title to additional equipment required, and that the railroad should pay as rental, for the use thereof, the costs of the trusts, all taxes and assessments and an annual sum sufficient to retire a part of the equipment trust certificates each year. Such certificates were in the nature of stock, bonds, etc., within the meaning of this section and the railroads issuing them without permission, are liable for the penalty prescribed by section 56. The certificates were the obligations of the railroad companies and they cannot through a fiscal agent do indirectly what is forbidden to be done directly. Peo. v. N. Y. Central & H. R. R. R. Co., 138 A. D. 601 (1910), affd., 199 N. Y. 539.

Validity of Bonds Issued Without Authority of Commission.

A railroad corporation which has issued its bonds in defiance of an order of the Commission may not plead its ultra vires act as a defense to a suit on the bonds brought by one who had received them in good faith, as this section does not provide that bonds issued without the authority of the Commission shall be void in the hands of bona fide holders. Goldan v. Delaware & Eastern Ry. Co., 144 A. D. 78 (1911).

In an action against a railroad company, its officers and directors, for fraud in the issuance of bonds which were represented to be valid obligations but which were issued in violation of an order of the Public Service Commission, the plaintiff must allege that the bonds were payable more than twelve months from the date thereof. Goldan v. Delaware & Eastern Ry. Co., 144 A. D. 78 (1911).

When a corporation, prior to the present law, had issued notes in payment for property without the consent of the Public Service Commission or the Railroad Commission at a time when such consent was not required, even if the transaction was ill-advised and the securities inflated, still the obligation was a valid debt and an application to issue bonds for the purpose of taking up the notes should be approved by the Commission. Peo. ex rel. D. & H. Co. v. Stevens, 197 N. Y. 1 (1909), affg. 134 A. D. 99.

Purchase Price of Property Not Conclusive as to Value.

The purchase price of property in the open market, while entitled to great weight in determining the value of such property, is not conclusive evidence of value, and does not prevent the Commission, on an application by the purchaser of part of the franchises of a railway for permission to issue stock, from considering other evidence bearing upon the value of the property. Peo. ex rel. Westchester St. R. R. Co. v. Pub. Serv. Com., 210 N. Y. 456 (1914), modfg. 158 A. D. 251. Where the finding of a commission as to the value of such property has been disapproved and its order annulled and set aside by the Appellate Division the proceeding should be remitted to the Commission for further action, and either party to the proceeding be allowed to present further testimony relating to value. Id.

Issue of Securities by Reorganized Railroad Corporation.

As a general rule the securities should not be authorized except where the value of the property is equal to the amount of securities issued, but the law does not provide that in no instance shall the securities issued exceed the value of the property. In the case of merger of corporations it is provided that the capital stock of the corporation formed by the merger shall not exceed the capital stock of the corporation merged. Thus the limit of stock is not dependent upon the value of property. The same rule applies to a corporation formed on the reorganization of a foreclosed railroad, and a readjustment does not require that the new securities shall be scaled down to the actual value of the property. Peo. ex rel. Third Ave. Ry. Co. v. Public Service Com., 203 N. Y. 299 (1911), affg. 145 A. D. 318.

This section and sections 9 and 10 of the Stock Corporation Law are not inconsistent. The statutes must be construed together, and a public service corporation which is reorganized in accordance with sections 8 and 10 must comply with sections 53, 54 and 55 of the Public Service Law. Peo. ex rel. Third Ave. Ry. Co. v. Pub. Service Com., 203 N. Y. 299 (1911), affg. 145 A. D. 318.

Rulings of Commissioners.

An application for consent to a mortgage for a term not exceeding 100 years and to a bond issue thereunder bearing interest at not over 5 per cent. per annum lacks necessary definiteness. Matter of Greenwich & Johnsonville Ry. Co., 2nd Dist., Feb. 18, 1907.

Where an applicant before the Commission has entered into obligations prior to the date when the Public Service Commissions Law became effective and for which new bonds or long-time notes are sought to be issued, such bonds or notes can only issue in accordance with the provisions of that law, and the Commission must inquire and satisfy itself whether the capital as proposed to be raised by the particular method stated in the application is or is not reasonably required for one or more of the corporate purposes set forth in the statute. Matter of Delaware & Hudson Co., 2nd Dist., Dec. 7, 1908.

An authorization for a railroad corporation to issue its stock and bonds in exchange for the stock of other railroad corporations will not be issued unless it be affirmatively shown to the satisfaction of the Commission that the fair value of the stocks proposed to be purchased is equal to the stock and bonds proposed to be issued therefor. Matter of Elmira, Corning & Waverly Ry., 2nd Dist., July 23, 1908.

The privilege preserved to public service corporations by this section to issue notes for proper and lawful purposes payable at periods not more than 12 months, without obtaining the consent of the Public Service Commission, was not designed to operate as a license whereby, through successive renewals with extensive additions of new short-time note issues, a great mass of obligations running over a series of years is piled up to become eventually the subject of application for leave to fund by mortgage and an issue of long-term bonds. Such privilege was intended to enable the corporation to contract temporary loans which it purposed at the time of issue to discharge at maturity. When the exercise of such privilege is developed into a practice covering several times of maturity and renewal and partial renewal extending through a period of several years, the intent of the law is being evaded and the corporation is accomplishing by indirection what the law forbids to be done directly. Matter of The Delaware & Hudson Co., 2nd Dist., July 7, 1908.

The board of directors of the Erie R. R., on August 28, 1907, declared a dividend of 2 per cent. upon its first preferred stock, payable October 1, 1918, and a dividend of 4 per cent. upon its second preferred stock, payable Nov. 1, 1917. It further determined to issue interest-bearing warrants evidencing the right of the stockholders to the dividends so declared, subject to the approval of the Commission. On an application for approval of the issue of such warrants, Held: That in order to authorize the issue of stock, bonds or other evidence of indebtedness pursuant to this section three elements are essential: 1. That capital is to be secured by the issue. 2. That the use of such capital must be necessary for one or more of the purposes specified in the section. 3. That the amount authorized is reasonably required for such purpose or purposes. Held further, That since under the Stock Corporation Law dividends may be declared only from surplus profits and since by the issue of warrants as proposed no capital is secured nor are they necessary for the purposes specified in this section that the application should be denied. Matter of Erie R. R., 2nd Dist., Feb. 27, 1908.

The Rochester, Corning, Elmira Traction Company was on the 22nd of March, 1907, granted a certificate of public convenience and necessity to construct a road from Rochester to Elmira, the line passing through Dansville. Prior to any actual construction of any part of its proposed road the

company pursuant to the provisions of section 90 of the Railroad Law, executed a statement that it proposed to construct an extension and branch of its road from Dansville to Hornell. The local consents required under section 91 of the Railroad Law were not obtained. An application for permission to issue stock and bonds for the construction of the road including the proposed branch was denied. Upon application for capitalization to be used in the construction of a railroad the Commission will require (1) Proof showing in careful detail the probable cost of the physical construction and equipment of the road; (2) expense of organization; (3) incorporation tax; (4) expense of obtaining certificate of public convenience and necessity; (5) preliminary engineering expenses; (6) expenses of proceedings to secure authorization to issue of stocks and bonds; (7) expense of marketing securities; (8) discount upon bonds provided they cannot be sold at par; (9) interest upon the bond issue during the period of construction and prior to the beginning of revenue producing operations; (10) compensation of officers during construction period; (11) expense of obtaining local franchises and consents.

The Commission will make a fair allowance for a proper amount of working capital to be determined by the extent of the proper operations. A fair allowance will be made for services in promoting the organization of the enterprise.

The division of the capitalization between stock and bonds will be determined in substantially the following manner whenever the same is practicable: An estimate will be made from consideration of the results of operation of existing roads of the probable gross earnings and of the probable operating expenses, taxes and depreciation charges. No bond issue will be permitted creating an interest charge beyond an amount which it is reasonably certain can be met from the net earnings. Stock representing a cash investment should be required to an amount sufficient to afford a moral guaranty that in the judgment of those investing the enterprise is likely to prove commercially successful. The order authorizing the issue of stock and bonds will contain appropriate provisions designed to secure the construction of the road in accordance with the plans and specifications upon which the authorization was made and not in excess of actual requirements. If the authorization proves insufficient an application for further capitalization may be made but upon such an application the expenditures of the former issues must be shown in detail. Application of Rochester, Corning, Elmira Traction Co., 2nd Dist., March 30, 1908.

Upon applications for authorization to issues of stocks, bonds and other evidences of indebtedness under sections 55 and 69, an indispensable inquiry is as to the purposes for which the capital to be secured by such issue is to be used. The statute permits capitalization for four purposes only, which are enumerated in those sections, and capital secured under them must be expended for one or more of the purposes authorized. An issue of stocks or bonds cannot be permitted for the purpose of reimbursing the treasury of the applicant for moneys previously spent, even though the expenditures may have been proper subjects for capitalization. Matter of Lehigh and Hudson River Ry. Co., 2nd Dist., May 7, 1908.

§ 55-a. Reorganizations. 1. Reorganizations of railroad corporations, street railroad corporations and common carriers pursuant to sections nine and ten of the stock corporation law and such other laws as may be enacted from time to time shall be

subject to the supervision and control of the proper commission and no such reorganization shall be had without the authorization of such commission.

2. Upon all such reorganizations the amount of capitalization, including therein all stocks and bonds and other evidence of indebtedness, shall be such as is authorized by the commission which, in making its determination, shall not exceed the fair value of the property involved, taking into consideration its original cost of construction, duplication cost, present condition, earning power at reasonable rates and all other relevant matters and any additional sum or sums as shall be actually paid in cash, provided, however, that the commission may make due allowance for discount of bonds. Any reorganization agreement before it becomes effective shall be amended so that the amount of capitalization shall conform to the amount authorized by the commission.

New section, added by L. 1912, ch. 289.

§ 56. Forfeiture; penalties. 1. Every common carrier, railroad corporation and street railroad corporation and all officers, and agents of any common carrier, railroad corporation or street railroad corporation shall obey, observe and comply with every order made by the commission, under authority of this chapter, so long as the same shall be and remain in force. Any common carrier, railroad corporation or street railroad corporation which shall violate any provision of this chapter, or which fails, omits or neglects to obey, observe or comply with any order or any direction or requirement of the commission, shall forfeit to the people of the state of New York not to exceed the sum of five thousand dollars for each and every offense; every violation of any such order or direction or requirement, or of this chapter, shall be a separate and distinct offense, and, in case of a continuing violation, every day's continuance thereof shall be and be deemed to be a separate and distinct offense.

2. Every officer and agent of any such common carrier or corporation who shall violate, or who procures, aids or abets any violation by any such common carrier or corporation of, any provision of this act, or who shall fail to obey, observe and comply with any order of the commission, or any provision of an order of the commission, or who procures, aids or abets any such common carrier or corporation in its failure to obey, observe and comply with any such order or provision, shall be guilty of a misdemeanor.

Penalty for Failure to Obey Order of Commission.

This section, imposing a penalty to the people of the State upon any common carrier failing to comply with the orders of the Commission, is highly penal, and in an action to recover the penalty it must be clearly established that the defendant has been guilty of an offense. The plaintiff must show that the Commission did in fact make an order which the defendant disobeyed, and where failure to obey an order resulted from unavoidable causes, there can be no recovery. People v. Whitridge, 144 A. D. 486 (1911), affd., 204 N. Y. 646.

Orders of the Commission Must be Proven in Suits for Penalty.

There can be no recovery against a common carrier for a failure to equip its cars with wheel guards pursuant to an alleged order of the Commission, where the only proof that such order was made is a typewritten document without signature or marks of identification, and bearing changes on its face as to date and the time it was to take effect, and where the only witness to its authenticity does not state in whose handwriting the changes were made or that they were made before the order was adopted. People v. Whitridge, 144 A. D. 486 (1911), affd., 204 N. Y. 646.

Orders of the Commission Must be Adopted at Meetings and by at Least a Majority.

In order to establish the validity of an order by the Commission it must appear that such order was adopted by at least a majority of the commissioners at a stated meeting, or at a meeting properly called, because the commissioners are not authorized to act independently of each other, and it is only for a violation of an order adopted by the commissioners as a body that a penalty can be imposed. People v. Whitridge, 144 A. D. 486 (1911), affd., 204 N. Y. 646.

§ 57. Summary proceedings. Whenever either commission shall be of opinion that a common carrier, railroad corporation or street railroad corporation subject to its supervision is failing or omitting or about to fail or omit to do anything required of it by law or by order of the commission, or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or of any order of the commission, it shall direct counsel to the commission to commence an action or proceeding in the supreme court of the state of New York in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunction. Counsel to the commission shall thereupon begin such action or proceeding by a petition to the supreme court alleging the violation complained of and praying for appropriate relief by way of mandamus or injunction. It shall thereupon be the duty of the court to specify the time, not exceeding twenty days after service of a copy of the

petition, within which the common carrier, railroad corporation or street railroad corporation complained of must answer the petition. In case of default in answer or after answer, the court shall immediately inquire into the facts and circumstances in such manner as the court shall direct without other or formal pleadings, and without respect to any technical requirement. Such other persons or corporations as the court shall deem necessary or proper to join as parties in order to make its order, judgment or writs effective, may be joined as parties upon application of counsel to the commission. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that a writ of mandamus or an injunction or both issue as prayed for in the petition or in such modified or other form as the court may determine will afford appropriate relief.

Compare Interstate Commerce Act, §§ 12 and 20, and Elkins Act.

Franchise Must be Accepted or Rejected in Toto.

Where a railroad company acquires a franchise to construct and operate a railway along a route terminating at a river, and the road was built and operated only to a point one block from the river, it is no answer to an application for a mandamus to compel the extension of the line to the river that the extension would not be financially profitable. Nor can the company successfully claim that because the necessity for the construction of the line to the river was not obvious at the time of construction, it cannot be compelled to observe the terms of its franchise when the necessity therefor is shown, as public convenience and not private advantage controls. It owes a duty to the public to exercise its franchise and may not abandon a portion of its road, as the franchise must be accepted or rejected in its entirety. Pub. Serv. Com. v. N. Y. Railways Co., 77 Misc. 487 (1912).

Mandamus to Compel Exercise of Franchise.

When a grievance against a railroad is public, action must be brought by the Attorney-General or by the Public Service Commission. A private person, whose complaint fails to set forth an injury common to the community, will not be granted a mandamus compelling a railroad to exercise its franchise and rebuild part of its line. Peo. ex rel. Karl v. United Traction Co., 145 A. D. 645 (1911). Where an application for the same relief has been made to the Commission and denied, the courts will not entertain the proceeding, even if they have the power. Id.

Additional Franchise Granted on Condition of Reduced Fare; Remedy for Violation.

Where a village had granted a franchise to a trolley company under which it was entitled to charge a ten-cent fare and thereafter granted it an additional franchise on condition of a reduced fare over that portion of the road covered and affected by the first franchise, which additional franchise was accepted by the company, this constituted a valid contract and the old franchise was effectively modified or superseded by the new contract so far as the village authorities were interested therein. The remedy of the village

is not restricted to an action for the forfeiture of the franchise, nor can the court refuse to enforce the obligations imposed by the contract involved, because one of the parties had agreed to unprofitable terms, but an injunction and mandamus may be granted under the provisions of this section. Public Service Com. v. Westchester St. Ry. Co., 206 N. Y. 209 (1912), affg. 151 A. D. 914.

Refusal to Issue Transfers.

The violation of law upon which the Commission may act under this section is not restricted to such offenses as are specifically mentioned in the written law. The refusal of a street surface railroad to issue transfers as required by its charter, ratified by the authorities of the municipalities in which it operates and as required by its contract with them, is not a mere violation of a covenant but is a violation of law as the term is used in this section. Willcox v. Richmond Lt. & R. R. Co., 142 A. D. 44 (1910), affd., 202 N. Y. 515.

Sections 48 and 57 Not Inconsistent.

This section and section 48 are supplementary to each other and not inconsistent and the Commission may proceed under either or both. Willcox v. Richmond Lt. & R. R. Co., supra.

§ 58. Penalties for other than common carriers. 1. Any corporation, other than a common carrier, railroad corporation or street railroad corporation, which shall violate any provision of this chapter, or shall fail to obey, observe and comply with every order made by the commission under authority of this chapter, so long as the same shall be and remain in force, shall forfeit to the people of the state of New York a sum not exceeding one thousand dollars for each and every offense; every such violation shall be a separate and distinct offense, and the penalty or forfeiture thereof shall be recovered in an action as provided in section twenty-four of this chapter.

2. Every person who, either individually or acting as an officer or agent of a corporation other than a common carrier, railroad corporation or street railroad corporation, shall violate any provision of this chapter or fail to obey, observe or comply with any order made by the commission under this chapter, so long as the same shall be or remain in force, or who shall procure, aid or abet any such corporation in its violation of this chapter or in its failure to obey, observe or comply with any such order, shall be guilty of a misdemeanor.

3. In construing and enforcing the provisions of this chapter relating to forfeitures and penalties the act of any director, officer or other person acting for or employed by any common carrier, railroad corporation, street railroad corporation or corporation,

acting within the scope of his official duties or employment, shall be in every case and be deemed to be the act of such common carrier, railroad corporation, street railroad corporation or corporation.

§ 59. Duties of commissions as to interstate traffic. Either commission may investigate interstate freight or passenger rates or interstate freight or passenger service on railroads within the state, and when such rates are, in the opinion of either commission, excessive or discriminatory or are levied or laid in violation of the act of congress entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and the acts amendatory thereof and supplementary thereto, or in conflict with the rulings, orders or regulations of the interstate commerce commission, the commission may apply by petition to the interstate commerce commission for relief or may present to the interstate commerce commission all facts coming to its knowledge, as to violations of the rulings, orders, or regulations of that commission or as to violations of the said act to regulate commerce or acts amendatory thereof or supplementary thereto.

Traffic beginning and ending in the State of New York, passing en route through another State, is interstate commerce. Hanly v. K. C. S. Ry. Co., 187 U. S. 617.

No Federal statute applies to the regulation of train service for interstate passenger traffic, but if it can be assumed that a case involving interstate train service is within the class of cases where a State may act with reference to interstate commerce until Congress shall legislate upon the subject, the Commission is nevertheless without jurisdiction because of the provision of section 86 of the Public Service Commissions Law. Matter of R. R. Improvement Assn. of Nyack v. Erie R. R. Co., 2nd Dist., June 8, 1909.

A State board may properly appear as complainant before the Interstate Commerce Commission. R. R. Com. of Ga. v. Clyde SS. Co., 4 Interstate Com. Rep. 120.

ARTICLE IV

Provisions Relating to Gas Corporations and Electrical Corporations; Regulation of Price of Gas and Electricity

SECTION 64. Application of article.
65. Safe and adequate service; just and reasonable charges; unjust discrimination; unreasonable preference.
66. General powers of commissions in respect to gas and electricity.
67. Inspection of gas and electric meters.
68. Approval of incorporation and franchises; certificate.

SECTION 69. Approval of issue of stock, bonds and other forms of indebtedness.
69-a. Reorganizations.
70. Approval of transfer of franchise.
71. Complaints as to quality and price of gas and electricity; investigation by commission; forms of complaints.
72. Notice and hearing; order fixing price of gas or electricity, or requiring improvements.
73. Forfeiture for noncompliance with order.
74. Summary proceedings.
75. Defense in case of excessive charge for gas or electricity.
76. Jurisdiction.
77. Powers of local officers.

§ 64. Application of article. This article shall apply to the manufacture and furnishing of gas for light, heat or power and the furnishing of natural gas for light, heat or power, and the generation, furnishing and transmission of electricity for light, heat or power.

§ 65. Safe and adequate service; just and reasonable charges; unjust discrimination; unreasonable preference. 1. Every gas corporation, every electrical corporation and every municipality shall furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such gas corporation, electrical corporation or municipality for gas, electricity or any service rendered or to be rendered, shall be just and reasonable and not more than allowed by law or by order of the commission having jurisdiction. Every unjust or unreasonable charge made or demanded for gas, electricity or any such service, or in connection therewith, or in excess of that allowed by law or by the order of the commission is prohibited.

2. No gas corporation, electrical corporation or municipality shall directly or indirectly, by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for gas or electricity or for any service rendered or to be rendered or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.

3. No gas corporation, electrical corporation or municipality shall make or grant any undue or unreasonable preference or ad-

vantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

4. Nothing in this chapter shall be taken to prohibit a gas corporation or electrical corporation from establishing a sliding scale for a fixed period for the automatic adjustment of charges for gas, electricity or any service rendered or to be rendered and the dividends to be paid to stockholders of such gas corporation or electrical corporation, provided that the sliding scale shall first have been filed with and approved by the proper commission; but nothing in this subdivision shall operate to prevent the commission after the expiration of such fixed period from fixing proper, just and reasonable rates and charges to be made for services as authorized in this article.

§ 66. General powers of commissions in respect to gas and electricity. Each commission shall within its jurisdiction:

1. Have general supervision of all gas corporations and electrical corporations having authority under any general or special law or under any charter or franchise to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality, for the purpose of furnishing or distributing gas or of furnishing or transmitting electricity for light, heat or power, or maintaining underground conduits or ducts for electrical conductors, and all gas plants and electric plants owned, leased or operated by any gas corporation or electrical corporation.

2. Investigate and ascertain, from time to time, the quality of gas supplied by persons, corporations and municipalities; examine or investigate the methods employed by such persons, corporations and municipalities in manufacturing, distributing and supplying gas or electricity for light, heat or power and in transmitting the same, and have power to order such reasonable improvements as will best promote the public interest, preserve the public health and protect those using such gas or electricity and those employed in the manufacture and distribution thereof, and have power to order reasonable improvements and extensions of the works, wires, poles, lines, conduits, ducts and other reasonable devices, apparatus and property of gas corporations, electrical corporations and municipalities.

3. Have power by order to fix from time to time standards for the measurement of the purity of gas and for the measurement of the illuminating power of gas and for the measurement of the heating power of gas to be manufactured, distributed or sold by persons, corporations or municipalities for lighting, heating or power purposes, notwithstanding that another standard for the measurement of any thereof may have been fixed by statute, and to prescribe from time to time the efficiency of the electric supply system, of the current supplied and of the lamps furnished by the persons, corporations or municipalities generating and selling electric current, and by order to require the gas so manufactured, distributed or sold to equal the standards so fixed by it, and to prescribe from time to time the reasonable minimum and maximum pressure at which gas shall be delivered by said persons, corporations or municpalities. For the purpose of determining whether the gas manufactured, distributed or sold by such persons, corporations or municipalities for lighting, heating or power purposes conforms to the standards of illuminating power, heating power, purity and pressure, and for the purpose of determining whether the efficiency of the electric supply system, of the current supplied and of the lamps furnished conforms to the orders issued by the commission, the commission shall have power, of its own motion, to examine and investigate the plants and methods employed in manufacturing, delivering and supplying gas or electricity, and shall have access through its members or persons employed and authorized by it to make such examinations and investigations to all parts of the manufacturing plants owned, used or operated for the manufacture, transmission or distribution of gas or electricity by any such person, corporation or municipality. Any employee or agent of the commission who divulges any fact or information which may come to his knowledge during the course of any such inspection or examination, except in so far as he may be directed by the commission, or by a court or judge thereof, or authorized by law, shall be guilty of a misdemeanor.

Thus amended by ch. 504, L. 1913.

L. 1913, ch. 504, § 2. All acts and parts of acts, general or special, inconsistent with this act are hereby repealed.

4. Have power, in its discretion, to prescribe uniform methods of keeping accounts, records and books, to be observed by gas corporations and electrical corporations and by municipalities en-

gaged in the manufacture, sale and distribution of gas and electricity for light, heat or power. It may also in its discretion prescribe, by order, forms of accounts, records and memoranda to be kept by such persons, corporations and municipalities. Notice of alterations by the commission in the required method or form of keeping a system of accounts shall be given to such persons or corporations by the commission at least six months before the same shall take effect. Any other and additional forms of accounts, records and memoranda kept by such corporation shall be subject to examination by the commission.

5. Examine all persons, corporations and municipalities under its supervision and keep informed as to the methods, practices, regulations and property employed by them in the transaction of their business. Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the rates or charges or the acts or regulations of any such person, corporation or municipality are unjust, unreasonable, unjustly discriminatory or unduly preferential or in anywise in violation of any provision of law, the commission shall determine and prescribe the just and reasonable rates and charges thereafter to be in force for the service to be furnished notwithstanding that a higher rate or charge has heretofore been authorized by statute, and the just and reasonable acts and regulations to be done and observed; and whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the property, equipment or appliances of any such person, corporation or municipality are unsafe, inefficient or inadequate, the commission shall determine and prescribe the safe, efficient and adequate property, equipment and appliances thereafter to be used, maintained and operated for the security and accommodation of the public and in compliance with the provisions of law and of their franchises and charters.

6. Require every person and corporation under its supervision and it shall be the duty of every such person and corporation to file with the commission an annual report, verified by the oath of the president, treasurer, general manager or receiver, if any, thereof. The verification shall be made by said official holding office at the time of the filing of said report, and if not made upon the knowledge of the person verifying the same shall set forth the sources of his information and the grounds of his belief as to any matters not stated to be verified upon his knowledge. The report shall show in detail (a) the amount of its authorized

capital stock and the amount thereof issued and outstanding; (b) the amount of its authorized bonded indebtedness and the amount of its bonds and other forms of evidence of indebtedness issued and outstanding; (c) its receipts and expenditures during the preceding year; (d) the amount paid as dividends upon its stock and as interest upon its bonds; (e) the names of its officers and the aggregate amount paid as salaries to them and the amount paid as wages to its employees; (f) the location of its plant or plants and system, with a full description of its property and franchises, stating in detail how each franchise stated to be owned was acquired; and (g) such other facts pertaining to the operation and maintenance of the plant and system, and the affairs of such person or corporation as may be required by the commission. Such reports shall be in the form, cover the period and be filed at the time prescribed by the commission. The commission may, from time to time, make changes and additions in such forms. When any such report is defective or believed to be erroneous, the commission shall notify the person, corporation or municipality making such report to amend the same within a time prescribed by the commission. Any such person or corporation or municipality which shall neglect to make any such report or which shall fail to correct any such report within the time prescribed by the commission shall be liable to a penalty of one hundred dollars and an additional penalty of one hundred dollars for each day after the prescribed time for which it shall neglect to file or correct the same, to be sued for in the name of the people of the state of New York. The amount recovered in any such action shall be paid into the state treasury and be credited to the general fund. The commission may extend the time prescribed for cause shown.

7. Require each municipality engaged in operating any works or systems for the manufacture and supplying of gas or electricity to make an annual report to the commission, verified by the oath of the general manager or superintendent thereof, showing in detail, (a) the amount of its authorized bonded indebtedness and the amount of its bonds and other forms of evidence of indebtedness issued and outstanding for lighting purposes; (b) its receipts and expenditures during the preceding year; (c) the amount paid as interest upon its bonds and upon other forms of evidence of indebtedness; (d) the name of and the amount paid to each person receiving a yearly or monthly salary, and the amount paid as wages to employees; (e) the location of its plant

and system with a full description of the property; and (f) such other facts pertaining to the operation and maintenance of the plant and system as may be required by the commission. Such report shall be in the form, cover the period and be filed at the time prescribed by the commission.

8. Have power, either through its members or inspectors or employees duly authorized by it, to enter in or upon and to inspect the property, buildings, plants, factories, power houses, ducts, conduits and offices of any of such corporations, persons or municipalities.

9. Have power to examine the accounts, books, contracts, records, documents and papers of any such corporation, person or municipality, and have power, after hearing, to prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited.

10. Have power to compel, by subpoena duces tecum, the production of any accounts, books, contracts, records, documents, memoranda and papers. In lieu of requiring production of originals by subpoena duces tecum the commission or any commissioner may require sworn copies of any such books, records, contracts, documents and papers, or parts thereof, to be filed with it. The commission may require of all such corporations, persons or municipalities, specific answers to questions upon which the commission may need information, and may also require such corporations, persons or municipalities to file periodic reports in the form, covering the period and filed at the time prescribed by the commission. If such corporation, person or municipality shall fail to make specific answer to any question or shall fail to make a periodic report when required by the commission as herein provided within the time and in the form prescribed by the commission for the making and filing of any such report or answer, such corporation, person or the officer of the municipality shall forfeit to the state the sum of one hundred dollars for each and every day it shall continue to be in default with respect to such report or answer. Such forfeiture shall be recovered in an action brought by the commission in the name of the people of the state of New York. The amount recovered in any such action shall be paid into the state treasury and be credited to the general fund.

11. Have power in all parts of the state, either as a commission or through its members, to subpoena witnesses, take testi-

mony and administer oaths to witnesses in any proceeding or examination instituted before it, or conducted by it in reference to any matter within its jurisdiction under this article.

12. Have power to require every gas corporation, electrical corporation and municipality to file with the commission and to print and keep open to public inspection schedules showing all rates and charges made, established or enforced or to be charged or enforced, all forms of contract or agreement and all rules and regulations relating to rates, charges or service used or to be used, and all general privileges and facilities granted or allowed by such gas corporation, electrical corporation or municipality; but this subdivision shall not apply to state, municipal or federal contracts. Unless the commission otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed and published by a gas corporation, an electrical corporation or municipality in compliance with an order of the commission, except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect. The commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe. No corporation or municipality shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time; nor shall any corporation or municipality refund or remit in any manner or by any device any portion of the rates or charges so specified, nor to extend to any person or corporation any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are regularly and uniformly extended to all persons and corporations under like circumstances. The commission shall have power to prescribe the form of every such schedule, and from time to time prescribe by order such changes in the form thereof as may be deemed wise. The commission shall also have power to establish such rules and regulations to carry into effect the provisions of this subdivision as it may deem necessary, and to modify or amend such rules or regulations from time to time.

13. In case any electrical corporation or gas corporation is engaged in carrying on any business other than owning, operating or managing a gas plant or an electric plant, which other business is not otherwise subject to the jurisdiction of the commission, and is so conducted that its operations are to be substantially kept separate and apart from the owning, operating, managing or controlling of such gas plant or electric plant, said corporation in respect of such other business shall not be subject to any of the provisions of this chapter and shall not be required to procure the assent or authorization of the commission to any act in such other business or to make any report in respect thereof. But this subdivision shall not restrict or limit the powers of the commission in respect to the owning, operating, managing or controlling by such corporation of such gas plant or electric plant, and said powers shall include also the right to inquire as to, and prescribe the apportionment of, capitalization, earnings, debts and expenses fairly and justly to be awarded to or borne by the ownership, operation, management or control of such gas plant or electric plant as distinguished from such other business. In any such case if the owning, operating managing or controlling of such gas plant or electric plant by any such corporation is wholly subsidiary and incidental to the other business carried on by it and is inconsiderable in amount and not general in its character, the commission may by general rules exempt such corporation from making full reports and from the keeping of accounts as to such subsidiary and incidental business.

The Commission of the First District has required the filing of the following documents by electrical corporations and gas companies operating in the district:

1. Certificate of incorporation.
2. Supplemental or amended certificates of incorporation.
3. Any act of the Legislature granting, confirming or limiting any right or franchise of the corporation, or affecting the right of the corporation to use or exercise any franchise.
4. Certificates relative to changes in the capital stock.
5. Any consolidation or merger agreement between companies now operating in connection with the plant.
6. Consents of local authorities constituting franchise rights.
7. Certificates from State or municipal authorities, including departments, affecting franchises.
8. Copies of all mortgages.
9. Copy of all leases, deeds, contracts or other documents in the chain of title.
10. Location of all real estate owned in fee, described by metes and bounds.
11. Location of all real estate leased, described by metes and bounds.
12. Copy of any contracts executed between companies as to the purchase or sale of gas or electricity.

13. Reference to court decisions, affecting the validity of franchises.

14. As of July 1, 1907, the location of plants, and system, with a full description of property and franchises, stating in detail how each franchise was acquired.

15. A map drawn to a scale of at least twenty-five hundred feet to the inch, showing all pipes, conduits and other structures constructed or now maintained in the public streets.

Under this order several thousand documents have been collected. They are all public documents open to inspection during office hours.

§ 67. Inspection of gas and electric meters. 1. Each commission shall appoint inspectors of gas meters whose duty it shall be when required by the commission to inspect, examine, prove and ascertain the accuracy of any and all gas meters used or intended to be used for measuring or ascertaining the quantity of gas for light, heat or power furnished by any person, corporation or municipality to or for the use of any person or persons and when found to be or made to be correct, the inspector shall seal all such meters and each of them with some suitable device, which device shall be recorded in the office of the secretary of state.

2. No corporation, person or municipality shall furnish, set or put in use any gas meter which shall not have been inspected, proved and sealed by an inspector of the commission.

3. Each commission shall appoint inspectors of electric meters whose duty it shall be, when required by the commission, to inspect, examine and ascertain the accuracy of any and all electric meters used or intended to be used for measuring and ascertaining the quantity of electric current furnished for light, heat or power by any person, corporation or municipality to or for the use of any person or corporation, and to inspect, examine and ascertain the accuracy of all apparatus for testing and proving the accuracy of electric meters, and when found to be or made to be correct the inspector shall stamp or mark all such meters and apparatus with some suitable device, which device shall be recorded in the office of the secretary of state. No corporation, person or municipality shall furnish, set or put in use any electric meter the type of which shall not have been approved by the commission.

4. Every gas corporation, electrical corporation and municipality shall provide, repair and maintain such suitable premises and apparatus and facilities as may be required and approved by the commission for testing and proving the accuracy of gas and electric meters furnished for use by it, and by which apparatus every meter may be tested.

5. If any consumer to whom a meter has been furnished shall request the commission in writing to inspect such meter, the commission shall have the same inspected and tested; if the same on being so tested shall be found to be more than four per centum if an electric meter, or more than two per centum if a gas meter, defective or incorrect to the prejudice of the consumer, the expense of such inspection and test shall be borne by the corporation or municipality, if the same on being so tested shall be found to be correct within the limits of error prescribed by the provisions of this subdivision, the expense of such inspection and test shall be borne by the consumer.

6. The commission shall prescribe such rules and regulations to carry into effect the provisions of this section as it may deem necessary, and shall fix uniform reasonable charges for the inspection and testing of meters upon complaint.

§ 68. Approval of incorporation and franchises; certificate. No gas corporation or electrical corporation shall begin construction of a gas plant or electric plant without first having obtained the permission and approval of the commission of each district within which any part of the work of construction is to be performed. No such corporation shall exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year, without first having obtained the permission and approval of the proper commission. Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities. The commission within whose district such construction is to be made, or within whose district such right, privilege or franchise is to be exercised, shall have power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service.

No municipality shall build, maintain and operate for other than municipal purposes any works or systems for the manufacture and supplying of gas or electricity for lighting purposes without a certificate of authority granted by the commission. If the

certificate of authority is refused, no further proceedings shall be taken by such municipality before the commission, but a new application may be made therefor after one year from the date of such refusal.

Injunction to Restrain Competing Corporation.

A domestic lighting corporation, having a franchise, not exclusive, is not entitled to enjoin a similar corporation from invading its territory upon the ground that it has failed to get the consent required by this section; because through its incorporation the defendant has the same franchise rights as plaintiff, although by not securing consents, respectively, of the local authorities and the Public Service Commission, it has failed to comply with conditions necessary to exercise its franchise. No. Shore Elec. Lt. & P. Co. v. Port Jefferson Elec. Lt. Co., 151 A. D. 63 (1912).

Suspension of Business by Gas Company.

Where a gas light company had for three years ceased to use its pipes to furnish gas, held that the provisions of this section did not apply to its special franchise. Vil. of Fredonia v. Fredonia Central Gas Lt. Co., 84 Misc. 150 (1914).

If a small community is well served by an existing concern furnishing electric current for light, heat and power, the application of a new corporation for leave to exercise its franchises in the same field is not to be looked upon with favor, the unnecessary duplication of plants being an economic waste injurious to the public. Matter of the Katonah Lighting Co., 2nd Dist., Dec. 3, 1907.

No general rule can be formulated which will indicate with precision when a new lighting company will be permitted to do business in a field already occupied by another company. Circumstances and conditions prevailing in each case must control the decision. If an existing company has failed to discharge its duties to the public it is entitled to but little consideration when it seeks to exclude competition. Matter of the Citizen's Electric Service Co. of Bath, 2nd Dist., Aug. 5, 1908.

Petition of the Hudson River Electric Power Co. for certificate under this section examined and granted. Matter of Hudson River Elec. Power Co., 2nd Dist., Dec. 4, 1907.

§ 69. Approval of issues of stock, bonds and other forms of indebtedness. A gas corporation or electrical corporation organized or existing, or hereafter incorporated, under or by virtue of the laws of the state of New York, may issue stocks, bonds, notes or other evidence of indebtedness payable at periods of more than twelve months after the date thereof, when necessary for the acquisition of property, the construction, completion, extension or improvement of its plant or distributing system, or for the improvement or maintenance of its service or for the discharge or lawful refunding of its obligations or for the reimbursement of moneys actually expended from income, or from any other moneys in

the treasury of the corporation not secured or obtained from the issue of stocks, bonds, notes or other evidence of indebtedness of such corporation, within five years next prior to the filing of an application with the proper commission for the required authorization, for any of the aforesaid purposes except maintenance of service and except replacements in cases where the applicant shall have kept its account and vouchers of such expenditure in such manner as to enable the commission to ascertain the amount of moneys so expended and the purposes for which such expenditure was made; provided and not otherwise that there shall have been secured from the proper commission an order authorizing such issue, and the amount thereof, and stating the purposes to which the issue or proceeds thereof are to be applied, and that, in the opinion of the commission, the money, property or labor to be procured or paid for by the issue of such stock, bonds, notes or other evidence of indebtedness is or has been reasonably required for the purposes specified in the order, and that except as otherwise permitted in the order in the case of bonds, notes and other evidence of indebtedness, such purposes are not in whole or in part reasonably chargeable to operating expenses or to income. Nothing herein contained shall prohibit the commission from giving its consent to the issue of bonds, notes or other evidence of indebtedness for the reimbursement of moneys heretofore actually expended from income for any of the aforesaid purposes, except maintenance of service and replacements, prior to five years next preceding the filing of an application therefor, if in the judgment of the commission such consent should be granted; provided application for such consent shall be made prior to January first, nineteen hundred and twelve. For the purpose of enabling it to determine whether it should issue such an order, the commission shall make such inquiry or investigation, hold such hearings and examine such witnesses, books, papers, documents or contracts as it may deem of importance in enabling it to reach a determination. Such corporation shall not without the consent of the commission apply said issue or any proceeds thereof to any purpose not specified in such order. Such gas corporation or electrical corporation may issue notes, for proper corporate purposes and not in violation of any provision of this or of any other act, payable at periods of not more than twelve months without such consent; but no such notes shall, in whole or in part, directly or indirectly be refunded by any issue of stock or bonds or by any evi-

dence of indebtedness running for more than twelve months without the consent of the proper commission. Provided, however, that the commission shall have no power to authorize the capitalization of any franchise to be a corporation or to authorize the capitalization of any franchise or the right to own, operate or enjoy any franchise whatsoever in excess of the amount (exclusive of any tax or annual charge) actually paid to the state or to any political subdivision thereof as the consideration for the grant of such franchise or right. Nor shall the capital stock of a corporation formed by the merger or consolidation of two or more other corporations, exceed the sum of the capital stock of the corporations, so consolidated, at the par value thereof, or such sum and any additional sum actually paid in cash; nor shall any contract for consolidation or lease be capitalized in the stock of any corporation whatever; nor shall any corporation hereafter issue any bonds against or as a lien upon any contract for consolidation or merger.

Duty and Powers of Commission Under Amendment of 1910.

The amendment of the statute in 1910 gives to the Commission authority to authorize the issue of stocks, bonds, notes or other evidences of indebtedness payable at periods of more than twelve months after the date thereof for the discharge or lawful refunding of its obligations or for the reimbursement of moneys actually expended from income or from any other moneys in the treasury not secured or obtained from the issue of stocks, bonds or other evidence of indebtedness within five years next prior to the filing of the application, but it expressly excepts from the Commission the right to authorize the issue of such stocks, bonds or other evidence of indebtedness for maintenance of service and for replacements. It also provides that the applicant must have kept proper accounts and vouchers to enable the Commission to ascertain the amount of money so expended and for the purposes for which the expenditure was made. The question as to what expenditures are a proper basis for permanent capitalization is a necessary subject for consideration, by both corporate directors and any commission that has authority to grant or withhold its consent to the issue of new stock or bonds. Peo. ex rel. Binghamton Light, Heat & Power Co. v. Stevens, 203 N. Y. 7, 21 (1911).

Discretion of Commission Must Not Override Corporate Management.

The discretion of the Commission cannot override the discretion of the officers of a corporation in the management of its affairs, or the provisions of the statute which prescribe the cases in which securities are permitted to be issued. The duty of the Commission upon an application under this section is to determine whether a proposed issue of bonds is necessary for the proper corporate purpose, is authorized by law and is to be used in a proper manner. If such are the facts it cannot withhold its certificate, otherwise it cannot grant it. Peo. ex rel. Binghamton Light, Heat & Power Co. v. Stevens, 203 N. Y. 7 (1911), citing with approval and following Peo. ex rel. D. & H. Co. v. Stevens, 197 N. Y. 1, 10.

Unrestricted Right of Competition Between Public Utility Corporations; Policy of Statute Relative Thereto.

It is the settled policy of the statute to withdraw the unrestricted right of competition between corporations occupying, through special consents or franchises, the public streets and supplying the public with their products or utilities. This policy has been given expression in the Public Service Commissions Law which intends to bring under its restrictions and regulation, in so far as is lawful, the franchises, powers and rights of the corporations existing at its enactment and to which it relates and under the control of the Commissions all construction of their plants. Peo. ex rel. N. Y. Edison Co. v. Willcox, 207 N. Y. 86.

Capitalization of Funds Expended for Improvements.

The fact that stock is worth more than par and sells for a premium does not in itself afford a basis for capitalizing such premium, but where net earnings have been used to pay off indebtedness and the stockholders have received no dividends and the funds have been expended for improvement of the corporate property, the stockholders should be allowed to receive new capital obligations of the company for the corporate debts which have thus been paid. Matter of Watertown Gas Light Co., 127 A. D. 462 (1908).

Application for consent to an issue of $250,000 preferred stock bearing 8 per cent. cumulative dividends denied. Matter of the Newburgh Light, Heat & Power Co., 2nd Dist., Aug. 21, 1907.

A sale of the property and franchises of two gas or electric corporations to a third is virtually a merger or consolidation of the three, and as such is subject to the provision of this section that the capital stock of a corporation formed by the merger or consolidation of two or more corporations shall not exceed the capital stock of the corporations so consolidated at the par value thereof, or such sum and any additional sum actually paid in cash. Bonds will be treated as a part of the capitalization of a corporation. Matter of the Lockport Light, Heat and Power Co., 2nd Dist., Oct. 31, 1907.

An order of the Commission authorizing the issue of a portion of the bonds covered by a mortgage carries no implication of consent upon a future application as to all or any of the remaining bonds provided for in the mortgage. Matter of the Hudson River Electric Power Co., 2nd Dist., Dec. 4, 1907.

An application to issue additional capital involves considerations: 1. The purposes to which the proceeds arising from the sale of the securities are to be applied. 2. The amount reasonably necessary for the consummation of such purposes. 3. The character of the securities proposed to be issued. 4. Whether any proposed construction or extension is likely to create unhealthful conditions or otherwise constitute a public nuisance, infringe upon the vested rights or impede the necessary operations of other public service corporations, or interfere with the flow of water in a navigable stream to the extent of impairing its public use. 5. Whether there is reasonable prospect of fair return upon the investment proposed, to the end that securities having apparent worth but actually little or no value may not be issued with the sanction of the Commission. Matter of the Hudson River Electric Power Co., 2nd Dist., Dec. 4, 1907.

It is not now lawful for electrical corporations subject to the provisions of the Public Service Commissions Law to issue stock in payment of a dividend. Matter of Babylon Electric Light Co., 2nd Dist., March 9, 1908.

The existing capitalization of a public service corporation need not necessarily be examined into before authorization of securities under this section. The material question on such an application is whether the desired issue is neces-

sary for one of the purposes specified in the section. Matter of the Watertown Light & Power Co., 2nd Dist., March 10, 1908.

Public service corporations may be authorized to make expenditures for purposes other than public service, if such expenditures are on property ultimately to be used for such service. Matter of Watertown Light and Power Co., 2nd Dist., March 10, 1908.

Application for authority to issue ten year debenture bonds to the amount of $350,000, bearing interest at the rate of 8 per cent. examined and granted in part. Matter of Newburgh Light. Heat & Power Co., 2nd Dist., April 29, 1908.

Application for authorization to issue bonds to the amount of $50,000 upon security of a general mortgage upon the property of the applicant. The capital to be secured by such bond issue was proposed to be used for the following purposes: (a) Laying new gas pipe extending applicant's distributing system, $8,964.50; (b) laying gas pipe replacing other pipe which had become worn out and worthless in service, $19,517.50; (c) payment of various indebtedness of applicant incurred in making replacements to applicant's plant, $11,959.37. Total, $40,441.37.

Held: 1. That the authorization of bonds to the amount of approximately $9,000 for the purpose of laying new mains constituting additions to applicant's distributing system was proper.

2. That the other matters for which bonds were sought to be issued were replacements of parts of applicant's plant which already stood charged to fixed capital. That the issue of bonds for such purpose without crediting to fixed capital account the amount with which that account is charged by reason of the property replaced or proposed to be replaced, would be a violation of elementary financial principles which this Commission cannot permit.

Application denied in its present form with leave to the applicant to continue the case for further consultation. Matter of Niagara Light, Heat and Power Co., 2nd Dist., June 29, 1909.

Upon applications for authorization to issues of stocks, bonds and other evidences of indebtedness under sections 55 and 69 an indispensable inquiry is as to the purposes for which the capital to be secured by such issue is to be used. The statute permits capitalization for four purposes only, which are enumerated in those sections, and capital secured under them must be expended for one or more of the purposes authorized. An issue of stocks or bonds cannot be permitted for the purpose of reimbursing the treasury of the applicant for moneys previously spent, even though the expenditures may have been proper subjects for capitalization. Matter of Lehigh and Hudson River Ry. Co., 2nd Dist., May 7, 1908.

§ 69-a. Reorganizations. 1. Reorganizations of gas corporations and electrical corporations pursuant to sections nine and ten of the stock corporation law and such other statutes as may be enacted from time to time shall be subject to the supervision and control of the proper commission, and no such reorganization shall be had without the authorization of such commission.

2. Upon all such reorganizations the amount of capitalization, including therein all stocks and bonds and other evidence of indebtedness, shall be such as is authorized by the commission, which, in making its determination shall not exceed the fair value of the

property involved, taking into consideration its original cost of construction, duplication cost, present condition, earning power at reasonable rates and all other relevant matters and any additional sum or sums as shall be actually paid in cash, provided, however, that the commission may make due allowance for discount of bonds. Any reorganization agreement before it becomes effective shall be amended so that the amount of capitalization shall conform to the amount authorized by the commission.

New section, added by L. 1912, ch. 289.

§ 70. Approval of transfer of franchise. No gas corporation or electrical corporation shall transfer or lease its franchise, works or system or any part of such franchise, works or system to any other person or corporation or contract for the operation of its works and system, without the written consent of the proper commission. The permission and approval of the commission, to the exercise of a franchise under section sixty-eight of this chapter, or to the assignment, transfer or lease of a franchise under this section shall not be construed to revive or validate any lapsed or invalid franchise or to enlarge or add to the powers and privileges contained in the grant of any franchise or to waive any forfeiture. No such corporation shall directly or indirectly acquire the stock or bonds of any other corporation incorporated for, or engaged in, the same or a similar business, or proposing to operate or operating under a franchise from the same or any other municipality, neither shall any street railroad corporation acquire the stock or bonds of any electrical corporation, unless authorized so to do by the commission. Save where stock shall be transferred or held for the purpose of collateral security only with the consent of the commission empowered by this chapter to give such consent, no stock corporation of any description, domestic or foreign, other than a gas corporation or electrical corporation or street railroad corporation, shall purchase or acquire, take or hold, more than ten per centum of the total capital stock issued by any gas corporation or electrical corporation organized or existing under or by virtue of the laws of this state, except that a corporation now lawfully holding a majority of the capital stock of any gas corporation or electrical corporation may with the consent of the commission acquire and hold the remainder of the capital stock of such gas corporation or electrical corporation or any portion thereof. Nothing herein contained shall be construed to prevent the holding

of stock heretofore lawfully acquired, or to prevent, upon the surrender or exchange of said stock pursuant to a reorganization plan, the purchase, acquisition, taking or holding of a proportionate amount of stock of any new corporation organized to take over, at foreclosure or other sale, the property of any corporation whose stock has been thus surrendered or exchanged. Every contract, assignment, transfer or agreement for transfer of any stock by or through any person or corporation to any corporation, in violation of any provision of this chapter shall be void and of no effect, and no such transfer or assignment shall be made upon the books of any such gas corporation, or electrical corporation, or shall be recognized as effective for any purpose.

Thus am'd by L. 1911, ch. 788.

The consent of the Public Service Commission is necessary to the validity of a merger of gas or electric companies. Matter of the Watertown Light and Power Co., 2nd Dist., March 9, 1909.

If it is desired to merge or consolidate two corporations supplying different kinds of public service to the same community some distinct and affirmative advantage to the public must be shown. Matter of Watertown Light and Power Co., 2nd Dist., March 9, 1909.

§ 71. Complaints as to quality and price of gas and electricity; investigation by commission; forms of complaints. Upon the complaint in writing of the mayor of a city, the trustees of a village or the town board of a town in which a person or corporation is authorized to manufacture, sell or supply gas or electricity for heat, light or power, or upon the complaint in writing of not less than one hundred customers or purchasers of such gas or electricity in cities of the first or second class, or of not less than fifty in cities of the third class, or of not less than twenty-five elsewhere, or upon complaint of a gas corporation or electrical corporation supplying said gas or electricity, as to the illuminating power, purity, pressure or price of gas, the efficiency of the electric incandescent lamp supply, the voltage of the current supplied for light, heat or power, or price of electricity sold and delivered in such municipality, the proper commission shall investigate as to the cause for such complaint. When such complaint is made, the commission may, by its agents, examiners and inspectors, inspect the works, system, plant, devices, appliances and methods used by such person or corporation in manufacturing, transmitting and supplying such gas or electricity, and may examine or cause to be examined the books and papers of such per-

son or corporation pertaining to the manufacture, sale, transmitting and supplying of such gas or electricity. The form and contents of complaints made as provided in this section shall be prescribed by the commission. Such complaints shall be signed by the officers, or by the customers, purchasers or subscribers making them, who must add to their signatures their places of residence, by street and number, if any.

Complaint of the trustees of the village of Adams as to rates charged for lighting examined and dismissed. Matter of Adams Electric Light Co., 2nd Dist., April 16, 1908.

§ 72. Notice and hearing; order fixing price of gas or electricity, or requiring improvement. Before proceeding under a complaint presented as provided in section seventy-one, the commission shall cause notice of such complaint, and the purpose thereof, to be served upon the person or corporation affected thereby. Such person or corporation shall have an opportunity to be heard in respect to the matters complained of at a time and place to be specified in such notice. An investigation may be instituted by the commission as to any matter of which complaint may be made, as provided in section seventy-one of this chapter, or to enable it to ascertain the facts requisite to the exercise of any power conferred upon it. After a hearing and after such an investigation as shall have been made by the commission or its officers, agents, examiners or inspectors, the commission within lawful limits may, by order, fix the maximum price of gas or electricity not exceeding that fixed by statute to be charged by such corporation or person, for the service to be furnished; and may order such improvement in the manufacture, distribution or supply of gas, in the manufacture, transmission or supply of electricity, or in the methods employed by such person or corporation, as will in its judgment be adequate, just and reasonable. The price fixed by the commission under this section or under subdivision five of section sixty-six shall be the maximum price to be charged by such person, corporation or municipality for gas or electricity for the service to be furnished within the territory and for a period to be fixed by the commission in the order, not exceeding three years except in the case of a sliding scale, and thereafter until the commission shall, upon its own motion or upon the complaint of any corporation, person or municipality interested, fix a higher or lower maximum price of gas

or electricity to be thereafter charged. In determining the price to be charged for gas or electricity the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question although not set forth in the complaint and not within the allegations contained therein, with due regard among other things to a reasonable average return upon capital actually expended and to the necessity of making reservations out of income for surplus and contingencies.

Rule for Determining "Going Value."

Where there is assumed to be a reasonable need of the service from a gas company, and that the failure to pay dividends is not due either to bad management, accumulation of a surplus or undivided profits, investment of earnings in permanent additions or betterments allowed for in the structural valuation, or to other causes besides those under consideration, "going value" is an element which the Commission must determine as a distinct item from good will in an appraisement on which to compute a fair return to which the company, and expert evidence is competent as to the cost of building up the business. Peo. ex rel. Kings Co. Lighting Co. v. Willcox, 210 N. Y. 479 (1914), modfg. 156 A. D. 603. "Going value" for rate purposes in such case is the amount equal to the deficiency of net earnings below a fair return on the actual investment due solely to the time and expenditures necessary and proper to the development of the business and property to its present stage, and not comprised in the valuation of the physical property. Id. The most satisfactory method of appraising "going value" is to show the actual experience of the company, the original investment, its earnings from the start, the time actually required and expenses incurred in building up the business, all expenditures not reflected by the present condition of the physical property, the extent to which bad management or other causes prevented or depleted earnings, and any other facts bearing on the question, treating the development expenses, whether paid from earnings or not, as part of the capital account, keeping in mind that the ultimate fact to be determined is not the amount of the expenditures, but the deficiency in the fair return to the investors due to the causes under consideration. Id.

Corporation Entitled to Fair Return on Investment.

The public is entitled to be served by a public service corporation at reasonable rates, and such corporation is entitled to a fair return on its actual investment and not upon an overissue of securities, treating a reasonably necessary outlay in building up the business as an investment, for the purpose of determining a fair rate of return to be charged. Peo. ex rel. Kings Co. Lighting Co. v. Willcox, 210 N. Y. 479 (1914).

§ 73. Forfeiture for noncompliance with order. Every gas corporation and electrical corporation and the officers, agents or employees thereof shall obey, observe and comply with every order made by the commission under authority of this chapter so long

as the same shall be and remain in force. Any such person or corporation, or any officer, agent or employee thereof, who knowingly fails or neglects to obey or comply with such order, or any provision of this chapter, shall forfeit to the state of New York not to exceed the sum of one thousand dollars for each offense. Every distinct violation of any such order or of this chapter shall be a separate and distinct offense, and in case of a continuing violation each day shall be deemed a separate and distinct offense.

§ 74. Summary proceedings. Whenever either commission shall be of opinion that a gas corporation, electrical corporation or municipality within its jurisdiction is failing or omitting or about to fail or omit to do anything required of it by law or by order of the commission or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or of any order of the commission, it shall direct counsel to the commission to commence an action or proceeding in the supreme court of the state of New York in the name of the commission for the purpose of having such violations or threatened violation stopped and prevented either by mandamus or injunction. Counsel to the commission shall thereupon begin such action or proceeding by a petition to the supreme court alleging the violation complained of and praying for appropriate relief by way of mandamus or injunction. It shall thereupon be the duty of the court to specify the time not exceeding twenty days after service of a copy of the petition within which the gas corporation, electrical corporation or municipality complained of must answer the petition. In case of default in answer or after answer, the court shall immediately inquire into the facts and circumstances in such manner as the court shall direct without other or formal pleadings, and without respect to any technical requirement. Such other persons or corporations, as it shall seem to the court necessary or proper to join as parties in order to make its order, judgment or writs effective, may be joined as parties upon application of counsel to the commission. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that a writ of mandamus or an injunction or both issue as prayed for in the petition or in such modified or other form as the court may determine will afford appropriate relief.

§ 75. Defense in case of excessive charges for gas or electricity. If it be alleged and established in an action brought in any court for the collection of any charge for gas or electricity, that a price has been demanded in excess of that fixed by the commission or by statute in the municipality wherein the action arose, no recovery shall be had therein, but the fact that such excessive charges have been made shall be a complete defense to such action.

§ 76. Jurisdiction. The words "proper commission," when used in this article, mean the commission of the district within which the person or corporation affected supplies or proposes to supply the whole or the greater part of the service rendered by it. But nothing herein contained shall be construed to deprive the commission of either district of the power of supervision and regulation within its district. And either commission shall have power to enter and inspect the plant of such corporation, wherever situated.

§ 77. Powers of local officers. If in any city of the first or second class there now exists or shall hereafter be created a board, body or officer having jurisdiction of matters pertaining to gas or electric service, such board, body or officer shall have and may exercise such power, jurisdiction and authority in enforcing the laws of the state and the orders, rules and regulations of the commission as may be prescribed by statute or by the commission.

ARTICLE 4-A

[New article, added by Laws 1913, Chapter 505.]

Provisions Relating to Steam Corporations; Regulating Price of Steam

SECTION 78. Application of article.
79. Adequate service; just and reasonable charges: unjust discrimination and unreasonable preference.
80. General powers of commissions in respect to steam heating.
81. Approval of incorporation and franchises; certificate.
82. Approval of issues of stock, bonds and other forms of indebtedness.
82-a. Reorganizations of steam corporations.
83. Approval of transfer of franchise.
84. Complaints as to service and price of steam heat; investigation by commission; forms of complaints.

SECTION 85. Notice and hearing; order fixing price of steam *heat, or requiring improvement.
86. Forfeiture for noncompliance with order.
87. Summary proceedings.
88. Defense in case of excessive charges for steam heat.
89. Powers of local officers.
89-a. Jurisdiction.

§ 78. Application of article. This article shall apply to the manufacture, holding, distributing and furnishing of steam for heat or power.

New, added by L. 1913, ch. 505.

§ 79. Adequate service; just and reasonable charges; unjust discrimination and unreasonable preference. 1. Every steam corporation shall furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such corporation for such service rendered or to be rendered shall be just and reasonable and not more than allowed by order of the commission having jurisdiction. Every unjust or unreasonable charge made or demanded for such service, or in connection therewith or in excess of that allowed by law or by the commission is prohibited.

2. No such corporation shall directly or indirectly by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for such service rendered or to be rendered or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.

3. No such corporation shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

4. Nothing in this chapter shall be taken to prohibit any such corporation from establishing a sliding scale for a fixed period for the automatic adjustment of charges for such service or any

* So in original.

service rendered or to be rendered and the dividends to be paid to stockholders of such corporation, provided that the sliding scale shall first have been filed with and approved by the proper commission; but nothing in this subdivision shall operate to prevent the commission after the expiration of such fixed period from fixing proper, just and reasonable rates and charges to be made for services as authorized in this article.

New, added by L. 1913, ch. 505.

§ 80. General powers of commissions in respect to steam heating. Each commission shall within its jurisdiction: 1. Have general supervision of all steam corporations having authority under any general or special law or under any charter or franchise, to lay down, regulate or maintain pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality, for the purpose of furnishing or transmitting steam for heat or power, and all plants leased or operated by any such corporation.

2. Investigate and ascertain, from time to time, the methods employed by such persons and corporations in manufacturing, distributing and supplying steam for heat or power and have power to order such reasonable improvements as will best promote the public interest, preserve the public health and protecting those using such steam and those employed in the manufacture and distribution thereof, and have power to order reasonable improvements and extensions of the pipes, lines, conduits, ducts and other reasonable devices, apparatus and property of such corporation.

3. Have power, in its discretion, to prescribe uniform methods of keeping account, records and books, to be observed by such corporation in the manufacture, sale and distribution of steam. It may also in its discretion prescribe, by order, forms of accounts, records and memoranda to be kept by such persons and corporations. Notice of alterations by the commission in the required method or form of keeping a system of accounts shall be given to such persons or corporations by the commission at least six months before the same shall take effect. Any other and additional forms of accounts, records and memoranda kept by such corporation shall be subject to examination by the commission.

4. Examine all persons and corporations under its supervision and keep informed as to the methods, practices, regulations and

property employed by them in the transaction of their business. The commission shall have power of its own motion to examine and investigate the plants and methods employed in manufacturing, delivering and supplying steam and shall have access through its members or persons employed and authorized by it to make such examinations and investigations to all parts of the manufacturing plants owned, used or operated for the manufacture, transmission, distribution, furnishing or sale of steam for heat or power by any such person or corporation. Any employee or agent of the commission who divulges any fact or information which may come to his knowledge during the course of any such inspection or examination, except in so far as he may be directed by the commission, or by a court or judge or authorized by law shall be guilty of a misdemeanor. Whenever the commission shall be of the opinion, after hearing had upon its own motion or upon complaint, that the rates or charges or the acts or regulations of any such person or corporation, are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, the commission shall determine and prescribe the just and reasonable rates and charges thereafter to be enforced for the service to be furnished, and the just and reasonable acts and regulations to be done and observed; and whenever the commission shall be of opinion, after hearing had upon its own motion or upon complaint, that the property, equipment or appliances of any such person or corporation are unsafe, inefficient or inadequate, the commission shall determine and prescribe the safe, efficient and adequate property, equipment and appliances thereafter to be used, maintained and operated for the security and accommodation of the public and in compliance with the provisions of law and of their franchises and charters.

5. Require every person and corporation under its supervision, and it shall be the duty of every such person and corporation to file with the commission an annual report, verified by the oath of the president, treasurer, general manager or receiver, if any, thereof. The verification shall be made by said officials holding office at the time of the filing of said report, and if not made upon the knowledge of the person verifying the same shall set forth the sources of his information and the grounds of his belief as to any matters not stated to be verified upon his knowledge. The report shall show in detail:

(a) The amount of its authorized capital stock and the amount thereof issued and outstanding; (b) the amount of its authorized bonded indebtedness and the amount of its bonds and other forms of evidence of indebtedness issued and outstanding; (c) its receipts and expenditures during the preceding year; (d) the amount paid as dividends upon its stock and as interest upon its bond; (e) the name of its officers and the aggregate amount paid as salaries to them and the amount paid as wages to its employees; (f) the location of its plant or plants and system, with a full description of its property and franchises, stating in detail how each franchise stated to be owned was acquired; (g) such other facts pertaining to the operation and maintenance of the plant and system, and the affairs of such person or corporation as may be required by the commission. Such report shall be in the form, cover the period and be filed at the time prescribed by the commission. The commission may from time to time make changes and additions in such forms. When any such report is defective or believed to be erroneous, the commission shall notify the person or corporation making such report to amend the same within a time prescribed by the commission. Any such person or corporation which shall neglect to make any such report or which shall fail to correct any such report within the time prescribed by the commission shall be liable to a penalty of one hundred dollars and an additional penalty of one hundred dollars for each day after the prescribed time for which it shall neglect to file and correct the same, to be sued for in the name of the people of the state of New York. The amount recovered in any such action shall be paid into the state treasury and be credited to the general fund. The commission may extend the time prescribed for cause shown.

6. Have power, either through its members or inspectors or employees duly authorized by it, to enter in or upon and to inspect the property, buildings, plants, power houses, ducts, conduits and offices of any such corporation or person.

7. Have power to examine all accounts, books, contracts, records, documents and papers of any such person or corporation, and have power, after a hearing, to prescribe by order all accounts in which particular outlays and receipts shall be entered, charged or credited.

8. Have power to compel, by subpoena duces tecum, the production of any accounts, books, contracts, records, documents,

memoranda and papers. In lieu of requiring production of originals by subpoena duces tecum the commission or any commissioner may require sworn copies of any such books, records, contracts, documents and papers, or parts thereof, to be filed with it. The commission may require of all such corporations, persons or municipalities, specific answers to questions upon which the commission may need information, and may also require such corporations, persons or municipalities to file periodic reports in the form, covering the period and filed at the time prescribed by the commission. If such corporation, person or municipality shall fail to make a specific answer to any question or shall fail to make a periodic report when required by the commission as herein provided within the time and in the form prescribed by the commission for the making and filing of any such report or answer, such corporation, person or the officer of the municipality shall forfeit to the state the sum of one hundred dollars for each and every day it shall continue to be in default with respect to such report or answer. Such forfeiture shall be recovered in an action brought by the commission in the name of the people of the state of New York. The amount recovered in any such action shall be paid into the state treasury and be credited to the general fund.

9. Have power in all parts of the state, either as a commission or through its members, to subpoena witnesses, take testimony and administer oaths to witnesses in any proceeding or examination instituted before it, or conducted by it in reference to any matter within its jurisdiction under this article.

10. Have power to require every steam corporation, person or municipality to file with the commission and to print and keep open to public inspection schedules showing all rates and charges made, established or enforced or to be charged or enforced, all forms of contract or agreement and all rules and regulations relating to rates, charges or service used or to be used, and all general privileges and facilities granted or allowed by such steam corporation, person or municipality; but this subdivision shall not apply to state, municipal or federal contracts. Unless the commission otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed or

published by a steam corporation, person or municipality in compliance with an order of the commission, except after thirty days' notice to the commission and the publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect. The commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe. No corporation or municipality shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time; nor shall any corporation, person or municipality refund or remit in any manner or by any device any portion of the rates or charges so specified, nor to extend to any person or corporation any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are regularly and uniformly extended to all persons and corporations under like circumstances. The commission shall have power to prescribe the form of every such schedule, and from time to time prescribe by order such changes in the form thereof as may be deemed wise. The commission shall also have power to establish such rules and regulations to carry into effect the provisions of this subdivision as it may deem necessary, and to modify or amend such rules or regulations from time to time.

11. In case any steam corporation is engaged in carrying on any business other than owning, operating or managing a steam plant, which other business is not otherwise subject to the jurisdiction of the commission, and is so conducted that its operations are to be substantially kept separate and apart from the owning, operating, managing or controlling of such steam plant, said corporation in respect of such other business shall not be subject to any of the provisions of this chapter and shall not be required to procure the assent or authorization of the commission to any act in such other business or to make any report in respect thereof. But this subdivision shall not restrict or limit the powers of the commission in respect to the owning, operating, managing or controlling by such corporation of such steam plant, and said powers shall include also the right to inquire as to, and prescribe the apportionment of, capitalization, earnings, debts and

expenses fairly and justly to be awarded to or borne by the ownership, operation, management or control of such steam plant as distinguished from such other business. In any such case if the owning, operating, managing or controlling of such steam plant by any such corporation is wholly subsidiary and incidental to the other business carried on by it and is inconsiderable in amount and not general in its character, the commission may by general rules exempt such corporation from making full reports and from the keeping of accounts as to such subsidiary and incidental business.

New, added by L. 1913, ch. 505.

§ 81. Approval of incorporation and franchises; certificate. No steam corporation shall begin construction of a steam plant without first having obtained the permission and approval of the commission of each district within which any part of the work of construction is to be performed. No such corporation shall exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year without first having obtained the permission and approval of the proper commission. Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities. The commission within whose district such construction is to be made, or within whose district such right, privilege or franchise is to be exercised, shall have power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service.

No municipality shall build, maintain and operate for other than municipal purposes any works or systems for the manufacture and supplying of steam for purposes without a certificate of authority granted by the commission. If the certificate of authority is refused, no further proceedings shall be taken by such municipality before the commission, but a new application may be made therefor after one year from the date of such refusal.

New, added by L. 1913, ch. 505.

§ 82. Approval of issues of stock, bonds and other forms of indebtedness. A steam corporation organized or existing, or hereafter incorporated, under or by virtue of the laws of the state of New York, may issue stock, bonds, notes or other evidence of indebtedness payable at periods of more than twelve months after the date thereof, when necessary for the acquisition of property, the construction, completion, extension or improvement of its plant or distributing system, or for the improvement or maintenance of its service or for the discharge or lawful refunding of its obligations or for the reimbursement of moneys actually expended from income or from any other moneys in the treasury of the corporation not secured or obtained from the issue of stocks, bonds, notes or other evidence of indebtedness of such corporation, within five years next prior to the filing of an application with the proper commission for the required authorization, for any of the aforesaid purposes except maintenance of service and except replacements in cases where the applicant shall have kept its accounts and vouchers of such expenditure in such manner as to enable the commission to ascertain the amount of moneys so expended and the purposes for which such expenditure was made; provided and not otherwise that there shall have been secured from the proper commission an order authorizing such issue, and the amount thereof, and stating the purposes to which the issue or proceeds thereof are to be applied, and that, in the opinion of the commission, the money, property or labor to be procured or paid for by the issue of such stock, bonds, notes or other evidence of indebtedness is or has been reasonably required for the purposes specified in the order, and that except as otherwise permitted in the order in the case of bonds, notes and other evidence of indebtedness, such purposes are not in whole or in part reasonably chargeable to operating expenses or to income. Nothing herein contained shall prohibit the commission from giving its consent to the issue of bonds, notes or other evidence of indebtedness for the reimbursement of moneys heretofore actually expended from income for any of the aforesaid purposes, except maintenance of service and replacements, prior to five years next preceding the filing of the application therefor, if in the judgment of the commission such consent should be granted; provided application for such consent shall be made prior to January first, nineteen hundred and twelve. For the purpose of enabling it to determine whether it should issue such an order,

the commission shall make such inquiry or investigation, hold such hearings and examine such witnesses, books, papers, documents or contracts as it may deem of importance in enabling it to reach a determination. Such corporation shall not without the consent of the commission apply said issue or any proceeds thereof to any purpose not specified in such order. Such steam corporation may issue notes, for proper corporate purposes and not in violation of any provision of this or of any other act, payable at periods of not more than twelve months without such consent; but no such notes shall, in whole or in part, directly or indirectly be refunded by any issue of stock or bonds or by any evidence of indebtedness running for more than twelve months without the consent of the proper commission. Provided, however, that the commission shall have no power to authorize the capitalization of any franchise to be a corporation or to authorize the capitalization of any franchise or the right to own, operate or enjoy any franchise whatsoever in excess of the amount exclusive of any tax or annual charge actually paid to the state or to any political subdivision thereof as to the consideration for the grant of such franchise or right. Nor shall the capital stock of a corporation formed by the merger or consolidation of two or more corporations exceed the sum of the capital stock of the corporation, so consolidated, at the par value thereof, or such sum or any additional sum actually paid in cash; nor shall any contract for consolidation or lease be capitalized in the stock of any corporation whatever; nor shall any corporation hereafter issue any bonds against or as a lien upon any contract for consolidation or merger.

New, added by L. 1913, ch. 505.

§ 82-a. 1. Reorganizations of steam corporations pursuant to sections nine and ten of the stock corporation law and such other statutes as may be enacted from time to time shall be subject to the supervision and control of the proper commission, and no such reorganization shall be had without the authorization of such commission.

2. Upon all such reorganizations the amount of capitalization, including therein all stocks and bonds and other evidence of indebtedness, shall be such as is authorized by the commission, which, in making its determination shall not exceed the fair value of the property involved, taking into consideration its

original cost of construction, duplication cost, present condition, earning power at reasonable rates and all other relevant matters and any additional sum or sums as shall be actually paid in cash, provided, however, that the commission may make due allowance for discount of bonds. Any reorganization agreement before it becomes effective shall be amended so that the amount of capitalization shall conform to the amount authorized by the commission.

New, added by L. 1913, ch. 505.

§ 83. Approval of transfer of franchise. No steam corporation shall transfer or lease its franchise, works or system or any part of such franchise, works or system to any other person or corporation or contract for the operation of its works and system, without the written consent of the proper commission. The permission and approval of the commission, to the exercise of a franchise under section eighty-one of this chapter, or to the assignment, transfer or lease of a franchise under this section shall not be construed to revive or validate any lapsed or invalid franchise or to enlarge or add to the powers and privileges contained in the grant of any franchise or to waive any forfeiture. No such corporation shall directly or indirectly acquire the stock or bonds of any other corporation incorporated for, or engaged in, the same or a similar business, or proposing to operate or operating under a franchise from the same or any other municipality, unless authorized so to do by the commission. Save where stock shall be transferred or held for the purpose of collateral security only with the consent of the commission empowered by this chapter to give such consent, no stock corporation of any description, domestic or foreign, other than a steam corporation or street railroad corporation, shall purchase or acquire, take or hold, more than ten per centum of the total capital stock issued by any steam corporation organized or existing under or by virtue of the laws of this state, except that a corporation now lawfully holding a majority of the capital stock of any steam corporation may with the consent of the commission acquire and hold the remainder of the capital stock of such steam corporation or any portion thereof. Nothing herein contained shall be construed to prevent the holding of stock heretofore lawfully acquired, or to prevent, upon the surrender or exchange of said stock pursuant to a reorganization plan, the purchase, acquisition, taking or holding of a propor-

tionate amount of stock of any new corporation organized to take over, at foreclosure or other sale, the property of any corporation whose stock has been thus surrendered or exchanged. Every contract, assignment, transfer or agreement for transfer of any stock by or through any person or corporation to any corporation, in violation of any provision of this chapter, shall be void and of no effect, and no such transfer or assignment shall be made upon the books of any such steam-heating corporation, or shall be recognized as effective for any purpose.

New, added by L. 1913, ch. 505.

§ 84. Complaints as to service and price of steam heat; investigation by commission; forms of complaints. Upon the complaint in writing of the mayor of the city, the trustees of a village or the town board of a town in which a person or corporation is authorized to manufacture, sell or supply steam for heat or power, or upon the complaint in writing of not less than fifty customers or purchasers of such steam heat in cities of the first or second class, or of not less than twenty-five in cities of the third class, or of not less than ten elsewhere, as to the price, pressure or efficiency of steam supplied for heat or power, sold and delivered in such municipality, the proper commission shall investigate as to the cause for such complaint. When such complaint is made, the commission may, by its agents, examiners and inspectors, inspect the work, system, plant, devices, appliances and methods used by such person or corporation in manufacturing, transmitting and supplying such steam, and may examine or cause to be examined the books and papers of such person or corporation pertaining to the manufacture, sale, transmitting and supplying of such steam. The form and contents of complaints made as provided in this section shall be prescribed by the commission. Such complaint shall be signed by the officers, or by the customers, purchasers or subscribers making them, who must add to their signatures their place of residence, by street and number, if any.

New, added by L. 1913, ch. 505.

§ 85. Notice and hearing; order fixing price of steam, or requiring improvement. Before proceeding under a complaint presented as provided in section eighty-four, the commission shall cause notice of such complaint, and the purpose thereof, to be

served upon the person or corporation affected thereby. Such person or corporation shall have an opportunity to be heard in respect to the matters complained of at a time and place to be specified in such notice. An investigation may be instituted by the commission as to any matter of which complaint may be made, as provided in section eighty-four of this chapter, or to enable it to ascertain the facts requisite to the exercise of any power conferred upon it. After a hearing and after such an investigation as shall have been made by the commission or its officers, agents, examiners or inspectors, the commission within lawful limits may, by order, fix the maximum price of steam not exceeding that fixed by statute to be charged by such corporation or person, for the service to be furnished; and may order such improvement in the manufacture, distribution or supply of steam, or in the methods employed by such person or corporation, as will in its judgment be adequate, just and reasonable. The price fixed by the commission under this section or under subdivision five of section eighty shall be the maximum price to be charged by such person, corporation or municipality for steam for the service to be furnished within the territory and for a period to be fixed by the commission in the order, not exceeding three years except in case of a sliding scale, and thereafter until the commission shall, upon its own motion or upon the complaint of any corporation, person or municipality interested, fix a higher or lower maximum price of steam to be thereafter charged. In determining the price to be charged for steam the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question although not set forth in the complaint and not within the allegations contained therein, with due regard among other things to a reasonable average return upon capital actually expended and to the necessity of making reservations out of income for surplus and contingencies.

New, added by L. 1913, ch. 505.

§ 86. Forfeiture for noncompliance with order. Every corporation and the officers, agents and employees thereof shall obey, observe and comply with every order made by the commission under authority of this chapter so long as the same shall be and remain in force. Any such person or corporation, or any officer, agent or employee thereof, who knowingly fails or neglects to obey or comply with such order, or any provision of this chapter,

shall forfeit to the state of New York not to exceed the sum of one thousand dollars for each offense. Every distinct violation of any such order or of this chapter shall be a separate and distinct offense, and in case of a continuing violation each day shall be deemed a separate and distinct offense.

New, added by L. 1913, ch. 505.

§ 87. **Summary proceedings.** Whenever either commission shall be of opinion that a steam corporation or municipality within its jurisdiction is failing or omitting or about to fail or omit to do anything required of it by law or by order of the commission or is doing anything or about to do anything or permitting anything or about to permit anything to be done contrary to or in violation of law or of any order of the commission, it shall direct counsel to the commission to commence an action or proceeding in the supreme court of the state of New York in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunction. Counsel to the commission shall thereupon begin such action or proceeding by a petition to the supreme court alleging the violation complained of and praying for appropriate relief by way of mandamus or injunction. It shall thereupon be the duty of the court to specify the time not exceeding twenty days after service of a copy of the petition within which the steam corporation or municipality complained of must answer the petition. In case of default in answer or after answer, the court shall immediately inquire into the facts and circumstances in such manner as the court shall direct without other or formal pleadings, and without respect to any technical requirement. Such other persons or corporations, as it shall seem to the court necessary or proper to join as parties in order to make its order, judgment or writs effective, may be joined as parties upon application of counsel to the commission. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that a writ of mandamus or injunction or both issue as prayed for in the petition or in such modified or other form as the court may determine will afford appropriate relief.

Added by L. 1913, ch. 505.

§ 88. **Defense in case of excessive charges for steam heat.** If it be alleged and established in an action brought in any court for

the collection of any charge for steam for heat or power, that a price has been demanded in excess of that fixed by the commission or by statute in the municipality wherein the action arose, no recovery shall be had therein, but the fact that such excessive charges have been made shall be a complete defense to such action.

Added by L. 1913, ch. 505.

§ 89. Powers of local officers. If in any city of the first or second class there now exists or shall hereafter be created a board, body or officer having jurisdiction of matters pertaining to steam power service, such board, body or officer shall have and may exercise such power, jurisdiction and authority in enforcing the laws of the state and the orders, rules and regulations of the commission as may be prescribed by statute or by the commission.

Added by L. 1913, ch. 505.

§ 89-a. Jurisdiction. The words "proper commission," when used in this article, mean the commission of the district within which the person or corporation affected supplies or purposes to supply the whole or the greater part of the service rendered by it. But nothing herein contained shall be construed to deprive the commission of either district of the power of supervision and regulation within its district. And either commission shall have power to enter and inspect the plant of such corporation, wherever situated.

Added by L. 1913, ch. 505.

ARTICLE V

[Article V was inserted by Laws of 1910, chapter 673. By the same chapter former Article V was renumbered as Article VI, and sections 80 to 87 of the latter article, inclusive, were renumbered, respectively, as 120 to 127, inclusive.]

Provisions Relating to Telegraph and Telephone Lines and to Telephone and Telegraph Corporations

SECTION 90. Application of article.
91. Adequate service; just and reasonable charges; unjust discrimination; unreasonable preference.
92. Rate schedules.
93. Liability for loss or damage caused by violation of this chapter.
94. General powers and duties of commission in respect to telegraph corporations and telephone corporations.
95. Reports of telegraph corporations and telephone corporations.

SECTION 96. Investigations by commission.
97. Rates, rentals and service.
98. Powers of commission to order repairs or changes.
99. Franchises and privileges.
100. Transfer and ownership of stocks.
101. Approval of issues of stocks, bonds and other forms of indebtedness.
101-a. Reorganization.
102. Forfeitures; penalties.
103. Summary proceedings.

§ 90. Application of article. The provisions of this article shall apply to communication by telegraph or telephone between one point and another within the state of New York and to every telegraph corporation and telephone corporation.

Added by L. 1910, ch. 673.

§ 91. Adequate service; just and reasonable charges; unjust discrimination; unreasonable preference. 1. Every telegraph corporation and every telephone corporation shall furnish and provide with respect to its business such instrumentalities and facilities as shall be adequate and in all respects just and reasonable. All charges made or demanded by any telegraph corporation or telephone corporation for any service rendered or to be rendered in connection therewith shall be just and reasonable and not more than allowed by law or by order of the commission. Every unjust or unreasonable charge made or demanded for any such service or in connection therewith or in excess of that allowed by law or by order of the commission is prohibited and declared to be unlawful.

2. No telegraph corporation or telephone corporation shall directly or indirectly or by any special rate, rebate, drawback or other device or method charge, demand, collect or receive from any person or corporation a greater or less compensation for any service rendered or to be rendered with respect to communication by telegraph or telephone or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect to communication by telegraph or telephone under the same or substantially the same circumstances and conditions.

3. No telegraph corporation or telephone corporation shall make or give any undue or unreasonable preference or advantage

to any person, corporation or locality, or subject any particular person, corporation or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

4. Nothing in this chapter shall be construed to prevent any telegraph corporation or telephone corporation from continuing to furnish the use of its lines, equipment or service under any contract or contracts in force at the date this article takes effect or upon the taking effect of any schedule or schedules of rates subsequently filed with the commission, as hereinafter provided, at the rate or rates fixed in such contract or contracts; provided, however, that when any such contract or contracts are or become terminable by notice, the commission shall have power, in its discretion, to direct by order that such contract or contracts shall be terminated by the telegraph corporation or telephone corporation party thereto, and thereupon such contract or contracts shall be terminated by such telegraph corporation or telephone corporation as and when directed by such order.

Added by L. 1910, ch. 673.

Discrimination in Telephone Rates.

A telephone company may make a discount from its usual charges in favor of the municipality, charitable institutions and clergymen, without entitling other customers to like discount, and such discrimination in the absence of statute is not unreasonable. N. Y. Telephone Co. v. Siegel-Cooper Co., 202 N. Y. 502 (1911).

Discriminations in favor of the public are not opposed to public policy, and in the absence of statutes to the contrary will not be held illegal. N. Y. Telephone Co. v. Siegel-Cooper Co., 202 N. Y. 502 (1911).

§ 92. Rate schedules. 1. Every telegraph corporation and every telephone corporation shall print and file with the commission schedules showing all rates, rentals and charges for service of each and every kind by or over its line between points in this state and between each point upon its line and all points upon every line leased or operated by it and between each point upon its line or upon any line leased or operated by it and all points upon the line of any other telegraph or telephone corporation whenever a through service or joint rate shall have been established between any two points. If no joint rate over a through line has been established the several corporations in such through line shall file with the commission the separately established rates and charges applicable where through

service is afforded. Such schedule shall plainly state the places between which telephone or telegraph service, or both, will be rendered and shall also state separately all charges and all privileges or facilities granted or allowed and any rules or regulations or forms of contract which may in any wise change, affect or determine any or the aggregate of the rates, rentals or charges for the service rendered. Such schedule shall be plainly printed and kept open to public inspection. The commission shall have the power to prescribe the form of every such schedule and may from time to time prescribe, by order, changes in the form thereof. The commission shall also have power to establish rules and regulations for keeping such schedules open to public inspection and may from time to time modify the same. Every telegraph corporation and telephone corporation shall file with the commission as and when required by it a copy of any contract, agreement or arrangement in writing with any other telegraph corporation or telephone corporation or with any other corporation, association or person relating in any way to the construction, maintenance or use of a telegraph line or telephone line or service by or rates and charges over or upon any such telegraph line or telephone line.

2. Unless the commission otherwise orders no change shall be made in any rate, charge or rental, or joint rate, charge or rental which shall have been filed by a telegraph corporation or telephone corporation in compliance with the requirements of this chapter, except after thirty days' notice to the commission, which notice shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rate, charge or rental shall go into effect; and all proposed changes shall be shown by filing new schedules or shall be plainly indicated upon the schedules filed and in force at the time and kept open to public inspection. The commission, for good cause shown, may allow changes in rates, charges or rentals without requiring the thirty days' notice, under such conditions as it may prescribe; all such changes shall be immediately indicated upon its schedules by such telegraph corporation or telephone corporation. No telegraph corporation or telephone corporation shall charge, demand, collect or receive a different compensation for any service rendered or to be rendered than the charge applicable to such service as specified in its schedule on file and in effect at that time. Nor shall any telegraph corporation or telephone corporation refund

or remit directly or indirectly any portion of the rate or charge so specified, nor extend to any person or corporation any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are specified in its schedule filed and in effect at the time and regularly and uniformly extended to all persons and corporations under like circumstances for the like or substantially similar service.

3. No telegraph corporation or telephone corporation subject to the provisions of this chapter shall, directly or indirectly, give any free or reduced service, or any free pass or frank for the transmission of messages by either telephone or telegraph between points within this state, except to its officers, employees, agents, pensioners, surgeons, physicians, attorneys-at-law and their families; to persons or corporations exclusively engaged in charitable and eleemosynary work and ministers of religions; to officers and employees of other telegraph corporations and telephone corporations, railroad corporations and street railroad corporations. But this subdivision shall not apply to state, municipal or federal contracts.

Section added by L. 1910, ch. 673, and subd. 3 thus am'd by L. 1911, ch. 124.

§ 93. Liability for loss or damage caused by violation of this chapter. In case any telegraph corporation or telephone corporation shall do or cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or other thing required to be done, either by law of the state of New York by this chapter or by any order of the commission, such telegraph corporation or telephone corporation shall be liable to the person or corporation affected thereby for all loss, damage or injury caused thereby or resulting therefrom and in case of recovery if the court shall find that such an act or omission was willful it may in its discretion fix a reasonable counsel or attorney's fee, which fee shall be taxed and collected as a part of the costs in the action. An action to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any such person or corporation.

Added by L. 1910, ch. 673.

§ 94. General powers and duties of commission in respect to telegraph corporations and telephone corporations. 1. The commission and each commissioner shall have power and authority

to administer oaths in all parts of the state to witnesses summoned to testify in any inquiry, investigation, hearing, or proceeding and also to administer oaths in all parts of the state whenever the exercise of such power is incidentally necessary or proper to enable the commission or a commissioner to perform a duty or to exercise a power.

2. The commission shall have general supervision of all telegraph corporations, telephone corporations and telegraph lines and telephone lines within its jurisdiction as hereinbefore defined and shall have power to and shall examine the same and keep informed as to their general condition, their capitalization, their franchises and the manner in which their lines and property are leased, operated or managed, conducted and operated with respect to the adequacy of and accommodation afforded by their service and also with respect to the safety and security of their lines and property, and with respect to their compliance with all provisions of law, orders of the commission, franchises and charter requirements. The commission shall have power either through its members or inspectors or employees duly authorized by it to enter in or upon and to inspect the property, equipment, buildings, plants, factories, offices, apparatus, machines, devices and lines of any telegraph corporation or telephone corporation.

3. The commission and each commissioner shall have power to examine all books, contracts, records, documents and papers of any telegraph corporation or telephone corporation and by subpoena duces tecum to compel the production thereof, or of duly verified copies of the same or of any of them.

Added by L. 1910, ch. 673.

§ 95. Reports of telegraph corporations and telephone corporations. 1. Every telegraph corporation and every telephone corporation shall file with the commission an annual report at a time and covering the yearly period fixed by the commission. Such annual report shall be verified by the oath of the president, treasurer, general manager or receiver of any of such corporations, or by the person required to file the same. Verification shall be made by the official holding office at the time of the filing of said report, and if not made upon the knowledge of the person verifying the same shall set forth in general terms the sources of his information and the grounds for his belief as

to any matters not stated to be verified on his knowledge. The commission shall prescribe the form of such reports and the character of the information to be contained therein and may, from time to time make such changes and additions in regard to form and contents thereof as it may deem proper, and shall furnish a blank form for such annual reports to every telegraph corporation and every telephone corporation required to make the same. When the report of any telegraph corporation or telephone corporation is defective or erroneous the commission shall notify the corporation to amend the same within a time prescribed by the commission. The said reports shall be preserved in the office of the commission. The commission may require of any telegraph corporation or telephone corporation specific answers to questions upon which the commission may desire information. If any telegraph corporation or telephone corporation shall fail to make and file its annual report as and when required or within such extended time as the commission may allow or shall fail to make specific answers to any question within the period specified by the commission for the making and filing of such answers, such corporation shall forfeit to the state the sum of one hundred dollars for each and every day it shall continue to be in default with respect to such report or answer. Such forfeiture shall be recovered in an action brought by the commission in the name of the people of the state of New York. The amount recovered in any such action shall be paid into the state treasury and shall be credited to the general fund. The commission may, when it deems it advisable, exempt any telegraph corporation or telephone corporation from the necessity of filing annual reports until the further order of the commission.

2. The commission may establish a system of accounts to be used by telegraph corporations and telephone corporations, which are subject to its jurisdiction, and are required to make annual reports to it or classify the said corporations, and prescribe a system of accounts for each class and may prescribe the manner in which such accounts shall be kept. It may also, in its discretion prescribe the form of records to be kept by such corporation. Notice of alterations by the commission in the required method or form of keeping accounts shall be given to such corporations by the commission at least six months before the same are to take effect. The commission shall at all times have access to all accounts, records and memoranda kept by telegraph corporations

and telephone corporations, and may designate any of its officers or employees who shall thereupon be authorized under the order of the commission to inspect and examine any and all accounts, records and memoranda kept by any such corporation; and the commission may, after hearing, prescribe by order, the accounts in which particular outlays and receipts shall be entered, charged or credited. Any employee or agent of the commission who divulges any fact or information which may come to his knowledge during the course of any such inspection or examination except in so far as he may be directed by the commission or by a court or judge thereof, or authorized by law, shall be guilty of a misdemeanor. Any provision of law prohibiting the disclosure of the contents of telegraph messages or the contents or substance of telephone communications shall not be deemed to prohibit the disclosure of any matter in accordance with the provisions of this chapter.

Added by L. 1910, ch. 673.

§ 96. Investigations by commission. 1. The commission may of its own motion investigate or make inquiry in a manner to be determined by it as to any act done or omitted to be done by any telegraph corporation or telephone corporation and the commission must make such inquiry in regard to any act done or omitted to be done by any telegraph corporation or telephone corporation in violation of any provisions of law or in violation of any order of the commission.

2. Complaints may be made to the commission by any person or corporation aggrieved, by petition or complaint in writing, setting forth any act done or omitted to be done by any telegraph corporation or telephone corporation alleged to be in violation of the terms or conditions of its franchise or charter or of any order of the commission. Upon the presentation of such a complaint the commission shall cause a copy thereof to be forwarded to the person or corporation complained of which may be accompanied by an order directed to such person or corporation requiring that the matters complained of be satisfied or that the charges be answered in writing within a time to be specified by the commission. If the person or corporation complained of shall make reparation for any injury alleged and shall cease to commit or permit the violation of law, franchise, charter or order charged in

the complaint, if any there be, and shall notify the commission of that fact before the time allowed for answer, the commission need take no further action upon the charges. If, however, the charges contained in such petition be not thus satisfied and it shall appear to the commission that there are reasonable grounds therefor, it shall investigate such charges in such manner and by such means as it shall deem proper and take such action within its powers as the facts in its judgment justify.

3. Whenever the commission shall investigate any matter complained of by any person or corporation aggrieved by any act or omission of a telegraph corporation or telephone corporation under this section, it shall be its duty within sixty days after final submission to make and file an order either dismissing the petition or complaint or directing the telegraph corporation or telephone corporation complained of to satisfy the cause of complaint in whole or to the extent which the commission may specify and require.

Added by L. 1910, ch. 673.

§ 97. Rates, rentals and service. 1. Whenever the commission shall be of opinion, after a hearing, had upon its own motion or upon a complaint that the rates, charges, tolls or rentals demanded, exacted, charged or collected by any telegraph corporation or telephone corporation subject to its jurisdiction for the transmission of messages or communications by telegraph or telephone or for the rental or use of any telegraph line, telephone line or any telegraph instrument, wire, appliances, apparatus or device or any telephone receiver, transmitter, instrument, wire, cable, apparatus, conduit, machine, appliance or device or any telephone extension or extension system or that the rules, regulations or practices of any telegraph corporation or telephone corporation affecting such rates, charges, rentals or service are unjust, unreasonable or unjustly discriminatory or unduly preferential or in any wise in violation of law, or that the maximum rates, charges or rentals chargeable by any such telegraph corporation or telephone corporation are insufficient to yield reasonable compensation for the service rendered, the commission shall with due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service and of the necessity of making reservation out of income for surplus and contin-

gencies determine the just and reasonable rates, charges and rentals to be thereafter observed and in force as the maximum to be charged, demanded, exacted or collected for the performance or rendering of the service specified and shall fix the same by order to be served upon all telegraph corporations and telephone corporations by which such rates, charges and rentals are thereafter to be observed, and thereafter no increase in any rate, charge or rental so fixed shall be made without the consent of the commission.

2. Whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaint that the rules, regulations or practices of any telegraph corporation or telephone corporation are unjust or unreasonable or that the equipment or service of any telegraph corporation or telephone corporation is inadequate, inefficient, improper or insufficient, the commission shall determine the just, reasonable, adequate, efficient and proper regulations, practices, equipment and service thereafter to be installed, to be observed and used, and to fix and prescribe the same by order to be served upon every telegraph corporation and telephone corporation to be bound thereby and thereafter it shall be the duty of every telegraph corporation and telephone corporation to which such order is directed to obey each and every such order so served upon it and to do everything necessary or proper in order to secure compliance with and observance of every such order by all its officers, agents and employees according to its true intent and meaning. Nothing contained in this chapter shall be construed as giving to the commission power to make any order, direction or requirement requiring any telegraph corporation or telephone corporation to perform any act which is unjust or unreasonable or in violation of any law of this state or of the United States not inconsistent with the provisions of this chapter.

3. The commission shall have power by order to require any two or more telegraph corporations whose lines form a continuous line of communication, or could be made to do so by the construction and maintenance of suitable connections or transfer of messages at common points, between different localities which are not reached by the line of either company alone, to establish through lines within the state between two or more such localities and joint rates or charges for service by or over said lines as the commission may by its order prescribe and in case such through lines

and joint rates be not established by the corporations named in any such order within the time therein specified, the commission shall have power by order to establish the same and to fix the just and reasonable rates and charges to be charged for such through service and to declare the portion thereof to which each of the corporations affected thereby shall be entitled and the manner in which the same shall be secured and paid.

Added by L. 1910, ch. 673.

§ 98. Power of commission to order repairs or changes. Whenever the commission shall be of opinion, after a hearing had upon its own motion, or upon a complaint, that repairs or improvements to or changes in any telegraph line or any telephone line ought reasonably to be made, or that any additions should reasonably be made thereto, in order to promote the convenience of the public or employees, or in order to secure adequate service or facilities for telegraphic or telephonic communications, the commission shall make and serve an order directing that such repairs, improvements, changes or additions be made within a reasonable time and in a manner to be specified therein and every telegraph corporation and telephone corporation is hereby required and directed to make all repairs, improvements, changes and additions required of it by any order of the commission served upon it.

Added by L. 1910, ch. 673.

§ 99. Franchises and privileges. 1. No telegraph corporation or telephone corporation hereafter formed shall begin construction of its telegraph line or telephone line without first having obtained the permission and approval of the commission and its certificate of public convenience and necessity, after a hearing had upon such notice as the commission may prescribe. Before any such certificate shall be issued there must be filed in the office of the commission by the applicant therefor a verified statement showing that the required consent of the proper municipal authorities has been obtained.

2. No franchise or any right to or under any franchise to own or operate a telegraph line or telephone line shall be assigned, transferred or leased, nor shall any contract or agreement hereafter made with reference to or affecting any such franchise or

right be valid or of any force or effect whatever unless the assignment, transfer, lease, contract or agreement shall have been approved by the commission. No franchise or right to or under any franchise to own or operate a telegraph line or telephone line shall be assigned, transferred or leased to or owned or operated by any foreign corporation.

3. The approval of the commission to the exercise of a franchise or to the assignment, transfer or lease of a franchise shall not be construed to revive or validate any lapsed or invalid franchise or to enlarge or add to the powers and privileges contained in the grant of any franchise or to waive any forfeiture.

Added by L. 1910, ch. 673.

§ 100. Transfer and ownership of stock. Save where stock shall be transferred or held for the purpose of collateral security, no stock corporation, domestic or foreign, other than a telegraph corporation or telephone corporation, shall, without the consent of the commission, purchase or acquire, take or hold more than ten per centum of the total capital stock issued by any telegraph corporation or telephone corporation organized or existing under or by virtue of the laws of this state, except that a corporation now lawfully holding a majority of the capital stock of any telegraph corporation or telephone corporation may, without the consent of the commission, acquire and hold the remainder of the capital stock of such telegraph corporation or telephone corporation, or any portion thereof. Nothing herein contained shall be construed to prevent the holding of stock heretofore lawfully acquired, or to prevent, upon the surrender or exchange of said stock pursuant to a reorganization plan, the purchase, acquisition, taking or holding of a proportionate amount of stock of any new corporation organized to take over, at foreclosure or other sale the property of any corporation whose stock has been thus surrendered or exchanged. Every contract, assignment, transfer or agreement for transfer of any stock by or through any person or corporation to any corporation in violation of any provision of this chapter shall be void and of no effect, and no such transfer or assignment shall be made upon the books of any such telegraph corporation or telephone corporation, or shall be recognized as effective for any purpose.

Added by L. 1910, ch. 673.

§ 101. Approval of issues of stock, bonds and other forms of indebtedness. 1. A telegraph or telephone corporation may when authorized by order of the commission and not otherwise, issue stock, bonds, notes or other evidence of indebtedness payable at periods of more than twelve months after the date thereof when necessary for the acquisition of property, the construction, completion, extension or improvement of its facilities or the improvement or maintenance of its service within the state, or for the discharge or lawful refunding of its obligations, or reimbursement of moneys actually expended from the income from any source, within five years next prior to the filing of the application therefor, or for any of such purposes, provided, however, that no order shall be granted authorizing such issue for reimbursement of moneys expended from income for betterments or replacements unless the applicant shall have kept its accounts and vouchers of such expenditures in such manner as to enable the commission to ascertain the amount of moneys so expended and the purposes for which such expenditures were made. The commission may by order authorize the issue of bonds, notes or other evidence of indebtedness for the reimbursement of moneys heretofore actually expended from income for any of the purposes herein specified, except maintenance of service or replacements prior to five years next preceding the filing of the application therefor, provided such application be made prior to January first, nineteen hundred and twelve. The order of the commission shall fix the amount of any such issue and the purposes to which it or its proceeds are to be applied and recite that in the opinion of the commission the money, property or labor procured or to be procured or paid for by such issue or its proceeds has been or is reasonably required for the purposes specified in the order, and that such purposes are in no part reasonably chargeable to operating expenses or to income except in the case of bonds, notes or other evidence of indebtedness as may be permitted in the order. For the purpose of enabling the commission to determine whether it should issue such an order the commission shall make such inquiry or investigation, hold such hearings and examine such witnesses, books, papers, documents or contracts as it may determine of importance in enabling it to reach a determination. No such corporation shall, without the consent of the commission, apply any such issue or its proceeds to any purpose not specified in the order. Such telegraph corporation or telephone corporation may

issue notes for proper corporate purposes and not in violation of any provision of this chapter or of any other act, payable at periods of not more than twelve months, without the consent of the commission; but no such note shall, in whole or in part, directly or indirectly, be refunded by any issue of stock or bonds, or by any evidence of indebtedness running for more than twelve months, without the consent of the commission. No telegraph corporation or telephone corporation shall be required, however, to apply to the commission for authority to issue stocks, bonds, notes or other evidence of indebtedness except for the acquisition of property, the construction, completion, extension or improvement of its facilities, or the improvement or maintenance of its service within the state, or the discharge or refunding of obligations, or reimbursement of moneys actually expended for such purposes. The commission shall have no power to authorize the capitalization of any franchise or right to be a corporation, or to authorize the capitalization of any franchise or the right to own, operate or enjoy any franchise whatsoever in excess of the amount (exclusive of any tax or annual charge) actually paid to the state or any political subdivision thereof, as the consideration of the grant of such franchise or right, nor shall the corporate stock of the corporation formed by the merger or consolidation of two or more other corporations exceed the sum of the capital stock of the corporation so consolidated, at the par value thereof, or such sum and any additional sum actually paid in cash; nor shall any contract for consolidation or lease be capitalized in the stock of any corporation whatever; nor shall any corporation hereafter issue any bonds against or as a lien upon any contract for consolidation or merger.

Added by L. 1910, ch. 673.

§ 101-a. Reorganization. 1. Reorganization of telegraph and telephone corporations pursuant to sections nine and ten of the stock corporation law and such other laws as may be enacted from time to time shall be subject to the supervision and control of the proper commission and no such reorganization shall be had without the authorization of such commission.

2. Upon all such reorganizations the amount of capitalization, including therein all stocks and bonds and other evidence of indebtedness, shall be such as is authorized by the commission, which, in making its determination shall not exceed the fair value

of the property involved, taking into consideration its original cost of construction, duplication cost, present condition, earning power at reasonable rates, and all other relevant matters and any additional sum or sums as shall be actually paid in cash, provided, however, that the commission may make due allowance for discount of bonds. Any reorganization agreement before it becomes effective shall be amended so that the amount of capitalization shall conform to the amount authorized by the commission.

Added by L. 1912, ch. 289.

§ 102. Forfeiture; penalties. 1. Every telegraph corporation and every telephone corporation, and all officers, agents and employees of any telegraph corporation or telephone corporation shall obey, observe and comply with every order, direction or requirement made by the commission, under authority of this article, so long as the same shall be and remain in force. Any telegraph corporation or any telephone corporation which shall violate any provision of this article, or which fails, omits or neglects to obey, observe or comply with any order or any direction or requirement of the commission, shall forfeit to the people of the state of New York, not to exceed the sum of one thousand dollars for each and every offense; every violation of any such order or direction or requirement, or of this article, shall be a separate and distinct offense, and, in case of a continuing violation, every day's continuance thereof shall be and be deemed to be a separate and distinct offense.

2. An action to recover a penalty or forfeiture under this article may be brought at any time within one year after the cause of action accrues, in any court of competent jurisdiction in this state, in the name of the people of the state of New York, on the relation of the commission, and shall be commenced and prosecuted to final judgment by counsel to the commission. In any such action all penalties and forfeitures incurred up to the time of commencing the same may be sued for and recovered therein, and the commencement of an action to recover a penalty or forfeiture shall not be, or be held to be, a waiver of the right to recover any other penalty or forfeiture; if the defendant in such action shall prove that during any portion of the time for which it is sought to recover penalties or forfeitures for a violation of an order of the commission, the defendant was actually and in good faith prosecuting a suit, action or proceeding

in the courts to set aside such order, the court shall remit the penalties or forfeitures incurred during the pendency of such suit, action or proceeding. All moneys recovered in any such action, together with the costs thereof, shall be paid into the state treasury to the credit of the general fund.

Added by L. 1910, ch. 673.

§ 103. Summary proceedings. Whenever the commission shall be of the opinion that a telegraph corporation or telephone corporation subject to its supervision is failing or omitting or about to fail or omit to do anything required of it by law or by order, direction or requirement of the commission authorized by this chapter, or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law, or of any order, direction or requirement of the commission authorized by this chapter, it shall direct counsel to the commission to commence an action or proceeding in the supreme court of the state of New York in the name of the people of the state of New York on the relation of the commission for the purpose of having such violations or threatened violations stopped and prevented, either by mandamus or injunction. Counsel to the commission shall thereupon begin such action or proceeding by a petition to the supreme court alleging the violation complained of and praying for appropriate relief by way of mandamus or injunction. It shall thereupon be the duty of the court to specify the time, not exceeding twenty days after service of a copy of the petition, within which the telegraph corporation or telephone corporation complained of must answer the petition. In case of default in answer or after answer, the court shall immediately inquire into the facts and circumstances in such manner as the court shall direct without other or formal pleadings, and without respect to any technical requirement. Such other persons or corporations as the court shall deem necessary or proper to join as parties in order to make its order, judgment or writs effective may be joined as parties. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that a writ of mandamus or an injunction, or both, issue as prayed for in the petition or in such modified or other form as the court may determine will afford appropriate relief.

Added by L. 1910, ch. 673.

ARTICLE VI

Commissions and Offices Abolished; Saving Clause; Repeal

SECTION 120. Board of railroad commissioners abolished; effect thereof.
121. Commission of gas and electricity abolished; effect thereof.
122. Inspector of gas meters abolished; effect thereof.
123. Board of rapid transit railroad commissioners abolished; effect thereof.
124. Transfer of records.
125. Pending actions and proceedings.
126. Construction.
127. Repeal.

§ 120. Board of railroad commissioners abolished; effect thereof. On and after July first, nineteen hundred and seven, the board of railroad commissioners shall be abolished. All the powers and duties of such board conferred and imposed by any statute of this state shall thereupon be exercised and performed by the public service commissions.

Formerly § 80, renumbered by L. 1910, ch. 673.

§ 121. Commission of gas and electricity abolished; effect thereof. On and after July first, nineteen hundred and seven, the commission of gas and electricity shall be abolished. All the powers and duties of such commission conferred and imposed by any statute of this state shall be exercised and performed by the public service commissions.

Formerly § 81, renumbered by L. 1910, ch. 673.

§ 122. Inspector of gas meters abolished; effect thereof. On and after July first, nineteen hundred and seven, the offices of inspector and deputy inspectors of gas meters shall be abolished. All the powers and duties of such inspector conferred and imposed by any statute of this state shall be exercised and performed by

Article VI (Formerly Article 5), and the sections thereunder, were renumbered by L. 1910, ch 673.

the public service commissions. But any meter inspected, proved and sealed, by the said inspector of gas meters, prior to July first, nineteen hundred and seven, shall be deemed to have been inspected by the commission.

Formerly § 82, renumbered by L. 1910, ch. 673.

§ 123. Board of rapid transit railroad commissioners abolished; effect thereof. On and after July first, nineteen hundred and seven, the board of rapid transit railroad commissioners shall be abolished. All the powers and duties of such board conferred and imposed by any statute of this state shall thereupon be exercised and performed by the public service commission of the first district.

Formerly § 83, renumbered by L. 1910, ch. 673.

§ 124. Transfer of records. 1. The board of railroad commissioners, the commission of gas and electricity, and the inspector of gas meters, shall transfer and deliver to the public service commission of the second district all books, maps, papers and records of whatever description, in their possession on July first, nineteen hundred and seven; and the said commission is authorized to take possession of all such books, maps, papers and records.

2. The board of rapid transit railroad commissioners shall transfer and deliver to the public service commission of the first district all contracts, books, maps, plans, papers and records of whatever description, in their possession on July first, nineteen hundred and seven; and the said commission is authorized to take possession of all such contracts, books, maps, plans, papers and records. The said commission may also, at its pleasure, retain in its employment any person or persons then employed by the said board of rapid transit railroad commissioners, and all said persons shall be eligible for transfer and appointment to positions under the public service commission of the first district.

3. The public service commission of the second district may transfer to the public service commission of the first district any of the said books, maps, papers and records which relate to any corporation, person or matter within the jurisdiction of the public service commission of the first district.

Formerly § 84, renumbered by L. 1910, ch. 673.

§ 125. Pending actions and proceedings. This chapter shall not affect pending actions or proceedings, civil or criminal, brought by or against the board of railroad commissioners or the commission of gas and electricity, or the board of rapid transit railroad commissioners, but the same may be prosecuted or defended in the name of the public service commission, provided the subject-matter thereof is within the statutory jurisdiction of such commission. Any investigation, examination or proceeding undertaken, commenced or instituted by the said boards or commission or either of them prior to July first, nineteen hundred and seven, may be conducted and continued to a final determination by the proper public service commission in the same manner, under the same terms and conditions, and with the same effect as though such boards or commission had not been abolished.

Formerly § 85, renumbered by L. 1910, ch. 673.

§ 126. Construction. Wherever the terms board of railroad commissioners, or commission of gas and electricity or inspector of gas meters or board of rapid transit railroad commissioners occur in any law, contract or document or whenever in any law, contract or document reference is made to such boards, commission or inspector, such terms or reference shall be deemed to refer to and include the public service commissions as established by this chapter, so far as such law, contract or document pertains to matters which are within the jurisdiction of the said public service commissions.

Formerly § 86, renumbered by L. 1910, ch. 673.

§ 127. Repeal. Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed. All other acts and parts of acts otherwise in conflict with this act are hereby repealed.

Formerly § 87, renumbered by L. 1910, ch. 673.

SCHEDULE OF LAWS REPEALED

Laws of	Chapter	Section
1890	565	38, 104, 150–172
1890	566	62–64
1891	4	1–3
1892	534	All
1892	676	Part amending L. 1890, ch. 565, §§ 105, 162
1893	385	All
1894	452	All
1894	752	1–3
1895	972	All
1896	456	All
1897	486	All
1898	364	All
1899	732	All
1901	639	All
1902	373	All
1904	158	All
1905	728	All
1905	737	All
1907	429	All

RULES OF THE COMMISSION FOR FIRST DISTRICT

RULES OF PROCEDURE AND REGULATIONS GOVERNING MATTERS BEFORE THE PUBLIC SERVICE COMMISSION FOR THE FIRST DISTRICT.

Adopted July 29, 1910, as amended to January 1, 1915.

RULE I. SESSIONS OF THE COMMISSION.

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X. APPLICATION FOR PERMISSION AND APPROVAL OF THE COMMISSION TO THE CONSTRUCTION AND OPERATION OF EXTENSIONS OF STREET SURFACE RAILROADS.

XI. APPLICATION FOR PERMISSION AND APPROVAL OF THE COMMISSION UNDER SECTION 53 OR 68 OF THE ACT EXCEPT IN A CASE COVERED BY THE LAST RULE.

XII. APPLICATION UNDER SECTION 54 OR 70 OF THE ACT FOR APPROVAL OF ASSIGNMENT, TRANSFER OR LEASE OF FRANCHISE, WORKS OR SYSTEM.

XIII. APPLICATION UNDER SECTION 54 OR 70 OF THE ACT FOR AUTHORIZATION TO PURCHASE OR ACQUIRE STOCK.

XIV. APPLICATION UNDER SECTION 55 OR 69 OF THE ACT FOR APPROVAL TO THE ISSUANCE OF SECURITIES.

XV. APPLICATION FOR CONSENT TO DISCONTINUE A STATION.

XVI. APPLICATION FOR EXTENSION OF TIME TO FILE PERIODIC REPORTS.

XX. FORMS PRESCRIBED FOR USE.

1. Form of complaint against railroad or street railroad companies or other common carriers.
2. Form of order to satisfy or answer a complaint.
3. Form of notice of a hearing.
4. Form of acknowledgment by a company of receipt of an order of the Commission, as required by Section 23 of the Public Service Commissions Law.
5. Form of published notice of hearing.

RULE I. SESSIONS OF THE COMMISSION.

Public sessions of the Commission will be held on Tuesday and Friday of each week, unless otherwise ordered.

RULE II. SECRETARY TO FURNISH INFORMATION.

The Secretary to the Commission will, upon request, advise as to the form of petition, answer, or other papers necessary to be filed in any case, and furnish such information from the files of the Commission as will conduce to a full presentation of material facts.

RULE III. GENERAL MATTERS APPLICABLE TO ALL CASES.

1. Address of the Commission. All papers and communications should be addressed to "Public Service Commission, 154 Nassau Street, Borough of Manhattan, New York City."

2. Case Numbers and Titles. Each matter coming formally before the Commission will be known as a case and shall receive a number and a title, descriptive of the subject matter. Such number and title shall be used on all papers in the case.

3. Documents Filed with the Commission shall be printed or typewritten, and, so far as practicable, shall be upon paper 8x11 inches in size.

4. Service of Papers. Notices or other papers may be served personally or by mail as provided by Section 23 of the Public Service Commissions Law and by the Code of Civil Procedure, and when any party has appeared by attorney, service upon such attorney will be deemed proper service upon the party.

5. Witnesses and Subpoenas. Subpoenas requiring the attendance of witnesses for the purpose of taking testimony may, upon the application of any party, be signed and issued by any member of the Commission or by the Secretary.

Subpoenas for the production of books, papers or documents (unless directed to issue by the Commision upon its own motion) will only be issued, in the discretion of a Commissioner, upon application in writing.

6. Amendments. The Commission may, in its discretion, allow any complaint, answer, petition or other paper to be amended or corrected or omission to be supplied therein.

7. Orders. All orders made by the Commission will be filed in the office of the Commission and certified copies thereof shall be served upon the parties to be affected thereby.

RULE IV. HEARINGS AND REHEARINGS.

1. When Hearing Will Be Given. Except as determined otherwise in specific cases, the Commission will grant or fix a hearing in the following classes of cases:

(a) Where an order to satisfy a complaint or to make answer thereto has been made and the person or corporation complained against has not satisfied the cause of the complaint. (See Rule V.)

(b) Where a complaint against a gas or electric company has been made, as prescribed by Rule VI.

(c) Where application has been made for the approval, determination, consent, permission, certificate or authorization of the Commission, or for extension of time in which to file a periodic report. (See Rules VII–XVI.)

2. Notice of Hearing.

(a) Notice of the day and hour of a hearing shall be served upon all interested parties at least ten days before the date of hearing, unless the Commission prescribes a shorter notice. (For form see Rule XX [3].)

(b) Hearings, unless otherwise directed by the Commission, will be at the office of the Commission, in a room assigned by the Secretary.

3. Procedure at Hearings and Rehearings. At a hearing witnesses will be examined orally unless otherwise ordered by the Commissioner, or unless with the consent of the Commissioner the facts are agreed upon. Parties will be afforded all reasonable opportunity for presenting evidence and examining and cross-examining witnesses. No document offered in evidence at any hearing will be received or marked for identification unless either the original document and a copy of the same or two copies of the original document are first presented.

The complainant may establish the facts alleged, unless the same are admitted in the answer, or the Commission may investigate the facts relevant to the issue or the subject matter complained of. The person or corporation complained against must fully disclose its defense at the hearing, but in case of failure to answer the Commission will take such proof of the facts and make such order thereon as the case requires. (Rule IV, subdivision 3, as amended on April 26, 1912, effective May 1, 1912.)

4. Adjournments. Hearings may be adjourned from time to time by or at the direction of the Commission or any Commissioner.

5. Briefs. The Commission or any Commissioner will receive or may require the submission of briefs.

6. Rehearings. Applications for reopening a case after final submission, or for a rehearing after decision made by the Commission, must be in writing and must state specifically the grounds upon which the application is based, and fully the facts in support thereof. When any decision, order or requirement of the Commission is sought to be reversed, abrogated, changed or modified on account of facts and circumstances arising subsequent to the hearing or of consequences resulting from compliance with such decision, order or requirement which are claimed to justify a reconsideration of the case, the matters relied upon by the applicant must be fully set forth.

RULE V. COMPLAINTS AS TO COMMON CARRIERS UNDER SECTION 48 OF THE ACT.

1. Contents of a Complaint. A complaint must be by petition or complaint in writing, filed in duplicate, setting forth the facts claimed to constitute the thing or act done or omitted to be done in violation (1) of any provision of law or (2) of the terms and conditions of the franchise or charter of the company complained of or (3) of an order of the Commission. The petition or complaint must also contain allegations tending to show that the complainant is aggrieved by the acts or omissions complained of. The name of the person or corporation complained of should be stated in full and the address of the complainant, with the name and the address of his attorney or counsel, if any, must appear on the petition or complaint. (For form of such complaint see Rule XX [1].)

(a) Complaints regarding rates and charges shall not be joined with other complaints, nor shall wholly unrelated complaints be joined, nor except in the case of complaints regarding joint rates or through service shall two or more corporations be joined as defendants in one complaint without the consent of the Commission.

(b) No oral or unsigned complaint will be entertained or acted upon by the Commission.

(c) Where a complaint is submitted which is not in the form prescribed by this rule the Secretary may notify the party against whom the complaint is made of such complaint in order that the cause for complaint may be remedied without the necessity of the Commission taking formal action regarding same.

2. Order upon Complaint. The Commission may adopt an order, as to a complaint filed as herein prescribed, directed to the person or corporation complained against, directing that the matters complained of be satisfied or that the charges be answered in writing within ten days from the date of such order, but the Commission may, in a particular case, require the answer to be filed within a shorter time. (For form of such order see Rule XX [2].)

3. Answer to Complaint.

(a) The original answer must be filed with the Secretary of the Commission at its office, and a copy thereof at the same time served, personally or by mail, upon the complainant, who must forthwith notify the Secretary of its receipt. Notice of the service of such copy must be filed with the Secretary of the Commission by the person or corporation complained of.

(b) The answer must specifically admit or deny the material allegations of the petition or complaint and set forth the facts which will be relied upon as a defense.

(c) If the person or corporation complained of satisfies the matters or charges contained in the complaint, in whole or in part, a written statement shall be filed by the defendant with the Secretary of the Commission, showing the extent of the satisfaction accorded.

4. Hearing upon Complaint. Upon issue being joined or upon failure of defendants to answer or make satisfaction, the Commission may fix a date for a hearing. (See Rule IV and for form of notice of hearing see Rule XX [3].)

RULE VI. COMPLAINTS AS TO GAS AND ELECTRIC COMPANIES UNDER SECTION 71 OF THE ACT.

The form and contents of complaints made as provided in Section 71 shall be as follows:

(1) The complaint shall be directed to the Public Service Commission for the First District. It shall state the names of the corporations supplying gas or electricity for heat, light or power, either within the City of New York or within such subdivision thereof, either county, borough or ward, as the complainants may desire to include within the complaint.

(2) If the complaint be against gas companies, it shall state whether it is directed to (a) the illuminating power or (b) purity or (c) the pressure or (d) the price of gas; if against electrical companies, whether directed to (a) the efficiency of the electric incandescent lamp supply, or (b) the voltage of the current supplied for light, heat or power, or (c) the price of electricity sold and delivered. It shall specify the respects wherein the service is otherwise inadequate or the methods unreasonable, and if it is claimed that the price is excessive, unfair or unreasonable, the price actually charged by such companies should be set forth.

(3) The complaint, when made by customers or purchasers, shall state that each of the complainants is a customer or purchaser of either gas or electricity, as the case may be, from one or more of the said companies against whom the complaint is made.

(4) If the complaint relates to the price of either gas or electricity, it should state that the price is excessive, unjust or unreasonable and is disproportionate to the proper cost of manufacturing and delivering such gas or electricity in the locality mentioned.

(5) The complaint may also contain any other specifications of any illegal act on the part of said companies, or any violation of the charter or franchises of said companies or any of them, in respect of the manufacture, distribution, transmission or supply of gas or electricity, or in its methods of conducting its business, and should demand the relief which the complainant desires.

(6) The complaint must be signed by the Mayor or by not less than one hundred customers or purchasers or by an officer of a gas or electrical corporation in the City of New York, or in such lesser territory as is included in the complaint. Each complainant must add to his signature his place of residence, by street and number, if any.

(7) A single complaint shall not include both gas and electricity.

(8) Upon such complaint being filed an order for a hearing will be made returnable at such time as the Commission may direct. Such order may also include such other matters as the Commission may desire to include in the investigation or hearing. A certified copy of the order with a copy of the complaint shall be served on each corporation affected thereby, and the hearing shall proceed at the time and place designated or at such other time and place to which the Commission or the Commissioner presiding may adjourn the same. (See also Rule IV.)

RULE VII. GENERAL RULES AS TO APPLICATION TO THE COMMISSION BY COMPANIES.

1. All applications for the approval, determination, consent, permission, certificate or authorization of the Commission in cases where such approval, determination, consent, permission, certificate or authorization is required by law, shall be by petition, duly verified. Five copies of the petition shall also be filed. In all cases there must be annexed to the original petition certified or verified copies of the certificate of organization of every corporation directly affected by the proposed action, and certified copies of all such certificates, statements or records which modify, change or extend the purposes or powers of such corporations. When documents have already been filed with the Commission, the petitioner may, in lieu of filing additional copies, state in the petition such fact with the date of filing.

The petition must contain such further statements as are required by special provisions of law or by special rules governing the particular application and must show in detail compliance with all provisions of law as to such petition.

2. Upon the receipt of a petition required by this rule the same will be referred for examination. If it is found not to be correct in form, the Secretary will advise the applicant of the defects, who may correct the same. If the petition be found correct in form, the Commission will thereupon either make an order ex parte granting the application or will appoint a time and place for a public hearing. (See Rule IV.)

3. Where a hearing has been appointed the applicant may be required to publish in such papers and at such time as may be designated a notice of hearing to be known as "published notice of hearing" substantially in the form shown in Rule XX (5), and submitted for the approval of the Secretary to the Commission.

At or before the hearing the applicant must file with the Secretary to the Commission proof of due publication of such notice.

RULE VIII. FINANCIAL CONDITION DEFINED.

Wherever an applicant is required to set forth its financial condition, such financial condition shall be given so far as practicable in proper schedules annexed to and referred to and properly designated in the petition. Such schedules shall show the following:

(1) Amount and kinds of stock authorized.

(2) Amount and kinds of stock issued and outstanding.

(3) Terms of preference of all preferred stock.

(4) Brief description of each mortgage upon property of the applicant giving date of execution, name of mortgagor, name of mortgagee or trustee, amount of indebtedness authorized to be secured thereby and amount of indebtedness actually secured.

(5) Number and amount of bonds authorized and issued, giving name of company which issued and describing each class separately, giving date of issue, par value, rate of interest, date of maturity and how secured.

(6) Other indebtedness giving same by classes and describing security, if any. A brief statement showing devolution or assumption of any of the foregoing debts upon or by any person or corporation, if the original liability has been transferred.

(7) Amount of interest paid during previous fiscal year and rate thereof. If different rates were paid, amount paid at each rate.

(8) Rate and amount of dividends paid during previous five years.

(9) Detailed statement of earnings and expenditures for and balance sheet showing conditions at the close of last fiscal year, unless already filed with the Commission as part of the annual report.

RULE IX. APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND A NECESSITY UNDER SECTION 9 OF THE RAILROAD LAW.

When application is made for a certificate of public convenience and a necessity

1. The petition in addition to the requirements of Rule VII, must state:

(a) That a copy of the certificate of incorporation of the applicant has been published as required by Section 9 of the Railroad Law.

(b) That application is made within six months after the completion of such publication.

(c) The proposed route or routes, the method of construction and the motive power proposed to be employed on the route and the names of all railroads and street railroads with which the proposed road is likely to compete.

(d) The facts showing the proposed construction to be required by public convenience and necessity.

(e) The manner in which it is proposed to finance the proposed construction.

2. With the petition shall be filed:

(a) Proof of publication of the certificate of incorporation as required by Section 9 of the Railroad Law.

(b) Map showing the streets, avenues and all other places and property in which the road is to be constructed.

(c) Proof of payment of the organization tax by receipt of the State Treasurer.

3. Notice of hearing in the form prescribed in Rule XX (3) shall be served by the applicant, if required by the Commission, upon railroad corporations and street railroad corporations with which the proposed construction is likely to compete at least five days before the hearing and at or before the hearing proofs of the service of such notices shall be filed with the Secretary.

RULE X. APPLICATION FOR PERMISSION AND APPROVAL OF THE COMMISSION UNDER SECTION 53 OF THE PUBLIC SERVICE COMMISSIONS LAW TO THE CONSTRUCTION AND OPERATION OF EXTENSIONS OF STREET SURFACE RAILROADS.

1. When application is made for the permission and approval to the construction and operation of extensions of a street railroad, in addition to the matters required by Rule VII, the petition shall:

(a) State the route of the proposed extension and the name of each railroad and street railroad corporation with which the proposed construction is likely to compete.

(b) State the facts showing that such construction and operation is necessary or convenient for the public service.

(c) State the manner in which it is proposed to finance the construction of the extension and give the financial condition of the applicant as defined in Rule VIII.

(d) State the motive power proposed to be employed on the route, and describe the method of construction on the proposed route.

2. With the petition there shall be filed:

(a) A certified copy of the certificate of Extension of Route filed in the office of the Secretary of State with the date of the filing thereof.

(b) A certified copy of the written application for the consent of the local authorities to the construction and operation of such extension, and the consent of the local authorities granted thereon.

(c) An affidavit of an officer of the company stating whether the consent of the abutting property owners has been obtained and recorded and if recorded the time and place of record, or a certified copy of the report of the Commission appointed by the Appellate Division of the Supreme Court pursuant to Section 174 of the Railroad Law and the order of the Court thereon, if such report and order have been made, and if such consent or report and order have not been obtained or made the petition shall contain a statement to that effect.

(d) A map of the said extension as proposed showing the streets, avenues and all other places and property in or upon which it is proposed to construct such extension.

3. The published notice of application and of hearing shall set forth the names and descriptions of the streets, roads, places and property upon which it is proposed to construct and operate such extension.

4. At the hearing proof must be made that the construction and operation of such extension are necessary or convenient for the public service, and proof must be made of the bona fides of the enterprise and of the financial ability of the applicant to build the extension.

RULE XI. APPLICATION FOR PERMISSION AND APPROVAL OF THE COMMISSION UNDER SECTION 53 OR 68 OF THE ACT EXCEPT IN A CASE COVERED BY RULE X.

When application is made for permission and approval under Section 53 or 68 of the Public Service Commission Law, except as governed by Rule X,

1. The petition in addition to the requirements of Rule VII, shall state:

(a) The facts showing compliance with all provisions of law respecting the organization of the applicant and its right to begin construction or exercise the franchise or right for which permission and approval are sought, and a reference to each and every document filed with the Commission affecting the same.

(b) The financial condition of the applicant as defined in Rule VIII and the proposed method of financing the proposed construction or operation.

(c) If consents of property owners are required to be obtained, whether such consents have been obtained and recorded and if recorded the time and place of record, or a certified copy of the report of the Commission appointed by the Appellate Division of the Supreme Court pursuant to Section 174 of the Railroad Law and the order of the Court thereon, if any.

(d) Whether the applicant, if a railroad corporation or street railroad corporation, has prior to June 6, 1907, received any certificate of public convenience and a necessity for any purpose and if so, a certified copy of the same should be annexed.

(e) If the application is for permission to exercise a franchise or right not theretofore lawfully exercised, the reason why such franchise or right has not been theretofore exercised.

(f) The facts showing that the construction or the exercise of the franchise or privilege for which the permission and approval of the Commission are sought is necessary or convenient for the public service.

2. With the petition shall be filed all documents, so far as pertinent to the application, enumerated in Rule X, Subdivision 2, a, b, c, d.

3. At the hearing proof must be made by the applicant of full compliance with all provisions of law respecting the organization of the applicant and its right to begin the construction or extension proposed or to exercise the franchise or privilege for which the permission and approval of the Commission are sought: and that such construction or the exercise of such franchise or right is necessary or convenient for the public service; and in all cases proof must be made of the bona fides of the enterprise and of the financial ability of the applicant to make the construction or to operate or use the franchise or right in such a way as to benefit the public service.

RULE XII. APPLICATION UNDER SECTION 54 OR 70 OF THE ACT FOR APPROVAL OF ASSIGNMENT, TRANSFER OR LEASE OF FRANCHISE, WORKS OR SYSTEM.

When application is made for approval by the Commission of an assignment, transfer or lease of the franchise, works or system of an applicant:

1. The petition must be made by all the parties to the proposed transaction and in addition to the requirements of Rule VII must state:

(a) The financial condition of each applicant as defined in Rule VIII.

(b) In detail the reasons upon the part of each applicant for making the proposed assignment, transfer, lease, contract or agreement and all the facts warranting the same and showing that it is for the benefit of the public service.

2. There must be annexed to the petition copies of the proposed assignment, contract, lease or agreement, and if any prior agreements have been made between the parties relating to the same subject matter copies of such agreements must be annexed to the petition or referred to therein as already on file with the Commission.

RULE XIII. APPLICATION UNDER SECTION 54 OR 70 OF THE ACT FOR AUTHORIZATION TO PURCHASE OR ACQUIRE STOCK.

When an application is made for authorization to purchase or acquire the stock of a corporation,

1. The petition must be made by the corporation proposing to acquire the stock and, in addition to the requirements of Rule VII, must set forth:

(a) The financial condition of the applicant and of the corporation whose stock is sought to be acquired or held, as defined in Rule VIII.

(b) The reasons why the applicant desires to make the purchase and the amount of such stock already owned or held by applicant.

(c) Price proposed to be paid for the stock, the names of the present owners and the terms of payment with the market value thereof, with highest and lowest price during the period of at least one year prior to the application, and dividends, if any, paid for a period of five years.

RULE XIV. APPLICATION UNDER SECTION 55 OR 69 OF THE ACT FOR APPROVAL TO THE ISSUANCE OF SECURITIES.

When application is made for the consent of the Commission to the issuance of securities,

1. The petition, in addition to the requirements of Rule VII, shall set forth:

(a) The financial condition of the applicant as defined in Rule VIII, and a description of the road, plant or system and equipment of the applicant, and a statement of the cost of existing property and of the amount of any of its stock held by other corporations and their names, and the kinds of stock held by each.

(b) A statement of the amount and kind of stock which the corporation desires to issue, and, if preferred, the nature and extent of the preference, a statement of the amount of bonds, notes, and other evidences of indebtedness which the corporation desires to issue, the terms, the rate of interest and whether and how to be secured, and if to be secured by a mortgage or pledge, the terms thereof.

(c) A statement of the use to which the capital to be secured by the issue of such stock, bonds, notes or other evidence of indebtedness is to be put, with a definite statement of how much is to be used severally for the acquisition of property, the construction, completion, extension or improvement of facilities, the improvement of its service, the maintenance of its service, the discharge or refunding of its obligations, and the reimbursement of moneys actually expended from income or from any other moneys in the treasury as provided by Sections 55 and 69.

(d) A statement in detail of the property which is to be acquired with its value, a detailed description of the construction, completion, extension or improvement of facilities set forth in such a manner that an estimate may be made of its cost, a statement of the character of the improvement of its service proposed, and of the reasons why the service should be maintained from its capital; if it is proposed to discharge or refund its obligations or to reimburse moneys actually expended, a statement of the nature and description of such obligations and expenditures, including the par value of the obligations and the amount for which they were actually sold and the application of the proceeds and of the moneys expended, showing when, to whom and for what paid or applied.

(e) A statement showing whether any contracts have been made for the acquisition of such property, or for such construction, completion, extension or improvement of facilities, or for the reimbursement of expenditures, or for the disposition of any of the stock, bonds, notes or evidence of indebtedness which it is proposed to issue or the avails thereof, and if any such contracts have been made, copies thereof should be annexed to the petition.

(f) A statement showing whether any of the outstanding stock or bonds or other obligations of the company have been issued or used in capitalizing any franchise or any right to own, operate or enjoy any franchise or any contract for consolidation or lease, and if so, the amount thereof and the franchise, right, contract or lease so capitalized.

(g) If the stock is to be issued by a corporation formed by the merger or consolidation of two or more other corporations, the petition shall contain a complete statement of the financial condition of the corporations so to be merged or consolidated of the kind required by subdivision (a) hereinabove set forth, and of their capital stock at the par value thereof.

(h) The petition shall contain a statement of other facts pertinent to the application.

2. With the petition shall be filed:

(a) If application is in regard to an increase or reduction of capital stock, a certificate of the proceedings at the meeting of stockholders or unanimous consent of the stockholders as required by the Stock Corporations Law.

(b) If the application is in regard to a mortgage, proof of the consent of the stockholders under the Stock Corporation Law and the Railroad Law.

3. The order granting an application will:

(a) Prescribe the purposes for which securities or obligations authorized or the proceeds thereof shall be used.

(b) Direct the applicant to report under oath the sale or sales of the securities or obligations authorized, the terms and conditions of sale and the amounts realized therefrom.

(c) Require the applicant to make a verified report at least every six months showing in detail the use and application by it of the moneys so realized until such moneys shall have been fully expended.

RULE XV. APPLICATION FOR CONSENT TO DISCONTINUE A STATION.

On an application for the consent of the Commission to discontinue a station,

1. The petition shall, in addition to the matters required by Rule VII, state:

(a) The facts upon which the applicant relies for the consent.

(b) Whether the station is situated on a line operated under lease or other agreement.

(c) Whether there is any agreement with the lessor or predecessor as to the maintenance of the station.

(d) Whether there is any agreement between the applicant or its lessor or predecessor and any person or persons, association or corporation or municipality, with reference to the maintenance of the station at the point in question.

(e) Whether any application as to the station in question has heretofore been made to the Board of Railroad Commissioners or to the Public Service Commission for the First District.

2. With the petition should be filed certified copies of any such agreements as are not already on file with the Commission.

RULE XVI. APPLICATION FOR EXTENSION OF TIME TO FILE ANNUAL OR PERIODIC REPORTS OR COMPLY WITH AN ORDER OF THE COMMISSION.

When an application is made for extension of time within which to make and file any annual or periodic report with the Commission or to comply with an order of the Commission,

1. The petition, filed before the expiration of the period prescribed, shall be set forth in detail:

(a) What, if any, effort has been made by the applicant to prepare such report or to comply with the order:

(b) Any facts tending to show why the said report cannot be made and filed or the order complied with within the time prescribed;

(c) Any other facts which may make an extension of time necessary or proper;

(d) The further period of time deemed necessary by the applicant within which to make and file such report or to comply with the order.

2. The Commission may direct a hearing upon said petition and in that event the applicant shall attend before the Commissioner presiding and produce such witnesses and documents in the matter as the Commission shall require.

Rule XX. Forms Prescribed for Use.

Forms of papers shall be substantially as follows:

1. Form of Complaint against Railroad or Street Railroad Companies or Other Common Carriers.

To the Public Service Commission for the First District:

The complaint (or petition) of (name and address of complainant) respectfully shows:

That (here state the name of person or corporation complained of) (and set forth the facts which complainant claims constitute a cause of complaint, with a statement showing how the complainant is aggrieved thereby).

2. Wherefore complainant asks (here state the relief to which complainant believes he is entitled).

(Date.)

.....
Complainant's name and address.

.....
Name and address of attorney, if any.

2. Form of Order to Satisfy or Answer a Complaint.

TITLE.	CASE NO.....
SEE RULE III (2).	COMPLAINT ORDER.

The complaint herein having been received and filed:

Ordered: That the matter therein complained of be satisfied or that the charges be answered in writing by the said company within ten days from the service upon it of a certified copy of this order and a copy of the complaint.

3. Form of Notice of a Hearing.

TITLE. SEE RULE III (2).	CASE NO..... NOTICE OF HEARING.

Please Take Notice that the Public Service Commission for the First District will give a hearing in the above entitled matter on (day of week) (day of month) at o'clock M., at the offices of the Commission, at No. 154 Nassau Street, Borough of Manhattan, City of New York, or at such other time and place to which the same may be adjourned.

By the Commission,

.....,
Secretary.

To.....

4. Form of Acknowledgment by a Company of Receipt of an Order of the Commission, as Required by Section 23 of the Public Service Commissions Law.

TITLE. SEE RULE III (2).	CASE NO..... ACKNOWLEDGMENT OF RECEIPT OF ORDER.

PUBLIC SERVICE COMMISSION:

You are hereby notified that a certified copy of an order in the above entitled matter adopted by the Public Service Commission for the First District on (date) was received by the Company on the day of , 19 .

Dated, , 19 .

(Signed) .....
Name and title of officer as required by Section 23.

CITY OF NEW YORK, County of } ss.:

On this day of , 19 , before me personally came , to me known, and known to me to be the (title of officer) of the Company and the person who signed the foregoing notice, and he duly acknowledged to me that he signed the same.

.....,
Commissioner of Deeds
or
Notary Public.

5. Form of Published Notice of Hearing (See Rule VII [2]).

TITLE. SEE RULE III (2).	CASE NO. ..... PUBLISHED NOTICE OF HEARING.

Notice is hereby given that the application of (name of applicant in full) for the (approval, determination, consent, permission, certificate, or authori-

zation) of the Public Service Commission for the First District to (here state the nature of the consent asked for) will be heard by said Commission at its office, 154 Nassau Street, Borough of Manhattan, New York City, on the day of at o'clock in the noon.

Dated

(Name of applicant.)

6. Form of Application for Approval of Expenditures Out of the Proceeds of the Authorized Sale of Stock, Bonds, Notes or Similar Evidences of Indebtedness.

TITLE. SEE RULE III (2).	CASE NO. .....

PUBLIC SERVICE COMMISSION, FIRST DISTRICT:

APPLICATION is hereby made by the ..... Company for the approval and consent of the Commission to the expenditure of the sum of $..... from the proceeds of the sale of ....., par or face value, of the (stock), (bonds), (notes, etc.), issued by the said company in accordance with the provisions of the Order of the Public Service Commission for the First District, dated ....., 19.., the said expenditure to be for the purposes specified in the statement annexed hereto (marked Schedule "A") and made a part of this application.

The undersigned hereby certifies

(a) that the amount to be expended for each and every item in the statement hereunto annexed (Schedule "A") represents the actual and reasonable charge for the property received or service or labor performed;

(b) that no such item is in whole or in part directly or indirectly for the replacement, renewal or repair of any part of the fixed capital of the company as such fixed capital is defined in the accounting rules of the Commission;

(c) that no such item is in whole or in part directly or indirectly in substitution of any lost, wasted or expired capital;

(d) that no such item is properly chargeable to income, and

(e) that the proposed expenditure represents a real increase in the fixed capital of the company over and above all proper allowances for expired capital of every kind.

.....Company.

By.....,

.....

(Schedule "A" Annexed.)

(New subdivision added and effective May 21, 1912.)

Amendment of Rules of Procedure and Regulations Governing Matters before the Commission — Standard Clauses — Additional Rules — Repeal of Rule XIV, Subdivision 3.

[The Commission on October 31, 1911, upon the report and recommendation of Commissioner Maltbie, adopted the following resolution prescribing standard forms of clauses to govern applications relative to the issuance of stock, bonds, notes and other evidences of indebtedness, including the approval of mortgages:

RESOLVED: That the said proposed standard clauses and rules as set out in the report be approved and adopted as amendments to the Rules of Procedure and Regulations governing matters before the Commission; that subdivision 3 of Rule XIV of the Rules of Procedure and Regulations, as adopted on July 29, 1910, be, and the same is, hereby repealed, as of this date; that the said additional rules as set forth in the report, be subdivisions 1, 2, 3, 4 and 5 of Rule XXI, and that the said standard clauses be subdivision 6 of Rule XXI, all as more fully shown in the said report.

In recommending the adoption of these standard forms and the additional rules relative thereto, the report by Commissioner Maltbie said:

"Since the enactment of the Public Service Commissions Law in 1907, this Commission has received and passed upon a considerable number of applications relating to the issuance of stocks, bonds, notes and other evidences of indebtedness and the approval of mortgages. The orders issued in the various cases have covered many phases of the subject. Numerous suggestions have been made from time to time as to the form of these orders and as to conditions which should be applied to different cases. Gradually the practice of the Commission has crystallized until it is now possible to recommend the adoption of certain standard clauses and of rules relating thereto. Naturally, each case presents its peculiar set of facts and the order should be drawn with these in mind. The clauses recommended for adoption allow such latitude but provide for the application of the same general principles to all applications in the same class."]

Rule XXI. Standard Clauses for Orders Approving Issuance of Stock, Bonds and Other Obligations.

1. Orders for Approval of Stock. All orders submitted to the Commission for the approval of stock shall contain standard clauses 1, 2, 10, 11, 12 and 14. (See subdiv. 6, Rule XXI.)

2. Orders for Approval of Mortgage. All orders submitted to the Commission for the approval of a mortgage shall contain standard clauses 3, 13 and 14. (See subdiv. 6, Rule XXI.)

3. Orders for Approval of Bonds. All orders submitted to the Commission for the approval of bonds, notes or other evidences of indebtedness shall contain standard clauses 4, 5 or 5-a, 6, 8 or 9, 10, 11, 12 and 14. (See subdiv. 6, Rule XXI.)

4. Orders for Public Sale of Securities. Every order submitted to the Commission for approval which provides for the public sale of securities shall contain clause 7. (See subdiv. 6, Rule XXI.)

5. Compliance with Rules. The Secretary shall advise the Commission before the adoption of an order approving a mortgage or the issuance of stock, bonds, notes or other evidences of indebtedness, that the above rules have been complied with.

6. Forms Prescribed by Above Subdivisions of Rule XXI.

CLAUSE 1. CERTIFICATE OF NECESSITY — STOCK.

Section . Application having been made to the Public Service Commission for the First District by .....
Company under provisions of the [Railroad Law] [Public Service Commissions Law] for the consent of the Commission to the issuance by said company of ..... capital stock to the amount of ..... dollars ($), par value, and a hearing having been duly held upon said application before

the Commission, Honorable ..... presiding; and it appearing to the Commission that the authorized capital stock of the said ..... Company has been duly increased from ..... dollars ($) to ..... dollars ($) of which .....dollars ($), par value, have been issued and are outstanding; and it being now the opinion of the Commission:

(1) That the money to be procured by a further issue of stock is reasonably required for [acquisition of property], [construction, completion, extension or improvement of its facilities, plant or distributing system], [discharge or lawful refunding of its obligations] or [reimbursement of moneys actually expended from income or from other moneys in the treasury of the corporation not secured by or obtained from the issue of stocks, bonds, notes, or other evidence of indebtedness of such corporation, for the [[acquisition of property, construction, completion, extension or improvement of its facilities, plant or distributing system or discharge or lawful refunding of its obligations]]], and particularly for the purposes which are hereinafter stated in this order, and

(2) That said purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

CLAUSE 2. AUTHORITY TO ISSUE — STOCK.

Section . It is ORDERED, that the ..... Company be and hereby is authorized to issue its ..... stock to the amount of ..... dollars ($), par value; that all the stock hereby authorized shall be ..... stock of said company to be issued for money .....; and that the proceeds thereof shall be applied only to the following purposes, that is to say:

(1) For acquisition of property described as follows:
..... $

(2) For acquisition of property to replace property of the company, the property so acquired being described as follows:
..... $

(3) For maintenance of service..... $

(4) For discharge or refunding of obligations of the company incurred for:

(a) Acquisition of property..... $

(b) Construction, completion, extension or improvement of its facilities, plant or distributing system.... $

(c) Maintenance of service..... $

(d) Replacement of property of the company..... $

(5) For reimbursement of moneys expended from income or such other moneys in the treasury for:

(a) Acquisition of property..... $

(b) Construction, completion, extension or improvement of its facilities, plant or distributing system.... $

(c) Discharge of its obligations..... $

Total ..... $

CLAUSE 3. APPROVAL OF MORTGAGE.

Section . Application having been made to the Public Service Commission for the First District by ..... Company under provisions of the [Railroad Law] [Public Service Commissions Law] for the consent of the Commission to the execution and issuance by said company of a mortgage to ..... as trustee, and a hearing having been duly held upon said application before the Commission, Honorable ..... presiding; and it appearing to the Commission that the owners of capital stock of said ..... Company to an amount equal to that required by the statute have consented to the issuance of said mortgage:

Section . It is ORDERED that the Public Service Commission for the First District does hereby consent to the issuance and execution by said ..... Company unto said ....., as trustee, of a ..... mortgage, said mortgage to be dated as of the ..... day of ....., 19.., to secure an issue of ..... dollars ($) of bonds of said ..... Company, said bonds to be dated as of the ..... day of ....., 19.., and to be payable on the ..... day of ....., 19.., redeemable at ..... ( ) per cent. of the par value thereof and accrued interest, and the said bonds to bear interest at ..... ( ) per cent. per annum, payable ..... annually upon the terms and conditions in said mortgage set forth and contained. The form of such mortgage submitted by said ..... Company to the Commission is hereby approved and ordered filed and properly identified by rereference thereon to the resolution under authority of which this order is issued. Said company, however, shall have no right or authority to issue any bonds pursuant to the terms of said mortgage except as hereafter authorized by the Commission.

CLAUSE 4. CERTIFICATE OF NECESSITY — BONDS, ETC.

Section . Application having been made to the Public Service Commission for the First District by ..... Company under provisions of the [Railroad Law] [Public Service Commissions Law] for the consent of the Commission to the issuance by said company of [bonds] [notes] [or other evidence of indebtedness] to the amount of ..... dollars ($), face value, said [bonds] [notes, etc.] to be payable on the ..... day of ..... 19..., and to bear interest at .....( ) per cent. per annum, payable ..... annually and secured by a ..... mortgage upon all the property of the company; and a hearing having been duly held upon said application before the Commission, Honorable ..... presiding; and it being now the opinion of the Commission:

(1) That the money to be procured by the issuance of said [bonds] [notes] [or other evidence of indebtedness] of the said ..... Company to the amount of ..... dollars ($) face value, payable at a period of more than twelve months after the date thereof, is necessary to and reasonably required by said company for the [acquisition of property], [construction, completion, extension or improvement of its facilities, plant or distributing system], [improvement or maintenance of its service], [discharge or lawful refunding of its obligations] or [reimbursement of moneys actually expended from income or from other moneys in the treasury of the corporation not secured by or obtained from the issue of stocks, bonds, notes or other evidence of indebtedness of such corporation, for the [[acquisition of property, construction, completion, extension or improvement of its facilities, plant or distributing system or discharge or lawful refunding of its

obligations]]], and particularly for the purposes which are hereinafter stated in this order; and

(2) That, except as to the following specified amounts of said [bonds], [notes], [or other evidence of indebtedness] authorized to be issued hereunder to procure money for the purposes following to wit:

$....., or so much thereof as may be necessary, to pay expenses of sale and make up discount;

$..... for maintenance of service;

$..... for acquisition of property to replace property of the company;

$....., or so much thereof as in the opinion of the Commission may be necessary, to discharge or refund obligations of the company incurred for [maintenance of service] [acquisition of property to replace property of the company],

said purposes are not in whole or in part reasonably chargeable to operating expenses or to income;

CLAUSE 5. AUTHORITY TO ISSUE BONDS, ETC.

Section . It is ORDERED, that the Public Service Commission for the First District does hereby authorize the issue by the said ..... Company of ..... dollars ($) face value of principal of [bonds] [notes] [or other evidence of indebtedness] of said company, maturing the ..... day of ....., 19..., redeemable at any time after the ..... day of ....., 19...; at ..... ( ) per cent. of the par or face value thereof besides accrued interest, and to bear interest at ..... ( ) per cent. per annum, payable ..... annually under and in pursuance of the terms of the mortgage hereby approved, to be made and executed by the said ..... Company to ....., as trustee.

CLAUSE 5a. AUTHORITY TO ISSUE BONDS, ETC.

Section . It is ORDERED, that the Public Service Commission for the First District does hereby authorize the issue by the said ..... Company of ..... dollars ($) face value of principal of [bonds] [notes, etc.] of said company, maturing the ..... day of ....., 19..., redeemable at any time after the ..... day of ....., 19..., at ..... ( ) per cent. of the par or face value thereof besides accrued interest and to bear interest at ..... ( ) per cent. per annum, payable ..... annually, under and in pursuance of the terms of the mortgage heretofore and on ..... day of ....., 191.., made and executed by the said ..... Company to the ....., as trustee.

CLAUSE 6. PURPOSES OF ISSUE.

Section . It is ORDERED, that said issue of [stock] [bonds] [notes, etc.] is authorized upon the conditions following and not otherwise, to wit:

First: That the said ..... Company shall sell the said [bonds] [notes, etc.] hereby authorized so as to net the said company not less than ..... ( ) per cent. of the par value of the principal thereof besides interest accrued thereon, and that the proceeds thereof shall be applied only to the following purposes, that is to say:

(1) For acquisition of property described as follows:

..... $

(2) For acquisition of property to replace property of the company, the property so acquired being described as follows:

..... $

(3) For maintenance of service..... $

(4) For discharge or refunding of obligations of the company incurred for:

(a) Acquisition of property..... $

(b) Construction, completion, extension or improvement of its facilities, plant or distributing system ..... $

(c) Maintenance of service..... $

(d) Replacement of property of the company..... $

(5) For reimbursement of moneys expended from income or such other moneys in the treasury for:

(a) Acquisition of property..... $

(b) Construction, completion, extension or improvement of its facilities, plant or distributing system.... $

(c) Discharge of its obligations..... $

(6) For expenses of sale of bonds hereby authorized and to make up the discount or deficiency, if any, in the amount realized from the sale to net not less than ..... ( ) per cent. of par of the bonds sold for the purposes specified in subdivisions ..... ( ) and ..... ( ) of Section ..... ( ) and to be applied pro rata for the purposes therein stated, not exceeding the sum of..... $

Total ..... $

CLAUSE 7. PUBLIC SALE OF SECURITIES.

Second: That no [bonds] [notes, etc.] authorized hereunder shall be sold by the company for less than ..... ( ) per cent. of par with interest accrued thereon, unless the same shall be first offered to public subscription as herein provided. Whenever the company shall desire to sell [bonds] [notes, etc.] issued hereunder except for not less than ..... ( ) per cent. of par and accrued interest, the treasurer of the company shall invite proposals for the purchase of such [bonds] [notes, etc.] by public advertisement for not less than once a week for four successive weeks in at least four daily newspapers published in the City of New York and shall award the same to the highest bidder or bidders therefor. The said proposals shall only be publicly opened by the treasurer of the company and in the presence of the Public Service Commissioners for the First District or such of them as shall attend at the time and place specified in such public advertisement. It shall be a condition of said sale (and the advertisement calling for proposals therefor shall so declare) that any bidder may bid for all or none of said bonds at one price, or for all or any portion at one price, or for portions at different prices, and any bidder who shall bid for a portion of said [bonds] [notes, etc.] may be required to accept a part of the portion bid for by him at the same rate as may be specified in his bid, and any bid which conflicts with this condition may be rejected; and if the board of directors deem it to be in the interest of the company so to do, they may award the [bonds] [notes, etc.] to the bidder offering the highest

price for all or a number of the said [bonds] [notes, etc.], and provided also that if the board of directors deem it to be in the interest of the company they may reject all bids. The board of directors may prescribe such other conditions incident to and providing for the proposal for the purchase of [bonds] [notes, etc.] as it may see fit.

CLAUSE 8. SINKING FUND AND PAYMENTS.

Third: That to provide for ..... said ..... Company shall establish and maintain a cumulative sinking fund, and that for said purpose said company shall pay in cash into said fund out of revenue at least ..... dollars ($), beginning on the ..... day of ....., 19.., and on the ..... day of ..... in each and every year thereafter, and continuing until the ..... day of ....., 19.., or until said fund with accumulations shall have aggregated ..... dollars ($). Said company shall use the cash funds in said sinking fund for the acquisition, at the authorized price of issue, of bonds issued by said company directly to said fund. Said company shall, if there are cash funds in said sinking fund not either used or required for the purchase of bonds, as hereinbefore provided, use such funds for the purchase of bonds in the following manner: Between ..... and ..... of each year said company shall cause an advertisement to be inserted in at least two newspapers of general circulation published in the Borough of Manhattan, City of New York, once in each week for four successive weeks, that the company will purchase upon ..... for the sinking fund to the extent of the cash sinking fund in its hands, bonds of said company then outstanding, at the lowest price for which the same shall be offered, not exceeding ..... ( ) per cent. of the par value thereof, besides interest accrued thereon. Upon ..... said company shall apply the cash in sinking fund then in its hands to the purchase of bonds of said company with unmatured coupons attached tendered to it as aforesaid at not exceeding ..... ( ) per cent. of the face value thereof, besides the interest accrued thereon, giving preference in said purchases to the bonds which shall be offered at the lowest price; and in case bonds shall be offered by two or more holders at the same price, to an amount in the aggregate exceeding the cash in sinking fund applicable thereto, then giving preference to such bonds in the order of the date of the reception by said company of the offer to sell the same. If there are any cash funds in said sinking fund not used or required for the acquisition of bonds, as hereinbefore provided, said company may invest said funds or any portion thereof in such manner and under such conditions as may be approved by the Public Service Commission for the First District. Any cash funds remaining in the sinking fund after application as hereinbefore provided shall be deposited in bank in a separate fund. All bonds and coupons acquired for the sinking fund shall be stamped as irrevocably belonging to the sinking fund and shall not again be issued. Said coupons shall be detached when and as said coupons become due and payable and shall be delivered to the treasurer of said company as evidence that the respective amounts have been paid into the said sinking fund, and said company shall pay into said sinking fund the amounts indicated by said coupons when and as they become due and payable.

CLAUSE 9. AMORTIZATION FUND.

Fourth: That all discounts, commissions and expenses in connection with the approval, issuance and sale of the said [bonds] [notes, etc.] authorized

to be issued under this order not to exceed ..... dollars ($) shall be amortized out of the income of the company before the ..... day of ....., 19.., by the payment of [a monthly] [an annual] installment, so long as may be necessary, of an amount not less than ....., such [monthly] [annual] installment to begin .....

CLAUSE 10. ACCOUNTS, REPORTS AND AUDIT.

Fifth: That said company shall keep separate, true and accurate accounts showing the receipt and application in detail of the proceeds of the sale or disposal of the [stock] [bonds] [notes, etc.] hereby authorized to be issued and on or before the tenth day of each month the company shall make verified reports to the Commission stating the sale or sales of said [stock] [bonds] [notes, etc.] during the previous month, the terms and conditions of sale, the moneys realized therefrom, and the use and application of such moneys; and said accounts, vouchers and records shall be open to audit and may be audited from time to time by accountants and examiners designated for such purpose by the Commission.

CLAUSE 11. WITHDRAWAL OF FUNDS ON APPROVAL.

Sixth: That none of the proceeds of the aforementioned [stocks], [bonds], [notes, etc.] hereby authorized for the purposes specified in subdivision ..... of paragraph ..... of section ..... of this order, other than the receipts on account of accrued interest, shall be expended by the said company for the purposes specified therein until a properly itemized bill for each proposed expenditure shall have been submitted to the Commission by the company with the certificate of one of its officers that such expenditure represents a real increase in its fixed capital as defined in the accounting rules of the Commission and not a replacement of any part of such fixed capital or a substitution for wasted capital or other loss properly chargeable to income, and until such bill shall have been approved by the Commission.

CLAUSE 12. LIMIT OF AUTHORITY.

Seventh: That the authority hereby given to issue such [stock] [bonds] [notes, etc.] shall apply only to [stock] [bonds] [notes, etc.] issued by the said company on or before the [thirtieth day of June] [thirty-first day of December], 19...

CLAUSE 13. FILING OF MORTGAGE.

Eighth: That a duplicate original of the mortgage consented to and authorized as aforesaid upon execution thereof be filed by the petitioner with the Secretary of this Commission.

CLAUSE 14. ACCEPTANCE OF ORDERS.

Section . It is ORDERED, that this order take effect on the ..... day of ..... 19... and except as provided in the ..... paragraph of section ..... limiting the duration of the authority to issue such [stock] [bonds] [notes, etc.] herein granted, continue in force until otherwise ordered by the Commission, and that within ten days after service upon it of a copy of this order said company notify the Commission whether the terms of this order are accepted and will be obeyed.

RULES OF THE COMMISSION FOR THE SECOND DISTRICT.

Rules of practice before the Public Service Commission, second district, State of New York, adopted and prescribed by the Commission, pursuant to section 20 of the Public Service Commissions Law:

(As amended November 25, 1914.)

RULE A.

All complaints and petitions which may be presented to a Commissioner shall be immediately transmitted to the Secretary of the Commission. The Secretary shall daily furnish each Commissioner with an abstract of all complaints and petitions received during the preceding twenty-four hours.

RULE 1. MEETINGS OF THE COMMISSION.

1. The Commission shall meet for executive conference at its assembly room in Albany at 10 o'clock a. m. on Tuesday and Wednesday of each week, excepting that for the months of July and August the time of such meetings may be otherwise appointed.

2. The Commission shall meet in executive session at its assembly room in Albany at 10:30 a. m. on Tuesday and Wednesday of each week, excepting that for the months of July and August the time of such meetings may be otherwise appointed. The Secretary of the Commission shall attend all executive sessions unless prevented by other official duties; in his absence a secretary pro tem of the session shall be designated by the Chairman.

3. General sessions of the Commission for hearings will be held at such times and places as may be fixed by the Secretary under instructions from the Commission. Special sessions for hearings by a Commissioner will be held at such time and place as may be fixed by the Secretary acting under instructions from such Commissioner. Hearings on capitalization matters will be held in Albany except when otherwise ordered.

4. A case will not be voted upon in executive session unless a syllabus of the proposed decision shall have been placed on the desk of each Commissioner at least two days in advance of such executive session, or unless the gist of such proposed decision shall have been explained at a previous session. A capitalization matter will not be finally acted upon until three days after a copy of the proposed decision or syllabus thereof shall have been placed on the desk of each Commissioner. Nothing in this Rule shall prevent the Commission from at any time disposing of a case by unanimous consent, such action to be entered in the minutes of the executive session at which it is taken.

RULE 2. COMPLAINTS.

A particular form of complaint is not required. The name of the corporation complained against must be stated in full; and the full name and post-office address of the complainant, with the full name and address of his attorney or counsel if any, must be given. The act or omission complained of, together with the facts and conditions generally relating thereto, must be stated with precision, and if such act or omission is claimed to be a violation of any statute, the latter should be cited specifically. A complaint need not be verified.

RULE 3. COMPLAINTS UNDER SECTION 48, SUBDIVISION 2, OF THE PUBLIC SERVICE COMMISSIONS LAW.

Upon the presentation of a complaint the charges in which are of such a nature as to admit of satisfaction under the provisions of subdivision 2, section 48 of the Public Service Commissions Law, an order will be made and served with a copy of the complaint on the person or corporation complained against, requiring that the matters complained of be satisfied, or that the charges be answered in writing within twenty days from the day of the service of the order. A shorter time for answer may be specified.

RULE 4. ANSWERS TO COMPLAINTS UNDER SECTION 48, SUBDIVISION 2, OF THE PUBLIC SERVICE COMMISSIONS LAW.

The person or corporation complained against must make satisfaction in the manner provided by statute and notify the Commission, or make answer within the time specified in the order. The original answer must be filed with the Secretary of the Commission at Albany, and a copy thereof must be served on the complainant, either personally or by mail, by the person or corporation answering. Proof of service of such copy must be filed with the Secretary of the Commission; and the complainant must on receipt of such copy forthwith notify the Secretary of such receipt.

RULE 5. HEARINGS ON ANSWER TO COMPLAINTS UNDER SECTION 48 OF THE PUBLIC SERVICE COMMISSIONS LAW.

After the filing of answer to a complaint as provided in Rule 4, a time and place for a hearing on the issue made will be appointed, notice of which will be served on all parties, and the proceedings thereafter will be as the Commission may direct.

RULE 6. OTHER COMPLAINTS, INCLUDING THOSE UNDER SECTION 27, SUBDIVISION 2, OF THE PUBLIC SERVICE COMMISSIONS LAW.

Complaints which in the opinion of the Commission are not of such nature as to permit their satisfaction under the provisions of section 48 of the Public Service Commissions Law, may be investigated by it in such manner as it deems proper, without notice to the person or corporation complained against. A copy of the complaint, and of the report if any on the ex parte investigation, may be served by mail on the party or corporation complained against, who will be required to make answer to the same within twenty days. On receipt of such answer a time and place will be appointed for a public hearing, notice of which will be served by mail to all parties, and the proceedings thereafter will be as the Commission may direct.

RULE 7. ANSWERS.

An answer must specifically admit or deny the material allegations of the complaint. If any or all of the allegations of the complaint are denied, the answer must set forth the facts as claimed by the party answering.

RULE 8. NOTICE IN NATURE OF DEMURRER.

A person or corporation complained against who deems the complaint insufficient to show a breach of legal duty may, instead of answering or formally demurring, serve on the complainant and the Commission notice that it demands a hearing on the complaint, and in such a case the facts stated in the complaint will be deemed admitted. On receiving such notice of hearing a time and place for the same will be appointed, notice of which will be served on all parties. Filing an answer, however, will not be deemed an admission of the sufficiency of the complaint, but a motion to dismiss for insufficiency may be made at the hearing.

RULE 9. AMENDMENTS.

Amendments to any complaint, petition, answer, or other paper filed in any proceeding or investigation may be allowed by the Commission, in its discretion.

RULE 10. ADJOURNMENTS AND EXTENSIONS OF TIME.

Adjournments and extensions of time may be granted on the application of any party, in the discretion of the Commission. Applications for extensions of time should be accompanied by an affidavit showing a necessity therefor.

RULE 11. STIPULATIONS.

The parties to any proceeding or investigation before the Commission may, by stipulation in writing filed with the Secretary, agree upon the facts or any portion thereof involved in the controversy, which stipulation shall be regarded and used as evidence on the hearing. The facts should be thus agreed upon whenever practicable.

RULE 12. PRACTICE ON HEARINGS.

The complainant must establish the facts alleged to constitute a violation of the law unless the defendant admits the same or fails to answer the complaint. The defendant must also give evidence of the facts alleged in the answer unless admitted by the complainant, and at the hearing must fully disclose its defense. Witnesses will be examined orally before the Commission unless the facts be stipulated. In case of failure to answer, the Commission will take such proof of the facts as may be deemed proper and reasonable and make such order as may be proper.

RULE 13. SUBPOENAS.

Subpoenas requiring the attendance of witnesses from any place in the State to any designated place of hearing, for the purpose of taking the testimony of such witnesses orally before the Commission or one or more Commissioners, may be issued by any member of the Commission or by the Secretary, on the application of either party or on the order of the Commission directing the taking of such testimony. The Commission may, as a condition of issuing a subpoena, require the party applying therefor to prepay the fees of the witness, as prescribed by section 19 of the Public Service Commissions Law.

Subpoenas for the production of books, papers, or documents, unless directed to issue by the Commission on its own motion, will be issued only on application in writing. When it is sought to compel witnesses not parties to a proceeding to produce such documentary evidence, the application must be sworn to, and must specify as nearly as may be the books, papers, or documents desired; that the same are in the possession of the witness or under his control, to the information and belief of the affiant, stating such information or the reasons of such belief; and also by facts stated show that they contain material evidence necessary to the applicant. Applicants to compel a party to the proceeding to produce books, papers, or documents need set forth only in a general way the books, papers, or documents desired to be produced, and that the applicant believes they will be of service in the determination of the case.

RULE 14. DOCUMENTARY EVIDENCE.

Where relevant and material matter offered in evidence is embraced in a written or printed statement, book, or document of any kind containing other

matter not material or relevant and not intended to be put in evidence, such statement, book, or document in whole shall not be received or allowed to be filed, but counsel or other party offering the same shall present in convenient and proper form for filing a copy of such material and relevant matter, and that only shall be received and allowed to be filed as evidence and made a part of the record.

RULE 15. BRIEFS.

In all contested hearings, unless otherwise specially ordered, printed briefs shall be filed on behalf of the parties; they shall contain abstracts of the evidence relied upon by the party filing the same, and in such abstracts reference shall be made to the pages of the minutes on which the evidence appears. The abstracts of the evidence shall follow the statement of the case and precede the argument. Briefs shall be filed with the Commission, and served on the adverse party or parties by the complainant within fifteen days after the taking of testimony has been concluded, and by the other party or parties within ten days thereafter, and the complainant shall have five days' additional time for reply. Different times may be specially ordered in any case. Ten copies of each brief shall be filed with the Secretary for the use of the Commission, and shall be accompanied by an affidavit showing service on the adverse party. In each case three copies shall be served on the adverse party. Briefs and other papers required to be printed shall be ten inches long and seven inches wide, with the printed page seven inches long and three and one-half inches wide.

RULE 16. REHEARINGS.

Applications for reopening a case after final submission, or for rehearing after decision made by the Commission, must be by verified petition, and must state specifically the grounds on which the application is based. If such application be to reopen the case for further evidence, the nature and purpose of such evidence must be briefly stated, and the same must not be merely cumulative. If the application be for a rehearing, the petition must specify the findings of fact and conclusions of law claimed to be erroneous, with a brief statement of the grounds of error. And when any decision, order, or requirement of the Commission is sought to be reversed, changed, or modified on account of facts and circumstances arising subsequent to the hearing, or of consequences resulting from compliance with such decision, order, or requirement which are claimed to justify a reconsideration of the case, the matters relied upon by the applicant must be fully set forth.

RULE 17. SERVICE AND EFFECT OF ORDER.

The service and effect of orders are prescribed by section 23 of the Public Service Commissions Law.

RULE 18. APPLICATIONS FOR CONSENT, ETC., TO BE BY PETITION.

Applications for the consent, permission, certificate, or authorization of the Commission, in cases where such consent, permission, certificate, or authorization is required by law, shall be by petition. If a person, the petition shall be signed and verified by the applicant; if a corporation, the petition shall be signed and verified by some officer authorized by law to verify a pleading in a court of record, and the verification shall be in the form required by the code of procedure for pleadings in such courts. The petition must set forth the full name and postoffice address of the applicant, and of its attorney or counsel if any there be; and if the applicant be a corporation other than

municipal, the date of incorporation and term of corporate existence. It must contain a request for the specific consent or authorization desired, with a reference to the statute under which the application is made.

RULE 19. FINANCIAL CONDITION: TERM AS USED IN THESE RULES DEFINED.

Whenever by these rules a petitioner is required to set forth or disclose its financial condition, such financial condition shall be given so far as practicable in appropriate schedules annexed to and referred to and properly designated in the petition. Such schedules shall show the following:

1. Amount and kinds of stock authorized;
2. Amount and kinds of stock issued:
3. Terms of preference of all preferred stock:
4. Brief description of each mortgage on property of petitioner, giving date of execution, name of trustee, amount of indebtedness authorized to be secured thereby, and amount of indebtedness actually secured;
5. Number and amount of bonds authorized and issued, describing each class separately, giving date of issue, par value, rate of interest, date of maturity, and how secured;
6. Other indebtedness, giving same by classes and describing security, if any;
7. Amount of interest paid during previous fiscal year and rate thereof: if different rates were paid, amount paid at each rate;
8. Amount of dividends paid during previous fiscal year and rate thereof;
9. Detailed statement of earnings and expenditures for, and balance sheet showing condition at close of, last fiscal year.

Note: In a particular case, additional requirements as to information to be furnished under this Rule may be made by the Commission, or such additional requirements may from time to time be promulgated generally.

A reference in the petition to annual or other reports filed or to be filed with the Commission shall not be deemed a compliance with the provisions of this Rule.

RULE 20. APPLICATIONS FOR PERMISSION AND APPROVAL TO EXERCISE FRANCHISE UNDER SECTION 53 OF THE PUBLIC SERVICE COMMISSIONS LAW, AND FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND A NECESSITY UNDER SECTION 9 OF THE RAILROAD LAW.

Applications for permission and approval to exercise franchises and privileges under section 53 of the Public Service Commissions Law; and applications for a certificate of public convenience and a necessity under section 9 of the Railroad Law, may be embraced in one petition and may be carried on in one proceeding. In all such applications the petition, in addition to setting forth compliance with the requirements of sections 9, 10, 11, 12, and 89 of the Railroad Law, shall state—

1. The route of proposed railroad, street railroad, or extension, giving the names of the cities, villages, or towns in and through which it is to be constructed.
2. The name of each railroad and street railroad corporation with which the proposed construction is likely to compete.
3. The facts showing the proposed construction to be required by public convenience and a necessity.
4. All other facts deemed material by the petitioner.
5. If the applicant has not exercised any of the powers or privileges of a corporation, it must set forth the manner in which it purposes to finance the proposed construction.

6. If the applicant has theretofore exercised the powers of a corporation, it must set forth the manner in which it purposes to finance the proposed construction and also its financial condition.

The petition must be accompanied by a copy of the articles of incorporation of the petitioner certified by the Secretary of State, and of all amendments thereto, maps and profiles showing the location and route of the proposed construction, and proof of compliance with all conditions required by law precedent to such application.

RULE 21. APPLICATIONS UNDER SECTIONS 54, 70, 83, AND 99 OF THE PUBLIC SERVICE COMMISSIONS LAW FOR APPROVAL OF ASSIGNMENT, TRANSFER, OR LEASE OF FRANCHISE.

In all applications under sections 54, 70, 83, and 99 for approval of assignment, transfer, or lease of franchise, or right to or under any franchise, or for approval of any contract or agreement with reference to or affecting any such transfer or right, the petition must be made by all parties to the proposed transaction, and must show —

1. The financial condition as defined in Rule 19 of all parties to the transaction, including those whose properties or franchises are to be acquired.

2. In detail the reasons on the part of each applicant for making the proposed assignment, transfer, lease, contract, or agreement, and all facts warranting the same, and all facts which should be known by the Commission to enable it to pass upon the application. The petition must be accompanied by copies of the articles of incorporation of each applicant certified by the Secretary of State, and of the franchise, contract, or agreement annexed as schedules thereto.

RULE 22. APPLICATIONS UNDER SECTIONS 54, 70, 83, AND 100 OF THE PUBLIC SERVICE COMMISSIONS LAW FOR AUTHORIZATION TO PURCHASE OR ACQUIRE CAPITAL STOCK.

In all applications for authorization to purchase or acquire capital stock of any domestic railroad corporation or other common carrier, gas corporation, electrical corporation, steam corporation, telegraph corporation, or telephone corporation, the petition must show —

1. In detail the reasons why the applicant desires to make the purchase and all facts warranting the same, including the amount of such stock already owned by the applicant.

2. The market value of the stock to be purchased, with highest and lowest price during a period of at least one year prior to the making of the petition; dividends if any paid for a period of five years prior to the making of the petition, the price proposed to be paid, the name of the present owner, and the terms of payment.

3. In the case of an application for authorization to purchase stock of a certain description as opportunity may offer, the reasons therefor in full detail, with a statement of market values and dividends paid for at least five years prior to the making of the petition, and the maximum price which the petitioner should be allowed to pay.

4. With all applications there must be submitted copies of the articles of incorporation of the corporation the stock of which is to be purchased or acquired, and of the purchasing corporation, certified by the Secretary of State, together with a statement showing the amount of stock issued and the financial conditions of such corporations as defined in Rule 19.

RULE 23. APPLICATIONS FOR CONSENT TO MORTGAGE PROPERTY AND FRANCHISES PURSUANT TO SECTION 8, SUBDIVISION 10, OF THE RAILROAD LAW.

An application for consent to mortgage property and franchises pursuant to subdivision 10, section 8 of the Railroad Law, and an application for an order authorizing the issue of bonds or other evidence of indebtedness to be secured by the proposed mortgage, should be embraced in one petition and carried on in one proceeding. If the application is for leave to mortgage only, it will be governed by the provisions of Rule 24. The application must be accompanied by proof of the consent of the stockholders as required by law, a copy of the proposed mortgage, and a statement of the applicant's financial condition as defined in Rule 19.

RULE 24. APPLICATIONS UNDER SECTIONS 55, 55A, 69, 69A, 82, 82A, 101, AND 101A OF THE PUBLIC SERVICE COMMISSIONS LAW FOR AN ORDER AUTHORIZING THE ISSUE OF STOCKS, BONDS, NOTES, OR OTHER EVIDENCE OF INDEBTEDNESS.

The following information must appear in applications under these sections:

1. A complete description of the securities proposed to be issued and the purposes for which they or their proceeds are to be used, including —

(a) Kind of security;

(b) The par value to be issued;

(c) If interest bearing, the rate of annual interest and date of maturity;

(d) The price at which it is desired to have authority to sell such securities;

(e) A description in detail of the purposes for which such securities or their proceeds are to be used.

2. The financial condition of the applicant as defined in Rule 19.

3. If the purpose is the acquisition of property, a general description of the property, estimated purchase price, from whom to be acquired, and full terms of the contract if any has been made for such acquisition. It must also appear whether such property is an addition or betterment, or a replacement. Names of owners of property to be acquired for right of way need not be set out, but a general description of the proposed route should be given.

4. If the purpose is for construction, completion, extension, or improvement of facilities, such purpose must be fully described; and it must affirmatively appear that the same is an addition, betterment, or replacement as defined in the accounting orders of the Commission, and that proper account has been or will be taken of the cost of any property retired in connection with such betterment or replacement.

5. If the purpose is the refunding of obligations, such obligations must be fully described, showing for each the amount actually outstanding, date of issue, date of maturity, purpose for which it was issued, and all material facts concerning the same.

6. If the purpose is the maintenance of service, the necessity for such use of stock, bonds, notes, or other evidence of indebtedness, or their proceeds, must be affirmatively set forth in detail.

7. If the purpose is for the reimbursement of the treasury of the petitioner, the petition shall show the exact period for which reimbursement is desired, and there shall be furnished balance sheets as at the beginning and ending dates of such period. The petition shall include a comparison of these balance sheets so as to show the increases of assets and decreases of obligations for which reimbursement is asked. Such increases and decreases shall be fully detailed in appropriate schedules annexed to the petition, and shall be so compiled that they may be readily checked with the accounts and vouchers

by representatives of the Commission. It shall affirmatively appear from such schedules of expenditures for acquisition of property, construction, completion, extension, or improvement of its facilities, that none of them were for maintenance or replacements.

8. If the application is for authorization of bonds or other obligations to be secured by an existing mortgage, lease, or other agreement, the amount of bonds or other obligations if any actually outstanding upon such security, and amount and application made of the proceeds of the same, must appear. A copy of such mortgage, lease, or other agreement shall be filed with the petition, except that if it is not in printed form and is on file in a previous proceeding reference may be made thereto.

9. If the proposed bonds or other evidence of indebtedness are to be secured by a mortgage, lease, or other agreement to be executed and not yet approved by the Commission, a copy of such proposed indenture in the form proposed to be executed shall be annexed to the petition, together with a certified copy of the consent of stockholders thereto if required pursuant to the provisions of the Stock Corporation Law or other statutes in such case made and provided.

10. If the proceeds are to be used for construction purposes, affidavits must be annexed —

(a) Of a competent person showing the estimated cost of such construction in reasonable detail;

(b) By an officer of the petitioner that the moneys petitioned for are reasonably required for the desired purposes;

(c) By an accounting officer of the petitioner that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income except as specifically set forth in the petition.

11. The petition must state that no franchise is capitalized directly or indirectly, except as the same is authorized by sections 55, 69, 82, or 101 of the Public Service Commissions Law. If it is proposed to capitalize any franchise as therein authorized, there shall be filed with the petition a verified copy of such franchise, and an affidavit of the proper officer of state or municipality granting same showing the amount that has been actually paid for such franchise.

12. If any contract, agreement, or arrangement, verbal or written, has been made to sell the stock, bonds, notes, or other evidence of indebtedness proposed to be issued, such contract, agreement, or arrangement must be set out in full, with copy of same if in writing. If no such contract, agreement, or arrangement has been made, there must be annexed an affidavit of a competent person showing the amount which can probably be realized from the sale or disposition thereof and the reasons for the opinion of the affiant.

13. If the use of the securities or proceeds thereof petitioned for under sections 55, 69, 82, and 101 is contingent upon the exercise of other authorities required to be obtained by the Public Service Commissions Law, Railroad Law, or other laws, such other authorities must be applied for either prior to or at the time the application for authority under these sections is made.

14. If any action by the corporation, its stockholders or directors, is necessary under the provisions of the Stock Corporation Law or other law before the securities asked to be authorized by the Commission can be issued, such other action shall be completed prior to the filing of the petition with the Commission, and the petition shall so show or there shall be set forth in the petition the reasons why such action has not been taken.

15. There must be annexed to the petition an affidavit made by at least three of the directors of the applicant, showing that it is the intention of

the applicant in good faith to use the stock, bonds, notes, or other evidence of indebtedness proposed to be issued and their proceeds for the purposes set forth in the petition.

16. There must be annexed to the petition an affidavit by the principal accounting officer of the petitioner showing that the accounts of the petitioner have been kept strictly in accordance with the accounting order of the Commission applicable thereto, and that there have been no charges to asset accounts since the effective date of such order not in accordance therewith, and that all required credits to such asset accounts have been made for the amount and in the manner prescribed therefor in such accounting order; provided that if the petitioner has made any variation in its accounting methods from the provisions of the governing accounting order, such affidavit shall set forth in detail the fact of such variation and the reason therefor.

17. If the application is brought under sections 55a, 69a, 82a, or 101a, there must be annexed to the petition a copy of the proposed reorganization agreement; and included in the petition or in suitable schedule annexed thereto, full information with reference to the matters which by such sections are specifically required to be considered by the Commission.

RULE 25. APPLICATIONS UNDER SECTIONS 55, 55A, 69, 69A, 82, 82A, 101, AND 101A, FOR AUTHORIZATION, ETC., CONTINUED.

The order granting an application or any part thereof under sections 55, 55a, 69, 69a, 82, 82a, 101, and 101a shall contain the following provisions:

1. Prescribing the purposes for which the proceeds of the security or obligation authorized shall be used.

2. Directing the applicant to report under oath the sale of the obligations authorized, the terms and conditions of such sale, and the amount realized therefrom.

3. Directing the applicant to make verified reports, at least once every six months, showing in detail the use and application by it of the moneys so realized, until such moneys shall have been fully expended.

4. Such other provisions as the Commission may deem necessary or appropriate.

RULE 26. APPLICATIONS UNDER SECTIONS 68, 81, AND 99 OF THE PUBLIC SERVICE COMMISSIONS LAW.

In applications under sections 68, 81, and 99 of the Public Service Commissions Law the petition must set forth all the facts upon which the petitioner relies to entitle it to begin construction or exercise the franchise owned by it; and the financial condition of the applicant as defined in Rule 19. Annexed to the petition shall be a certified copy of the charter of the applicant; a verified copy of the consent of the proper municipal authorities; the verified statement of the president and secretary of the corporation showing that it has received the required consent of the proper municipal authorities; and an affidavit made by at least three of the directors of the applicant showing that it is the intention of the applicant in good faith to begin the construction and exercise the franchise named in the petition.

After the filing of such petition the applicant shall cause to be published in such newspapers and in the number of insertions as may be prescribed by the Commission a notice in the following form:

An application having been received from the ..... company for permission to construct and operate an electric plant in the village of ..... and for permission to exercise franchises granted to said com-

pany by the village of ..... and the town of ....., all persons knowing any reasons why this application should not be granted are hereby notified to file a statement of such reasons with the Secretary of the Commission on or before .....

Hearing upon the petition shall not be had until the expiration of the time fixed in said notice for filing objections to the application.

RULE 27. APPLICATION BY A MUNICIPALITY UNDER SECTIONS 68 AND 81 OF THE PUBLIC SERVICE COMMISSIONS LAW.

The petition of a municipality under sections 68 and 81 of the Public Service Commissions Law for a certificate of authority to build, maintain, and operate a works or system for manufacturing and supplying gas or electricity for lighting or power purposes, or steam for heating, other than for municipal purposes, shall set forth —

1. The name and location of the principal office of all gas corporations, electrical corporations, and steam corporations doing business within the municipality;

2. The names of the executive officers of each such gas corporation, electrical corporation, or steam corporation;

3. A general statement of the amount and character of services rendered within such municipality by each gas corporation, electrical corporation, or steam corporation therein;

4. A statement showing by what authority the municipality will have the right to build the proposed works or system upon receiving a certificate of authority from the Commission;

5. A description of the works or system proposed to be constructed;

6. The manner in which the municipality purposes to pay for or finance the construction of the proposed works or system.

RULE 28. COMPLAINTS AS TO QUALITY AND PRICE OF GAS, ELECTRICITY, AND STEAM UNDER SECTIONS 71 AND 84 OF THE PUBLIC SERVICE COMMISSIONS LAW.

On informal application the Commission will prescribe the form and contents of complaints made under sections 71 or 84 of the Public Service Commissions Law, according to the requirements of the case. Such complaints should conform generally to Rule 2. Where the general price of gas or electricity or heating is challenged, the complaint should be brought as to gas or electricity under section 71, and as to heating under section 84, of the Public Service Commissions Law. Where the quality of gas or electricity or heating only is involved in a complaint, the matter of the complaint will have preliminary inquiry by the Commission through its division of light, heat, and power.

RULE 29. APPLICATIONS UNDER SECTION 64 OF THE STOCK CORPORATION LAW TO REDUCE CAPITAL STOCK.

In all applications for the reduction of capital stock the petition must show —

1. The financial condition of the applicant;

2. The reasons for the proposed reduction;

3. That the proposed amount of capital stock is sufficient for the proper purposes of the corporation.

Accompanying the petition there must be filed three certificates of the proceedings of the meeting of stockholders authorizing the increase or reduction, or unanimous consent of stockholders: two of such certificates to be indorsed for filing, and one to be filed in the office of the Commission.

RULE 30. APPLICATIONS RELATING TO GRADE CROSSINGS UNDER SECTIONS 89–99 OF THE RAILROAD LAW.

All applications relative to grade crossings must be by verified petition. In all cases where the statute is not sufficiently explicit as to the contents of the petition, the Commission will advise the applicant as to the matters necessary to be set forth in the particular case.

RULE 31. OBJECTIONS MUST BE FILED.

Whenever a copy of any report in any proceeding before the Commission shall be sent to a corporation or to any party to the proceeding, the report shall be deemed accepted as substantially correct unless objections thereto shall be filed at least ten days before any subsequent hearing in such proceeding.

RULE 32. SUNDRY APPLICATIONS FOR WHICH NO GENERAL RULE IS MADE.

Applications in the following cases must be made by verified petition; on the filing of the petition the Commission will determine the practice in the case, no general rule being prescribed:

1. Change of gauge.
   § 25, Railroad Law.
2. Signboards at crossings.
   § 53, Railroad Law.
3. Discontinuance of stations.
   § 54, Railroad Law.
4. Accommodation of connecting roads.
   § 55, Railroad Law.
5. Precedence of trains at grade crossings.
   § 56, Railroad Law.
6. Approval of safety devices.
   § 75, Railroad Law.
7. Approval of stoves or furnaces in dining-room car.
   § 76, Railroad Law.
8. Cessation of operation during winter by certain roads.
   § 85, Railroad Law.
9. Fixing compensation for transporting mail.
   § 87, Railroad Law.
10. Crossing of one road by another.
    § 98, Railroad Law.
11. Liability of reorganized railroad company to extend its road.
    § 153, Railroad Law.
12. Motive power of street railroads.
    § 180, Railroad Law.
13. Compensation for use of tracks of street railroad.
    § 183, Railroad Law.
14. Abandonment of part of route of street surface railroad.
    § 184, Railroad Law.
15. Extension of time to make reports.
    § 46, Public Service Commissions Law.
16. Rejection from service of defective engines.
    § 105, Conservation Law.

RULE 33.

If the petitioner in a matter pending before the Commission shall for a period of three months after notice by the Commission fail to proceed with the case either in a hearing or by supplying additional information as may be prescribed by the Commission, an order shall be entered without further notice dismissing the proceeding and closing the same on the records, unless the Commission upon good cause shown shall otherwise decide.

RULE 34. PRACTICE ON RECEIVING PETITIONS.

Immediately after receipt of any petition provided for by these rules, the same shall be referred by the Secretary to the executive clerk for examination. If such petition refers to a matter of capitalization, it shall within forty-eight hours after receipt by the executive clerk be returned by him, with such annotation as he deems proper, to the Secretary, who shall forthwith deliver the same to the chief of the division of capitalization; and after examination by such division, such petition, with the executive clerk's annotations and the recommendation of the chief of the division of capitalization for procedure shall be at once transmitted to the Chairman of the Commission.

In the case of every other petition, if the document is found to conform to these rules and all statutory provisions, the executive clerk will report that fact. If it does not so conform, he shall so report, and the Secretary shall advise the applicant of the defects, who may correct the same.

When the petition and accompanying papers are in proper form, a time and place for a hearing thereon will be appointed. The Commission will, in each case, direct what notice of the hearing shall be given, by publication or otherwise, and to whom.

At the hearing the petitioner must be prepared to establish all the facts alleged in the petition by evidence, but the Commission may, in such cases as it deems proper, grant the application upon the petition and accompanying papers.

The petitioner must furnish for the use of the Commission in determining the application, the originals of all books, papers, and documents which it may require, or certified or verified copies of the same. The failure so to do shall be ground for refusing the application.

RAILROAD LAW

Laws of 1910, Chapter 481, Entitled: "An Act in Relation to Railroads, Constituting Chapter Forty-nine of the Consolidated Laws," as Amended to the Commencement of the Legislative Session of 1915.

RAILROAD LAW

ARTICLE 1. Short title (§ 1).
2. Organization, general powers and location (§§ 5–39).
3. Construction, operation and management (§§ 50–108).
4. Consolidation, lease, sale and reorganization (§§ 140–155).
5. Street surface railroads (§§ 170–*210).
6. Rapid transit act of 1875 (§§ 220–244).
7. Laws repealed; when to take effect (§§ 250, 251).

ARTICLE 1

Short Title

§ 1. Short title. This chapter shall be known as the "Railroad Law."

Construction of Consolidated Railroad Law.

A proposed consolidated railroad law was reported in 1909 by the Board of Statutory Consolidation and was passed at that session of the Legislature, but failed of executive approval. In 1910 substantially the same bill was again introduced and became a law (ch. 481, Laws of 1910). By such consolidation the various independent railroad statutes were made a part of the Railroad Law. The consolidated laws passed in 1909 are not to be construed as in any manner changing the then existing law. The new Railroad Law of 1910, however, is not subject to the same rule of construction, but is to be construed as a revision and continuation of the prior law, modified or amended according to the language employed, pursuant to Gen. Construction Law, § 100.

ARTICLE 2

Organization, General Powers and Location

SECTION 5. Incorporation.
6. Supplemental certificate.
7. Payment of capital stock after filing certificate of incorporation.
8. Additional powers conferred.
9. Certificate of convenience and necessity.

*Error in original; should be 209.

SECTION 10. Public service commission may certify part of the route of a street surface railroad; power to revoke certificates; street surface railroad extensions.
11. Revocation of certificate under certain circumstances.
12. When corporate powers to cease.
13. Corporations failing to finish road.
14. Time extended.
15. Time extended where there has been a receiver.
16. Location of route.
17. Acquisition of title to real property; additions, betterments and facilities.
18. Railroads through public lands.
19. Railroads through Indian lands.
20. Railroads through Chautauqua assembly grounds.
21. Railroads along highways.
22. Proceedings to determine point at which a new railroad shall intersect one already established; compensation; duties of intersecting roads.
23. Highway exempted.
24. Change of route, grade or terminus.
25. Change of gauge.
26. Construction of part of line in another state.
27. Two roads having the same location.
28. Tunnel railroads.
29. Railroads in other countries.
30. Additional corporate powers of such road.
31. Location of principal office of such road.
32. Individual, joint-stock association, or other corporation may lay down and maintain railroad tracks in certain cases.
33. Powers of electric light and power corporations.
34. Substituted lines in certain cases.
35. Canal corporation may construct railroad.
36. Powers of such corporations.
37. Saving clause.
38. Bridge companies in cities containing more than one million inhabitants.
39. Change of time for holding elections.

§ 5. Incorporation. Fifteen or more persons may become a corporation, for the purpose (1) of building, maintaining and operating a railroad, or (2) of maintaining and operating a railroad already built, not owned by a railroad corporation, or for both purposes, or (3) of building, maintaining and operating a railroad for use by way of extension or branch or cut-off of any railroad then existing, or for shortening or straightening or improving the line or grade of such railroad or of any part thereof, by executing, acknowledging and filing a certificate, in which shall be stated:

1. The name of the corporation.
2. The number of years it is to continue.
3. The kind of road to be built or operated.

4. Its length and termini.

5. The name of each county in which any part of it is to be located.

6. The amount of capital stock, which shall not be less than ten thousand dollars for every mile of road built, or proposed to be built, except a narrow-gauge road, when it shall not be less than three thousand dollars for every such mile.

7. The number of shares into which the capital stock is to be divided.

8. If the capital stock is to consist of common and preferred stock, the amount of each class and the rights and privileges of the latter over the former.

9. The names and post-office addresses of the directors of the corporation, not less than nine, who shall manage its affairs for the first year.

10. The place where its principal office is to be located.

11. If a street surface railroad, the names and description of the streets, avenues and highways in which the road is to be constructed.

12. If it is to be a railroad corporation, specified in article six of this chapter, the statements required by that article to be inserted in the certificate of incorporation.

13. The name and post-office address of each subscriber to the certificate and the number of shares of stock he agrees to take.

Such certificate shall have indorsed thereon, or annexed thereto, to be taken as a part thereof, an affidavit of at least three of such directors, that at least ten per centum of the minimum amount of capital stock authorized by law has been subscribed thereto, and paid in good faith and in cash to the directors named in the certificate, and that it is intended in good faith to build, maintain and operate the road mentioned therein. In case of a railroad corporation specified in article six of this chapter, the affidavit of the directors shall show that the full amount of such capital stock has been in good faith subscribed, and there shall be annexed to the certificate of incorporation and as a part thereof the certificate of the public service commission showing the organization of the corporation for the purposes mentioned in the certificate.

The filing of every certificate, where the amount of stock required by this section has not been in good faith subscribed and paid in cash, shall be void.

Formerly L. 1890, ch. 565, § 2, as am'd by L. 1892, ch. 676; L. 1905, ch. 727. *For forms of certificates of incorporation, see post, Forms Nos.* 408, 409.

Street surface railroads are included in all the provisions of article 1 of the Railroad Law, except those from which they are expressly excluded. Buffalo, Bellevue & Lancaster R. R. Co. v. N. Y., L. E. & W. R. R. Co., 72 Hun 583 (1893).

A corporation formed under this law cannot exercise its powers nor begin the construction of its road until section 9 of this law has been complied with.

Incorporators.

Prior to the revision of 1890, ch. 565, twenty-five was the minimum number of persons for the formation of a steam railroad corporation, L. 1850, ch. 140, and thirteen for a street surface railroad, L. 1884, ch. 252. The present statute fixes the minimum number of incorporators of any kind of railroad corporation uniformly at fifteen. All the incorporators must be persons of full age, of whom at least two-thirds must be citizens of the United States, and at least one of them must be a resident of the State of New York. General Corp. Law, § 4. Only natural persons can become incorporators. Corporations, co-partnerships, and persons acting in a representative capacity, are, therefore, excluded from acting as incorporators. Id. In the Matter of N. Y., L. & W. R. R. Co., 99 N. Y. 12, a case arising under the General Railroad Act of 1850, ch. 140, now repealed, it was held that the signing of articles of association by duly authorized agents of the incorporators is sufficient; and, also, in Ogdensburg, Rome, etc., R. R. Co. v. Frost, 21 Barb. 541, under the same act, that the subscription to incorporation papers by a partner in a partnership name, if authorized, was a compliance with said act of 1850, but the rule laid down in these two cases can no longer be followed in view of the repeal of said act of 1850 and the enactment of the new provisions above referred to, which require a certificate of incorporation to be executed by natural persons. General Corp. Law, § 4. After the formation of the corporation, other corporations, as well as persons acting in a representative capacity, may become stockholders. Stock Corp. Law.

Corporate Name.

The name may neither be the same nor similar to that of any other domestic corporation and must clearly indicate a corporation. General Corp. Law, § 6. At any time after incorporation the corporate title may be changed by proper proceedings. See General Corp. Law, §§ 60-64.

Duration.

The term of existence must be definitely stated in the certificate, but no maximum period seems to be fixed by statute. Prior to the expiration of the period of existence it may be extended. General Corp. Law, § 37. The corporation ceases to exist, however, if the construction of its road shall not be commenced within five, and finished within ten, years from the time of filing its certificate of incorporation. See § 12 of this law. Street surface railroads, §§ 173, 179.

Description of Road.

The kind of road to be built or operated must be set forth as either a street surface railroad operated by horse power, cable or electricity; or a steam railroad of standard gauge; or a steam railway in the streets, avenues and public places of the city of ..... or county of .....

for the transportation of passengers, mails or freights, pursuant to article VI of the Railroad Law; or, a steam railroad of the gauge of ..... feet and ..... inches; or, as the case may be.

Length and Termini.

A statement in the certificate of a steam railroad as to the termini, and that the length was about 300 miles held sufficient. In re N. Y., L. & W. R. R. Co., 35 Hun 220, affd., 99 N. Y. 12 (1885). An approximate estimate, in good faith, of the length of the proposed road, without an actual survey and location, satisfies the statute. Buf. & Pitts. R. R. Co. v. Hatch, 20 N. Y. 157 (1859). In an action upon the subscription of an incorporator, it is no defense that the certificate failed to state definitely the termini, or the counties through which the road passed, after it has been in operation and recognized by the Legislature. Cayuga L. R. R. Co. v. Kyle, 64 N. Y. 185 (1876). When a particular location has been adhered to for some years the corporation is concluded by its acts. Bklyn. Cent. R. R. v. Bklyn. City R. R. Co., 32 Barb. 358 (1860); see, also, H. & D. Canal Co. v. N. Y. & E. R. R. Co., 9 Paige 323 (1842).

Capital Stock.

There is no limitation as to the amount of capital stock, except that it shall not to be less than $10,000 per mile of a standard gauge railroad, and not less than $3,000 for each mile of a narrow gauge road. The corporation may have preferred and common stock, and different classes of preferred stock, if the certificate of incorporation so provides. It may classify stock after organization. Stock Corp. Law. If classified, the amount of each class and the rights and privileges of the preferred over the common must be stated. Railroad Law, § 2, subd. 8. The amount of capital stock may be increased or reduced. Stock Corp. Law, §§ 62–64.

Shares of Stock.

The capital stock may be divided into such number of shares as the incorporators elect. The par value of the shares may be changed after organization, without changing the amount of capital stock. Stock Corp. Law, § 65.

Directors.

The board of directors must consist of at least nine persons. The names and post-office addresses of the directors for the first year must be stated in the certificate of incorporation. Railroad Law, § 2, subd. 9. The street and number should be given, if in a city. At least one director must be a resident of the State of New York. General Corp. Law, § 34. Directors must be stockholders, unless otherwise provided. Stock Corp. Law, § 25. The number may be increased or reduced. Stock Corp. Law, § 26. No maximum is fixed, but the minimum is nine. See subd. 9 of this section.

Principal Office.

The name of the city, village or town, and of the county, in which the principal office of the corporation is to be located, must be stated in the certificate. The location of the principal office named in the certificate of incorporation may be changed by proceedings under the Stock Corp. Law, § 13.

Description of Route.

It should be noted that in case of the incorporation of a street surface railroad company, the names and description of the streets, avenues and highways in which the road is to be constructed, must be set forth in the certificate.

Subscribers.

The post-office addresses of the subscribers to the certificate of incorporation, including the street and number if in a city, must be given, and a statement of the number of shares of stock each agrees to take. The aggregate of such subscriptions must at least equal $1,000 for every mile of road to be built, except in case of a narrow gauge road, and at least $1,000 for every mile of road to be built must be paid in good faith and in cash to the directors named in the certificate.

Filing of the certificate of incorporation is necessary in order to bind a subscriber. Erie & N. Y. City R. R. Co. v. Owen, 32 Barb. 616 (1860).

A signature to an incomplete paper, with no delegation of authority to supply the omission, will not bind the signer. D. & C. R. R. Co. v. Mabbett, 58 N. Y. 397 (1874).

Irregular or Defective Incorporation.

Irregularities in organization may be cured by special legislation recognizing existence of the corporation. Black River & Utica R. R. Co. v. Barnard, 31 Barb. 258 (1859). But informalities may now be corrected by filing an amended certificate. General Corp. Law, § 7.

The mere filing of the certificate does not create a corporation de jure. Performance of the conditions precedent is necessary. Farnham v. Benedict, 107 N. Y. 159 (1887).

The corporation is not formed until all statutory requirements have been complied with, and the incorporation papers filed. Burt, Receiver, etc. v. Farrar, 24 Barb. 518 (1857).

Peo. v. Bd. of R. R. Comrs., 75 A. D. 106 (1902).

When the incorporation papers filed consist of separate instruments, exact counterparts of each other, and each signed by different incorporators, they are to be regarded as one instrument. Lake Ontario, A. & N. Y. R. R. Co. v. Mason, 16 N. Y. 451 (1857); Sodus Bay & Corning R. R. Co. v. Hamlin, 24 Hun 390 (1881).

Payment of Capital Stock and Affidavit.

The affidavit to be attached to the certificate must be sworn to by three directors, and care should be taken that the persons who make such affidavit are named in the certificate of incorporation as directors.

Failure by the persons who seek to become a railroad corporation to pay in cash to the directors named in the certificate of incorporation at least ten per cent. of the minimum amount of the capital stock, as required by subd. 13 of sec. 2 of the Railroad Law, renders the filing of the certificate void, irrespective of whether the failure was the result of inadvertence or otherwise, and the mere fact that a check had been drawn by the company, payable to the order of three of its directors, in the amount required by the statute, is immaterial and is without force where it appears that such check had not been indorsed by the payees, that no money had been paid thereon, and that it was in the possession of the president of the company. Matter of Kings, Queens & Suffolk R. R. Co., 6 A. D. 241 (1896).

Where an alleged railroad corporation has failed to make the required statutory payment of ten percent. it has no existence whatever, and is in no sense a de facto corporation. Matter of Kings, Queens & Suffolk R. R. Co., 6 A. D. 241 (1869). In such case the filing of the certificate of incorporation is absolutely void, the statute being self-executing; therefore it is not necessary that the people, through the Attorney-General, should bring an action to dissolve the alleged corporation in order that this defect may be taken advantage of. Id.

It is not necessary that the required percentage be paid on each subscription. Cash payments amounting in the aggregate to ten per cent. comply with the statute. Lake Ontario, A. & N. Y. R. R. Co. v. Mason, 16 N. Y. 451 (1857); Beattys v. Town of Solon, 64 Hun 120 (1892); O., R. & C. R. R. Co., v. Frost, 21 Barb. 542 (1856).

Payment by a duly certified check is a payment in cash. Matter of Staten I. R. T. R. R. Co. v. Starin, 37 Hun 422 (1885), 38 Hun 381, affd., 101 N. Y. 636.

But an uncertified check is not cash within the meaning of this section. A certificate filed where payment has been made by check is void. Peo. ex rel. N. Y., N. H. & H. R. R. Co. v. Bd. of R. R. Comrs., 81 A. D. 242, affd., 175 N. Y. 516 (1903).

A check for the required cash payment given, on an assurance not authorized by the directors, that it need not be paid, is a valid payment and may be enforced after incorporation. Syracuse, P. & O. R. R. Co. v. Gere, 4 Hun 392 (1875).

An unauthorized agreement made by a person soliciting stock subscriptions, that the cash payment need not be made, is void and does not affect the validity of the incorporation. Beattys v. Town of Solon, 6 Hun 120 (1892).

The fact that a railroad company has shortened its line and reduced its capital stock will not release a subscriber to stock from payment of his subscription. T. & R. R. R. Co. v. Kerr, 17 Barb. 581 (1854).

The length of road as fixed in the certificate of incorporation determines the necessary capitalization and the amount which must be paid in cash. The fact that a map of the proposed road used on the application to the railroad commissioners for a certificate of necessity showed a longer road does not affect the question. Peo. ex rel. Elmira, C. & N. R. R. v. R. R. Comrs., 99 A. D. 85 (1904).

Liability of Stockholders.

The liability of stockholders of corporations formed under this law is regulated by the Stock Corp. Law, §§ 56, 57.

Additional Powers.

If desired, the certificate of incorporation may provide for cumulative voting at elections of directors. General Corp. Law, § 24. The corporation may reserve the right to acquire, hold and dispose of the stocks and bonds of any other corporation. Stock Corp. Law, § 52. See also § 4, post. This power is of course subject to the limitations imposed by Public Service Commissions Law, § 54, which see, ante.

A street railway company formed under this law may condemn private property for the purpose of its organization. In re Roch. El. Ry. Co., 123 N. Y. 351 (1890).

This law does not repeal any law prohibiting street railroads upon particular streets. Harlem B. M. & F. R. R. Co. v. Southern B. R. R. Co., 41 Hun 553. See, also, 43 St. Rep. 611; 17 N. Y. Supp. 828; 128 N. Y. 93; 58 Hun 479 (1886).

This act of 1850, chapter 140, did not authorize an elevated railroad in the streets of a city. People's Rapid Transit Co. v. Dash, 125 N. Y. 93 (1891); Schaper v. Bklyn. & L. I. C. Ry. Co., 124 N. Y. 630 (1890).

Corporations may be formed under this act for carrying freight or passengers by horse power in the streets of cities in this State, except New York city. In re Washn. St. A. & P. R. R. Co. v. S. B. & N. Y. R. R. Co., 115 N. Y. 442 (1889).

§ 6. Supplemental certificate. If the names and places of residence of the directors of the corporation have been omitted from the certificate, when executed and acknowledged, and thereafter the requisite number of directors has been chosen at a meeting of the subscribers to the certificate, a supplemental certificate, containing their names and places of residence, may be filed with such certificate with the same force and effect as if the names and places of residence of the directors had been originally inserted therein.

Formerly L. 1890, ch. 565, § 3.

For form of supplemental certificate, see post, Form No. 410.

§ 7. Payment of capital stock after filing certificate of incorporation. Where it does not appear by the affidavit indorsed on or annexed to any certificate of incorporation, or articles of association of any railroad company, filed under the laws of this state, that the amount of capital stock required by the provisions of said laws to be paid in good faith and in cash to the directors named in such certificate or articles has been so paid, or where the affidavit required by law is omitted, and where such payment has been made to the directors named in said certificate or articles, or any of them, for the use of the company prior to the fifteenth day of May, nineteen hundred and three, an affidavit of at least three of the directors named in said certificate or articles, stating that prior to said fifteenth day of May, nineteen hundred and three, at least the amount of capital stock of such corporation required by the law in force at the time of filing said certificate or articles to be subscribed thereto, has been subscribed for in good faith and that the amount required by the law in force at the time of filing said certificate or articles to be paid on subscriptions in good faith and in cash to the directors named in the certificate or articles has been paid in cash and in good faith to the directors named in said certificate or articles, or any of them, for the use of said corporation and that it is intended in good faith to build, construct, maintain and operate the road mentioned in said certificate or articles, may be filed in the office of the secretary of state, which affidavit shall be annexed to said certificate or articles and upon such filing said certificate or articles, shall for all purposes have the same force and effect as if an affidavit in all respects regular and in conformity with law had been annexed to said certificate or arti-

cles when said certificate or articles were filed and as if a subscription and payment in all respects sufficient and in conformity with law had been made to the directors named in the certificate or articles, prior to the original filing of said certificate or articles and said certificate or articles and the original filing thereof shall be and be deemed valid from the time of such original filing and such corporation shall be and be deemed a valid corporation from said time of original filing and shall now and hereafter have all the rights, privileges, powers and franchises to which if a valid corporation it would have been entitled by law at the time of such original filing together with such other rights, privileges, powers and franchises as have been since or may hereafter be granted by law to such valid corporations, provided that nothing herein contained shall affect or impair any vested right. A copy of said certificate or articles with a copy of said affidavit hereinabove authorized, certified to be a copy by the secretary of state or his deputy shall in all courts and places and for all purposes be presumptive evidence of the incorporation of such corporation and of the facts stated in said certificate or articles and affidavit. This section shall not apply to or affect any street surface railroad company the route of which in whole or in part lies within any city of the first or second class in this state, and shall not apply to or affect any railroad corporation incorporated under any private or local act.

Formerly L. 1893, ch. 238, as am'd by L. 1903, ch. 627.

§ 8. Additional powers conferred. Subject to the limitations and requirements of this chapter and of the public service commissions law every railroad corporation, in addition to the powers given by the general and stock corporation laws, shall have power:

1. Entry upon lands for purposes of survey. To cause the necessary examination and survey for its proposed railroad to be made for the selection of the most advantageous route; and for such purpose, by its officers, agents or servants, to enter upon any lands or waters subject to liability to the owner for all damages done.

See section 9 of this law.

The foregoing provision is constitutional. Polly v. Saratoga & Washington R. R. Co., 9 Barb. 449 (1850); Bloodgood v. M. & H. R. R. Co., 18 Wend. 16 (1837).

2. Acquisition of real property. To take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railroad; and to acquire by condemnation such real estate and property as may be necessary for such construction, maintenance and accommodation in the manner provided by law, but the real property acquired by condemnation shall be held and used only for the purposes of the corporation during the continuance of the corporate existence.

Thus am'd by L. 1892, ch. 676.

For provisions as to acquisition of property by condemnation, see the Condemnation Law, post.

To exercise the right of eminent domain it must be a corporation de jure. N. Y. Cable Co. v. Mayor, etc., 104 N. Y. 1 (1887).

Lands under waters of a navigable river, though owned by private individuals, may be condemned. Kerr v. W. S. R. R. Co. 127 N. Y. 269 (1891).

Lands may be condemned for the purpose of laying a branch track for the benefit of a private individual. In re Roch., Horn. & Lack. R. R. Co. v. Babcock, 110 N. Y. 119 (1888).

Land may be acquired for prospective use if the necessity for such use in the immediate future be properly established. In re Staten Isl. R. T. Co., 103 N. Y. 251 (1886). The fact that the land to be taken will largely benefit a foreign corporation makes no difference. Id.

Lands of private corporations may be acquired. In re N. Y. C. & H. R. R. R. Co. v. Met. Gas Lt. Co., 63 N. Y. 326 (1875).

Real property, once acquired by condemnation, cannot be appropriated for another public use without special authority. In re Bd. of Street Opening v. St. John Cem. Assn., 133 N. Y. 329 (1892); see, also, In re Mayor, etc., of N. Y. v. N. Y. C. & H. R. R. R. Co., 135 N. Y. 253, and Matter of B. & A. R. R. Co., 53 N. Y. 574.

A foreign railroad corporation, lawfully operating its road in this State, may acquire by condemnation additional real estate, when needed for the operation of its road. N. Y., N. H. & Hartford R. R. Co. v. Welsh, 143 N. Y. 411 (1894).

The corporation cannot be divested of the right to appropriate land except by some unequivocal expression of legislative intent. Suburban Rapid Transit Co. v. Mayor, etc., of N. Y., 128 N. Y. 510.

Lands necessary to restore a street or highway may be taken. Peo. ex rel. Green v. Dutchess & Col. R. R. Co., 58 N. Y. 152 (1874); Post v. W. S. R. R. Co., 123 N. Y. 580 (1890).

Street Railroads.

A street surface railroad may acquire by condemnation the easement in streets necessary for operating its road. The prohibition in section 90 refers to private property outside of the streets in which the railroad is to be operated. Adee v. Nassau Elec. Ry., 72 A. D. 404 (1902), affd., 173 N. Y. 580.

It is a trespass for a street surface railroad to begin to lay its tracks without agreeing with an abutting proprietor owning to the center of the street as to compensation, or taking proceedings to condemn. Duncan v. Nassau Electric Railroad Co., 127 A. D. 252.

Leasing of a railroad pending condemnation proceedings will not affect the proceedings. Kip v. N. Y. & H. R. R. Co., 67 N. Y. 227. The proceedings are not affected even when the company has leased its road for the entire term of its existence to a foreign corporation. In re N. Y., L. & W. Ry. Co., 99 N. Y. 12 (1885).

Purposes for Which Property May Be Condemned.

Lands may not be condemned for a place to store boats of passengers visiting a pleasure resort on the line of the railroad, nor for more convenient drainage of lands, nor for opening a highway from the railroad to a neighboring hotel. In re Roch. & G. H. R. R. Co., 12 N. Y. Supp. 566 (1890), appeal dismissed, 128 N. Y. 611.

A railroad company cannot exercise the power of eminent domain for the purpose of constructing an additional main line a half mile distant from its existing line. Erie R. R. Co. v. Steward, 61 A. D. 480 (1901), affd., 170 N. Y. 172.

A railroad corporation cannot condemn lands in New York city for an elevated structure passing through blocks of buildings upon which passenger trains may be run at high speed. In re Peo. Rap. Tr. Co. v. Dash, 125 N. Y. 93 (1891); see, also, Schaper v. B. & L. I. C. Ry. Co., 124 N. Y. 630 (1891).

Elevated Roads.

The term "Railroad Corporation" as used in the General Railroad Law includes elevated railroad companies, and such companies may acquire land necessary for the maintenance and accommodation of their roads. Manhattan Ry. Co. v. Astor, 56 Misc. 353 (1907).

Interest Acquired by Condemnation.

The interest acquired by a railroad corporation in land by condemnation proceedings is a permanent easement. Roby v. N. Y. C. & H. R. R. R. Co., 142 N. Y. 176.

A conveyance, absolute in form, first granting all the estate therein described, together with the appurtenances, and then containing a reservation to the grantor of the easements taken by reason of the operation and maintenance of an elevated railroad, does not reserve to the grantor any right of action, nor can he enforce an action as to future damages against such railroad. Shepard v. Met. El. Ry. Co., 82 Hun 527.

Where an abutting owner, on a street on which a railroad is operated, releases all the easements appurtenant to premises taken for use of such road, and releases it from all causes of action because of such operation, and consents to perpetual maintenance of the railroad in front of such premises, the railroad acquires thereby title to the easements. Ward v. Met. El. Ry. Co., 82 Hun 545.

It is not what the corporation does or may choose to do, but what, under the law, it must do, that constitutes the test whether a public trust is impressed upon it. In re N. Y., L. & W. Ry. Co., 99 N. Y. 12 (1885).

Title acquired in fee by deed may be conveyed. Yates v. Van De Bogert, 56 N. Y. 526 (1874); see, also, Kenney v. Wallace, 24 Hun 478 (1881); Nicoll v. N. Y. & E. R. R. Co., 12 N. Y. 121 (1854).

3. Construction of road. To lay out its road not exceeding six rods in width, and to construct the same; and, for the purpose of cuttings and embankments, to take such additional lands

as may be necessary for the proper construction and security of the road; and to cut down any standing trees that may be in danger of falling on the road, upon making compensation therefor.

See section 59 of this law.

When a corporation excavating upon its land for lawful purposes is compelled to resort to blasting, the fact that the blasting caused injury to a building on adjoining land does not render it liable, unless the corporation failed to exercise due care. The degree of care must be commensurate with the danger. Booth v. Rome, W. & O. T. R. Co., 140 N. Y. 267 (1894), revsg. 17 N. Y. Supp. 336, 44 St. Rep. 9.

The provision concerning width must be read in connection with section 7 of this law. Matter of N. Y. C. & H. R. R. R. Co., 67 Barb. 426 (1873).

4. Intersection of streams, highways, plank-roads, turnpikes and canals. To construct its road across, along or upon any stream, water-course, highway,* plank-road, turnpike, or across any of the canals of the state, which the route of its road shall intersect or touch.

The company must obtain an order of the Supreme Court before it may construct its road upon a highway. Osborne v. J. C. & Alb. Ry. Co., 27 Hun 589 (1857). See, also, section 21 of this law.

Construction of the words "upon and along" considered in Baxter v. S. D. & P. M. R. R. Co., 61 Barb. 428 (1872); Osborne v. J. C. & Alb. Ry. Co., 27 Hun 589 (1857).

The Canal Law, L. 1909, ch. 13, § 35, provides as follows, to wit:

§ 35. **Powers with reference to railroad near the canals.** The superintendent of public works shall have a general supervisory power over so much of any railroad as passes over any canal or feeder belonging to the State or approaches within ten rods thereof, so far as may be necessary to preserve the free and perfect use of such canals or feeders, or for making any repairs, improvements or alterations thereupon. No railroad corporation shall construct its railroad over or at any place within ten rods of any canal or feeder belonging to the state, unless it submits to the superintendent of public works a map, plan and profile of such canal or feeder and of the route designated for its railroad, exhibiting distinctly and accurately the relation of each to the other at all the places within the limits of ten rods thereof, and obtain the written permission of the superintendent of public works and of the canal board for the construction of such railroad, with such conditions, directions and instructions as in his judgment the free and perfect use of any such canal or feeder may require. *Whenever any street railway shall cross over any bridge

* The Highway Law, L. 1909, ch. 30, provides as follows, to wit:

§ 73. **Actions for injuries to highways.** The town superintendent shall bring an action in the name of the town, against any person or corporation, to sustain the rights of the public, in and to any town highway in the town, and to enforce the performance of any duty enjoined upon any person or corporation in relation thereto, and to recover any damages sustained or suffered, or expenses incurred by such town, in consequence of any act or omission of any such person or corporation, in violation of any law or contract in relation to such highway.

spanning a canal, or canal feeder, the company owning, maintaining and operating the same shall be deemed liable for and shall pay all damages that may occur or arise, either to the state or to individuals, by reason of its laying and maintaining its tracks or rails over, upon and across any such bridge, or by reason of the operation of its cars over the same; and any such company shall upon demand of the superintendent of public works, make any repairs to such structure to insure the continued safety thereof as shall have been rendered necessary by reason of such use of said structure by said company. Any company so maintaining or operating a street railroad over, upon and across any such bridge shall indemnify the state against any and all loss, damages or claims for damage, for injuries to person or property of passengers which shall be incurred by or made against such state by reason of the operation of such railway over any such bridge, and the superintendent of public works may, in his discretion, require any company so maintaining or operating a street railway to furnish a bond, with sureties to be approved by him, to indemnify the state from all such loss, damage or claims. All such permits heretofore or hereafter granted shall be revocable whenever the free and perfect use of any such canal or feeder may so require, or if such railway company shall fail to make any such repairs when required by the superintendent of public works and the railroad company using or occupying any bridge over the same shall, within a reasonable time after the service upon it of written notice of such revocation, or to make such repairs by the superintendent of public works, remove at its own cost and expense its railroad from such bridge and from the limits of ten rods of said canal feeder.

By the amendment of 1902 the matter following the asterisk (*) was added.

This provision removes the prohibition in the similar provision of L. 1850, ch. 140, of the right to obstruct any navigable stream or lake, but does not divest a patentee of any rights previously acquired from the State. Rumsey et al. v. N. Y. & N. E. R. R. Co., 130 N. Y. 88 (1892). See, also, 133 N. Y. 79 (1892), 125 N. Y. 681 (1890), 114 N. Y. 423 (1889).

Provisions in a city charter declaring it unlawful to grant the right to construct a street railroad, except to the person who will agree to carry passengers at the lowest rate of fare, were superseded by the foregoing subdivision. Adamson v. Nassau Electric R. R. Co., 89 Hun 261 (1895).

A street railroad company operating its cars over the canal by means of a bridge owned by the State does not make such bridge an appliance of its own. Birmingham v. R. C. & B. R. R. Co., 137 N. Y. 13 (1893).

A railroad easement and franchise are not necessarily inconsistent with the easement of a public highway. Trelford v. Coney Island & Brooklyn R. R. Co., 6 A. D. 204 (1896).

Liability for Damages.

This subdivision does not mean that the highway should be rendered useless. The duty of restoring carries with it the power so to do. Peo. ex rel. Green v. D. & C. R. R. Co., 58 N. Y. 152 (1874); Bell v. N. Y. C. & H. R. R. Co., 29 Hun 560 (1883); Richardson v. N. Y. C. R. R. Co., 45 N. Y. 848 (1871).

This statute does not attempt to grant any right to violate private property without consent of the owner. It merely grants the right which the public has in the roads, streams, etc. E. Plank Rd. Co. v. Buf. & P. R. R. Co., 20 Barb. 644 (1855); Williams v. N. Y. C. R. R. Co., 16 N. Y. 97 (1857).

Where a railroad company has constructed its road so as to cut off the owner's access to the navigable part of a river, he is entitled to recover the diminished rental value of his land. Rumsey v. N. Y. & N. E. R. R. Co., 136 N. Y. 543 (1893), distg. 133 N. Y. 79, above.

The directors of a railroad corporation are not liable, individually, if in the operation of the road rights of a property owner are violated; the responsibility is that of the company, whether it be a corporation de facto or de jure. Lamming v. Galusha, 81 Hun 247 (1894).

5. Intersection of other railroads. To cross, intersect, join, or unite its railroad with any other railroad before constructed, at any point on its route and upon the ground of such other railroad corporation, with the necessary turn-outs, sidings, switches, and other conveniences in furtherance of the objects of its connections.

Thus am'd by L. 1892, ch. 676.

In connection with the foregoing provisions, see, also, section 22 of this law.

Railroads may acquire real estate to make connection between them. In re Union El. R. R. Co., 113 N. Y. 275 (1889); In re Bklyn. El. R. R. Co., 32 St. Rep. 1065, affd., 125 N. Y. 434 (1890).

A proceeding by one railroad corporation to secure a crossing over the track of another is a special proceeding (Code Civ. Pro. §§ 3333, 3334), and costs are discretionary with the court. Matter of Cortland, etc., R. R. Co., 98 N. Y. 336 (1879). When no evidence is given upon the question of damages, an allowance of a nominal sum may not, as matter of law, be deemed inadequate. Id. See, also, Matter of Lockport & Buffalo R. R. Co., 77 N. Y. 557 (1879).

Lands or buildings already appropriated for railroad uses, which in their nature require an exclusive occupation, cannot be invaded. In re B. H. T. & W. Ry. Co. v. T. & B. R. Co., 79 N. Y. 64 (1879).

A connection between a street surface and an elevated railroad by an incline plane is not a joining or union within this subdivision. Eldert v. L. I. Elec. Ry. Co., 28 A. D. 451 (1898), affd., 165 N. Y. 651 (1901), distgd., 89 A. D. 384 (1903).

A taxpayer, who alleges neither fraud, collusion nor dishonesty, cannot procure a temporary injunction to restrain railroads from connecting tracks, and the commissioner of highways in the city of New York from permitting it to be done. Gallagher v. Keating, 171 N. Y. 657, affg. 40 A. D. 81, affg. 27 Misc. 131 (1902).

It seems that a written instrument is essential since the right provided for is an interest in land. A verbal agreement is therefore within the statute of frauds. Port Jervis, M. & N. Y. Ry. v. N. Y., L. E. & W. Ry., 132 N. Y. 439 (1892).

Subdivision 5 of section 4 of the Railroad Law, and section 12 of said law should be read together, and when so read the provision in section 12 that every railroad that shall be "intersected by any new railroad" shall unite with the latter in forming the necessary intersections and connections, does not mean that the intersection must amount to a crossing by the new railroad. The old railroad is "intersected" within the meaning of section 12 whenever a turnout or switch is built or it becomes necessary to build it in order to connect the two roads. Jennings v. D., L. & W. R. R. Co., 103 A. D. 164, affd., 190 N. Y. 544 (1905).

6. Buildings and stations. To erect and maintain all necessary and convenient buildings, stations, fixtures and machinery for the accommodation and use of its passengers, freight and business.

Thus am'd by L. 1892, ch. 676.

For powers of Public Service Commission to order increased or improved station facilities, see Public Service Com. Law, § 26, ante.

A statute authorizing the creation and operation of a railroad does not authorize it to so maintain and operate a turntable situate upon its premises as to make the same a nuisance. Garvey v. Long Island R. R. Co., 159 N. Y. 323 (1899), affg. 9 A. D. 254.

At common law, a carrier is not obliged to provide warehouses for freight offered or depots for passengers awaiting transportation. The Legislature has power to impose such an obligation. People v. N. Y., L. E. & W. R. R. Co., 104 N. Y. 58 (1887).

Specific performance of a contract to provide a station at a particular place considered in Conger v. N. Y., W. S. & B. R. R. Co., 120 N. Y. 29, affg. 45 Hun 296.

7. Transportation of persons and property. To take and convey persons and property on its railroad by the power or force of steam or of animals, or by any mechanical power, except where such power is specially prescribed in this chapter and to receive compensation therefor.

As to motive power of street surface railroads, see section 100 of this law.

8. Time and manner of transportation. To regulate the time and manner in which passengers and property shall be transported, and the compensation to be paid therefor.

Relative to rate of fare for immigrants, see Penal Law, § 1561, post.

This power is modified by the provisions of the Public Service Commissions Law, ante.

A railroad corporation has a dual relation; a public relation to the people, and a private one to its stockholders; its public obligation to run its cars and carry passengers transcends its obligation to its stockholders; it may not stop its cars for any length of time to beat or coerce the price or conditions of labor down to those conditions it offers. In re Loader v. Brooklyn Heights R. R. Co., 14 Misc. 208 (1895).

The courts have power to compel a railroad corporation to furnish reasonable traveling facilities for residents of places along its route. Peo. ex rel. Wheeler v. Long Isl. R. R. Co., 31 Hun 125 (1883); Peo. v. N. Y. C. & H. R. R. R. Co., 28 Hun 543 (1883).

As to unjust discrimination in charges. Root v. L. I. R. R. Co., 114 N. Y. 300 (1899); Langdon v. N. Y., L. E. & W. R. R. Co., 58 Hun 122 (1890). Relief by mandamus under the Inter-State Commerce Act considered. U. S. v. D., L. & W. R. R. Co., 40 Fed. Rep. 101 (1889).

When freight has been carried for several years at the schedule price, without objection thereto, the shipper must be deemed to have assented to the price as reasonable. Killmer v. N. Y. C. & H. R. R. R. Co., 100 N. Y. 395 (1885).

A regulation that no person should enter a particular place unless he had a ticket and his train was about to leave is reasonable; as also is one that articles committed to the care of the company shall be checked. Avery v. N. Y. C. & H. R. R. R. Co., 121 N. Y. 31. A regulation requiring passengers to show their tickets when requested and directing their ejection from the cars in case of refusal is reasonable. Hibbard v. N. Y. & E. R. R. Co., 15 N. Y. 455; Vedder v. Fellows, 20 N. Y. 126 (1859).

9. Purchase of lands and stock in other states. To acquire and dispose of any real property in any other state through which any part of its railroad is operated, and stock in any foreign corporation owning lands in another state for the purpose of securing for such railroad corporation in this state a permanent supply of fuel for its use, and stock of corporations in this state, formed for the purpose of erecting union railway depots.

Compare General Corp. Law, § 14. The comity between the States raises the presumption that a corporation of one State not forbidden by the law of its being may acquire property in another unless prohibited from so doing by direct enactments of the latter State or a public policy deducible from the general course of legislation or from the settled adjudications of its highest court. Cowell v. Springs Co., 100 U. S. 55 (1879).

10. Creation of mortgage. From time to time to borrow such sums of money as may be necessary for completing and finishing or operating or improving its railroad, or for any other of its lawful purposes and to issue and dispose of its bonds for any amount so borrowed, and to mortgage its property and franchises to secure the payment of any debts contracted by the company for the purposes aforesaid, notwithstanding any limitation on such power contained in any general or special law. But no mortgage, except purchase-money mortgages, shall be issued by any railroad corporation under this chapter or any other law without the consent of the public service commission, and the consent of the stockholders owning at least two-thirds of the stock of the corporation, which consent shall be in writing, and shall be given and certified and be filed and recorded in the office of the clerk or register of the county where it has its principal place of business, as provided in section six of the stock corporation law; or else the consent of the public service commission and the consent by their votes of stockholders owning at least two-thirds of the stock of the corporation which is represented and voted upon in person or by proxy at a meeting called for that purpose upon a notice stating the time, place and object of the meeting, served at least three weeks previously upon each stockholder personally, or mailed to him at his post-office address, and also published at least once a week for three weeks successively in some newspaper printed in the city, town or county where such corporation has its principal office, and a certificate of the vote at such meeting shall be signed and sworn to and shall be filed and recorded as provided by section six of the stock corporation law. When authorized by the stockholders' con-

sent to any bonds made or issued under this section, the directors, under such regulations as they may adopt, may confer on the holder of any such bonds the right to convert the principal thereof, after two and not more than twelve years from the date of the bond, into stock of the corporation at a price fixed by the board of directors, which may be either par or a price not less than the market value thereof at the date of such consent to such bonds; and if the capital stock shall not be sufficient to meet the conversion when made, the board of directors shall authorize an increase of capital stock sufficient for that purpose.

Formerly L. 1890, ch. 565, § 4, as added by L. 1892, ch. 676, and am'd by L. 1897, ch. 377; L. 1899, ch. 583; L. 1900, ch. 482; L. 1902, ch. 504.

Section 2 (now 6) of the Stock Corp. Law regulated mortgages executed by railroad corporations prior to the amendment of 1897, ch. 377.

For decisions applicable under the foregoing subdivision see the Stock Corp. Law, § 6.

§ 9. Certificate of convenience and necessity. No railroad corporation formed after May eighteenth, eighteen hundred and ninety-two, under the laws of this state shall exercise the powers conferred by law upon such corporations or begin the construction of its road until the directors shall cause a copy of the certificate of incorporation to be published in one or more newspapers in each county in which the road is proposed to be located, at least once a week for three successive weeks, and shall file satisfactory proof thereof with the public service commission; nor until the commission shall certify that the foregoing conditions have been complied with, and also that public convenience and a necessity require the construction of said railroad as proposed in said certificate of incorporation. The foregoing certificate shall be applied for within six months after the completion of the three weeks' publication hereinbefore provided for. If a certificate is refused no further proceedings shall be had before said commission, but the application may be renewed after one year from the date of such refusal. Prior to granting or refusing said certificate the commission shall have a right to permit errors, omissions or defects to be supplied and corrected. After a refusal to grant such certificate the commission shall certify a copy of all maps and papers on file in its office and of the findings of the commission when so requested by the directors aforesaid. Such directors may thereupon present the same to the appellate division of the supreme court of the department within which said road is pro-

posed in whole or in part to be constructed, and said appellate division shall have power, in its discretion, to order said commission, for reasons stated, to issue said certificate, and it shall be issued accordingly. Such certificate shall be filed in the office of the secretary of state, and a copy thereof, certified to be a copy by the secretary of state, or his deputy, shall be evidence of the fact therein stated. Nothing in this section shall prevent any such railroad corporation from causing such examinations and surveys for its proposed railroad to be made as may be necessary to the selection of the most advantageous route; and for such purpose by its officers or agents and servants, entering upon the lands or water of any person, but subject to the responsibility for all damages which shall be done thereto. The certificate provided for in this section shall not dispense with the permission and approval provided for in section fifty-three of the public service commissions law.

Formerly L. 1890, ch. 565, § 59, as added by L. 1892, ch. 676, and am'd by L. 1895, ch. 545.

Stage and Bus Lines.

A certificate of convenience and necessity must be obtained for the operation of certain classes of stage or bus lines, pursuant to the Trans. Corp. L., § 25.

Requisites for Consent to Construct Over a Public Highway.

Before a street railway company will be permitted to construct and operate its road over a public highway it must obtain, first, the certificate of convenience and necessity from the Public Service Commission provided by the Railroad Law, section 9, or the consent of said Commission pursuant to the Public Service Commissions Law, section 53, or both, as the case may be; second, the consent of the local authorities pursuant to section 18 of article 3 of the Constitution and section 171 of the Railroad Law; and, third, the consent of the abutting property owners, or in lieu thereof the determination of commissioners in favor of the construction of the road, pursuant to said constitutional provision and sections 171 and 174 of the Railroad Law. Manhattan Bridge Three Cent Line v. Bklyn. Heights R. R. Co., 78 Misc. 220 (1912). The consent of existing railroads on other parallel streets is not necessary. Id.

Review by Supreme Court on Certiorari.

The Appellate Division after a refusal to issue a certificate has power to order the board to grant it, upon a review of the testimony taken before the Commission, of the maps and papers on file, and of the findings. While this section does not expressly provide that a copy of the testimony shall be certified, the certification is implied and intended, and although it does not point out the precise practice in bringing the case to a hearing, the Appellate Division may specify the time and notice that shall be given to interested parties. Matter of Wood, 181 N. Y. 93 (1905), affg. 99 A. D. 334. Such

an order is a final order in a special proceeding, and, in the absence of any provision in the statute giving the right to appeal to the Court of Appeals, is appealable under the Code, section 190, so far as questions of law are concerned. Id.

Commission Not Required to Determine Precise Route.

The question of public necessity and convenience is defined by statute and is not dependent upon the form of the petition, the purpose of which is to present the jurisdictional facts. The Commission is not required to determine the precise route. The determination of public convenience and necessity depends upon the railroad as identified in the certificate of incorporation, and the Commission may consider any route which does not vary the road as thus identified. Matter of Frontier & Western R. R. Co., 155 A. D. 57 (1913).

Railroad Purchased at Foreclosure Sale; Certificate Not Required.

No certificate of public convenience and necessity is required to enable a railroad corporation to take over and operate a railroad constructed and formerly operated by another corporation, the title to which it had acquired as transferee of the property at a foreclosure sale. Syracuse, Lake Shore & Northern R. R. Co. v. Carrier, 149 A. D. 411 (1912), citing Peo. ex rel. Third Ave. Ry. Co. v. Pub. Serv. Com., 203 N. Y. 299.

Powers and Duties of Public Service Commission.

In determining as to the public convenience and necessity for the extension of a railroad the commissioners may take into consideration all of the circumstances, the probable growth and convenience of the population and the fact that there is a territory lying beyond which at an early date must be accommodated. Matter of United Traction Co., 119 A. D. 806 (1907).

The board of railroad commissioners has no power to grant a certificate under section 59 of the Railroad Law to a railroad company whose certificate of incorporation is not valid and sufficient. Peo. ex rel. Erie R. R. Co. v. Board of R. R. Com'rs, 105 A. D. 273 (1905).

The former railroad commission was not authorized to issue a certificate of public convenience and necessity until furnished with a receipt from the State Treasurer showing that the tax required by section 180 of the Tax Law had been paid, and a determination to issue such certificate did not become final and binding until the delivery of the certificate to the railroad after the payment of such tax. Peo. ex rel. N. Y. C. & H. R. R. R. Co. v. Public Service Com., 122 A. D. 283 (1907).

It is the duty of the commissioners to inquire into all prior proceedings of the alleged corporation, and if the commissioners find that ten per cent. of the minimum amount of its capital stock has not been paid in cash to the directors as required by subdivision 13 of section 2 of the Railroad Law, it is the duty of the board to refuse to grant the certificate. Matter of Kings, Queens & Suffolk R. R. Co., 6 A. D. 241 (1896).

Railroad commissioners have jurisdiction to determine, in a case of rival applicants, whether certificates shall be issued to both, or to one only, and if to one, to which one. Peo. ex rel. Depew & Southwestern R. R. Co. v. Board of R. R. Comrs., 4 A. D. 259 (1896).

Some considerations which should not influence the board of railroad commissioners are the following: The parties in interest (both concededly acting in good faith); the lines of railroad that were to furnish business to the new company, whether they are corporations organized in New York or other

States, and the capital stock was owned by residents or non-residents. Peo. ex rel. Depew & Southwestern R. R. Co. v. R. R. Comrs., 4 A. D. 259 (1896).

Among things to be considered is the proposed route between the named termini. The act contemplates filing maps of the route, for it speaks of certifying copies of all maps filed, in order that the same may be presented to the Supreme Court, indicating that the route or line of road, as shown upon the map, is a proper subject for consideration by the railroad commissioners in reaching the decision, thus indicating that the question for them to decide is whether public convenience and necessity require the construction of the proposed road, not any road. If they were only to determine whether a road was required between given termini, there would be no occasion for maps and profiles, or any consideration of its character, steam or electric, its route or gauge. Peo. ex rel. Depew & Southwestern R. R. Co. v. R. R. Comrs., 4 A. D. 259 (1896).

The board has no power to grant a certificate of necessity under this section with a proviso that "said railroad shall be built upon private right of way and not in the highway except through cities, villages and hamlets." Peo. ex rel. N. Y. C. & H. R. R. R. Co. v. Board of R. R. Comrs., 92 A. D. 126 (1904).

A prior determination of the board of railroad commissioners that another trolley road should not use a public highway is not res adjudicata as to whether public necessity requires a railroad upon that avenue upon the subsequent application of a traction company. Peo. ex rel. Rockland R. R. Co. v. Aldridge, 126 A. D. 404 (1908).

On the hearing upon the return to a writ of certiorari, issued to review the grant of a certificate for the construction of a proposed railroad, it appeared that such railroad would be less than three miles long, and would extend between two points on another line of railroad, in the interest of which it was to be constructed; that as the proposed road would be practically a switch of the old railroad, the commissioners improperly exercised their discretion in granting the certificate. Peo. ex rel. Steward v. Railroad Commissioners, 40 A. D. 559, affd., 160 N. Y. 202 (1899).

Where rival companies apply for a certificate of necessity, the fact that one completed its incorporation first does not necessarily give it a prior right to the certificate. In re Depew & Southwestern R. R. Co., 92 Hun 406 (1895). To same effect, Peo. ex rel. N. Y. City Ry. & W. R. Co. v. Comrs., 81 A. D. 237, affd., 176 N. Y. 577 (1903).

The intention of this section is to prevent paralleling of routes and the incorporation of different companies for the same routes, and the holding of franchises, preventing others willing so to do from proceeding with the improvement without making terms with the corporation first filing its certificate. Matter of Empire City Trac. Co., 4 A. D. 103 (1896).

The certificate does not issue as a matter of right in the event of no one appearing to oppose the application, and if any one does appear in opposition he is not obliged to prove the negative and convince the board that public convenience and necessity do not require the construction of the road; the burden of proof is upon the corporation to establish the performance by it of the requirements of the law and to establish the existence of that condition of affairs which will authorize the issue of a certificate. Matter of Amsterdam, J. & G. R. R. Co., 86 Hun 578 (1895). The fact that a railroad charged exorbitant rates for freight and passengers does not make out a case for building of a practically parallel road; such charges may indicate insufficient business to support the road at lower rates, or bad management and a grasping disposition on the part of the operators of the road. Id.

The fact that, owing to refusal of local authorities to permit the construction of a street surface railway in certain places, it is necessary to make changes in the route stated in the certificate of incorporation, does not require the railroad commissioners to refuse a certificate, where it appears that the changes are not substantial, and that whatever convenience would be subserved by the original route would be subserved by building on the route as changed. Peo. ex rel. Long Island R. R. Co. v. R. R. Comrs., 42 A. D. 366 (1899).

Where there has been a judicial determination that a certificate of public convenience and necessity for a proposed railroad should not be granted, the decision is controlling on a second application as to the necessity of the particular construction first proposed where the situation remains the same and the effect of the decision is not avoided because prior to the second application the railroad was reorganized and the line extended from that original plant. Peo. v. Board of R. R. Com'rs, 128 A. D. 114 (1908).

Review by Supreme Court on Certiorari.

An appeal from the board of railroad commissioners refusing a certificate of public convenience and necessity comes before the Appellate Division as an original application to be determined upon the record made before the board or upon such further evidence and facts as the court may deem essential to enable it to make a proper decision. It is not merely a review of the decision of a subordinate tribunal. Matter of Rochester-Corning-Elmira Traction Co., 118 A. D. 521, appeal dismissed, 189 N. Y. 522 (1907).

The railroad commissioners act judicially, and the burden is upon the defeated company to show that the board erred in its determination; the decision is entitled to support, so far as it is fairly justified by the facts, to the same extent as that of any other judicial tribunal whose judgments are subject to review. In re Depew & Southwestern R. R. Co., 92 Hun 406 (1895).

This section grants the General Term power to review the action of the railroad commissioners in refusing to grant the certificate, but the act plainly indicates that the court is to treat the application as in the nature of a review of the decision of a subordinate tribunal, and not as it would an original application. Matter of New Hamburg R. R. Co., 76 Hun 76 (1894); Matter of Amsterdam, Johnstown & Gloversville R. R. Co., 86 Hun 578 (1895). The burden rests upon the petitioner to show affirmatively that the commissioners erred. Matter of Amsterdam, Johnstown & Gloversville R. R. Co., 86 Hun 578 (1895).

An application to the Appellate Division to review proceedings of the railroad commissioners is a proceeding in the nature of an appeal, and a writ of certiorari should not be granted while an appeal is pending in the same matter. The action of the commissioners in refusing to grant a certificate does not finally determine the rights of the parties. A proceeding to review it is given by the foregoing section, and, therefore, certiorari would not lie to review the determination of the board. Peo. ex rel. Depew & Southwestern R. R. Co. v. B'd of R. R. Com'rs, 4 A. D. 259 (1896).

An application to reverse, as against the weight of evidence, the determination of the railroad commissioners upon an application for a certificate is governed, as to the preponderance of evidence, by the same rule which is applicable to a motion to set aside a verdict in an action in the Supreme Court. Peo. ex rel. Long Island R. R. Co. v. R. R. Com'rs, 42 A. D. 366 (1899).

The court will not reverse a determination of the railroad commissioners

that public convenience and necessity require the construction of a railroad unless it clearly appears that the decision was founded upon erroneous legal principles or was contrary to the weight of evidence. Peo. ex rel. Terminal Ry. v. R. R. Comrs., 53 A. D. 61, affd., 164 N. Y. 572 (1900). The fact that a proposed railroad will divert a large amount of traffic from the streets of a populous city and effect a considerable saving in time and cost of transporting freight affords sufficient basis for the determination that the construction of such railroad is required. Id.

The general rule, that a court or board exercising judicial functions by permission of a statute has no interest in maintaining its determination and, therefore, cannot be heard on appeal, applies to the railroad commissioners on a review of their determination that a certificate of public convenience and necessity shall issue. Steward v. R. R. Comrs., 160 N. Y. 202 (1899), affg. 40 A. D. 559.

A writ of certiorari to review the determination of the board of railroad commissioners granting a certificate of public convenience and necessity will not be quashed solely because it is sued out by a rival applicant. Peo. v. Board of R. R. Comrs., 128 A. D. 114 (1908).

As the statute makes no provision for appeal from or a review of the determination of the railroad commissioners in granting a certificate to a rival applicant, its review in that respect may be effected under a writ of certiorari. Peo. ex rel. Depew & Southwestern R. R. Co. v. R. R. Comrs., 4 A. D. 259 (1896).

The determination by the railroad commissioners that a certificate shall issue is a final determination of the rights of owners of land through which the road will pass, if constructed, as to the question of public convenience and necessity and hence they are not affected by the limitation upon the issuance of the writ of certiorari imposed by the Code of Civil Procedure, § 2122, subd. 1. Steward v. R. R. Comrs., 160 N. Y. 202 (1899), affg. 40 A. D. 559.

In view of the omission of section 59 to direct that the evidence taken before the board of railroad commissioners shall be certified to the Appellate Division, and of the express provision of the section that the Appellate Division shall have power in its discretion to direct the way to issue the certificate, it is doubtful whether an application to the Appellate Division under such section is strictly in the nature of an appeal from the decision of the board of railroad commissioners and whether it is not permissible for the Appellate Division to take evidence on the question itself and to determine such question de novo in its discretion. Matter of Wood, 99 A. D. 334, affd., 181 N. Y. 93 (1904).

A certificate of public convenience and necessity is to be granted upon considerations not alone affecting the convenience of the public, but also affecting other transportation companies which are already serving the territory. Hence a company so interested is a party aggrieved by the granting of such a certificate and as such has an interest in the controversy. Peo. ex rel. N. Y. C. & H. R. R. R. Co. v. Public Service Com., 2nd Dist., 195 N. Y. 157 (1909), affg. 122 A. D. 283.

Examples of Certificates Properly Refused.

When ten per cent. of the minimum amount of capital stock of a railroad applying for a certificate of convenience and a necessity has not been subscribed for and paid in good faith and in cash, the Public Service Commission should refuse the certificate. Peo. ex rel. Bath & Hammondsport R. R. Co. v. Public Service Com., 2nd Dist., 127 A. D. 480 (1908); decision modified, 194 N. Y. 543.

A certificate of public convenience and necessity should not be granted for a proposed steam railroad twelve miles in length, to be built as an independent road to furnish railroad facilities to a township of 1,800 inhabitants, including a village of 300, where it appears that it will be cheaper and nearer for at least half of the people of said township to take their produce by existing railroads, where they will secure better freight rates, and that it is probable that earnings of the new road will not pay running expenses. Peo. ex rel. Potter v. B'd R. R. Comrs., 124 A. D. 47 (1908).

A certificate of public convenience and necessity should not be granted where the construction of the railroad will involve the monopolizing of lines fronting on navigable waters to the great detriment of commercial interests and to the proposed ship canal to be built by the Federal government. Peo. et al. v. B'd R. R. Comrs., 128 A. D. 114 (1908).

Where a railroad is proposed for the convenience of land, the majority of the owners of which object to the road, a certificate of convenience and necessity should be refused. Peo. ex rel. Amm v. B'd of R. R. Comrs., 103 A. D. 123, affd., 184 N. Y. 575 (1905).

Where a proposed road for all practical purposes parallels existing roads, and would tend to destroy and impair vested property rights without material benefit resulting therefrom, the railroad commissioners are justified in denying the application. Matter of Kings, Queens & Suffolk R. R. Co., 6 A. D. 241 (1896).

Examples of Improper Refusal to Grant Certificate.

The fact that a proposed street surface railroad will parallel an existing steam railroad and will injuriously affect it by competition is not necessarily ground for refusing a certificate of convenience and necessity. Matter of Rochester-Corning-Elmira Trac. Co., 118 A. D. 521, appeal dismissed, 189 N. Y. 522 (1907).

If convenience and public necessity require the road, the certificate should be granted, where no public interests are prejudiced. In re Long Lake R. R. Co., 11 A. D. 233 (1896).

It is not against the policy of the State to allow railroads to be built in the Adirondack forests. In re Long Lake R. R. Co., 11 A. D. 233 (1896).

The fact that a railroad through a tract of Adirondack wilderness will enhance the value of lands in that locality and increase the expense of their addition to the State park is not a valid reason for refusal to grant a certificate. In re Long Lake R. R. Co., 11 A. D. 233 (1896).

A certificate should not be refused through doubts as to whether the proposed road would be profitable. Matter of Ticonderoga Union Terminal R. R. Co., 116 A. D. 56 (1906).

The mere fact that two railroads, professing to extend in opposite directions from the same point, each having a length of ten miles, are incorporated upon the same day and with the same directors, is not sufficient ground for refusing certificate of convenience and necessity. In re Long Lake R. R. Co., 11 A. D. 233 (1896).

A proposed railroad which for one-third of its length runs through a region where public necessity calls for a road will not be denied a certificate of public convenience and a necessity because there are several existing roads each of which parallels its route for a part of the distance. It seems that it is not the policy of the State in regulating railroad facilities through the Public Service Commission to do away entirely with the public benefits arising from competition. Peo. ex rel. D. & H. Co. v. B'd of R. R. Comrs., 126 A. D. 492 (1908).

Extensions.

A certificate, under section 59 of the Railroad Law, is not requisite where a street surface railroad is about to make only a bona fide extension of its route. D., L. & W. R. R. Co. v. Syracuse, Lakeside & B. R. R. Co., 28 Misc. 456, affd., 43 A. D. 621 (1899).

A certificate under this section is not required for an extension of an existing railroad. It cannot, however, without such certificate, under the guise of extending its line, construct an entirely new road which will constitute the main body of its line. The question as to what is properly an extension is one of fact. N. Y. C. & H. R. R. R. Co. v. B. & W. El. R. Co., 96 A. D. 471 (1904).

But section 53 of the Public Service Commissions Law practically accomplishes the same result in the case of extensions as this section does for the original line.

Effect of Failure to Obtain Certificate of Necessity.

Refusal of railroad commissioners to grant a proposed street railroad company a certificate does not prevent it from becoming a bidder at a sale in New York city under section 93 of the Railroad Law. Matter of Empire City Traction Co., 4 A. D. 103 (1896).

Until a certificate has been issued by the railroad commissioners to the corporation it has no right to "exercise the powers conferred by law upon such corporations," and is not complete as a corporation; until it can exercise its statutory powers it is an inchoate thing, having no vested rights. Peo. ex rel. Depew & Southwestern R. R. Co. v. Bd. of R. R. Comrs., 4 A. D. 259 (1896); see, also, dissenting opinion.

A railroad corporation, notwithstanding that no certificate has been issued to it by the railroad commissioners and that it has not paid its organization tax, is estopped from resisting payment for services rendered to it at its request. Muehlenbeck v. Babylon, North Shore R. R. Co., 26 Misc. 136 (1899).

Even if the board of railroad commissioners refuse to grant the requisite certificate, the corporation does not thereby become functus officio; it has the privilege, after the expiration of one year, to renew its application. McWilliams v. Jewett, 14 Misc. 491 (1895).

The prohibition against the exercise of "the powers conferred by law upon such corporations" until such certificate is obtained, has reference solely to the additional powers specially conferred by the chapter, relating to the survey, acquisition of land, construction, etc., and does not apply to the initial proceedings peculiar to street railroads, such as the obtaining of the consents of property owners and the local authorities. McWilliams v. Jewett, 14 Misc. 491 (1895).

Filing of Certificate.

A certificate of public convenience and a necessity is not effective until it is filed in the office of the Secretary of State, and it is only then that the statute of limitations begins to run as to the right to review the determination of the Public Service Commission. Peo. ex rel. N. Y. C. & H. R. R. R. Co. v. Public Service Com., 2nd Dist., 195 N. Y. 157 (1909), affg. 122 A. D. 283.

§ 10. Public service commissions may certify part of the route of a street surface railroad; power to revoke certificates; street surface railroad extensions. Whenever application is made by a street surface railroad company for a certificate of public convenience and a necessity as required by the provisions of section nine, and it shall appear to the public service commission, after examination of the proposed route of the applicant company that public convenience and a necessity do not require the construction of said railroad as proposed in its certificate of incorporation but do require the construction of a part of the said railroad, the commission may issue its certificate for the construction of such part of the said railroad as seems to it to be required by public convenience and a necessity. In case any railroad company which shall hereafter obtain the certificate of the commission that public convenience and a necessity require the construction of the whole or a part of the said railroad shall fail to begin such construction within two years from the date of the issuing of said certificate, the commission may inquire into the reason for such failure and the said commission may revoke said certificate if it shall appear to it to be in the public interest so to do. Any street surface railroad company which proposes to extend its road beyond the limits of any city or incorporated village by a route which will be practically parallel with a street surface railroad already constructed and in operation shall first obtain the certificate of the commission that public convenience and a necessity require the construction of such extension as provided in the case of a railroad corporation newly formed. Before making application for such certificate the corporation shall cause to be advertised the route of the proposed extension in one or more newspapers in each county in which such extension is to be constructed, at least once a week for three successive weeks, and shall file satisfactory proof of such publication with the commission. Nothing in this section shall prevent street railroad companies from making extensions within the limits of cities or incorporated villages upon compliance with the provisions of law now applicable thereto.

Formerly L. 1890, ch. 565, § 59-a, as added by L. 1898, ch. 643, as am'd by L. 1902, ch. 226.

The provisions regulating extensions which parallel existing railroads were added by the amendment of 1902.

Prior to the enactment of this section a street surface railroad could extend its lines, under section 90 (now 170), without obtaining a certificate as to public convenience and necessity. Under the above section, however, no

extension which will parallel another railroad may be made without such certificate. The section does not apply to a street railroad corporation organized in 1895, which, in 1901, filed a statement for a proposed extension under section 90. N. Y. C. & H. R. R. R. Co. v. Auburn Interurban Elec. R. R., 178 N. Y. 75 (1904). Origin of section discussed. Id.

§ 11. Revocation of certificate under certain circumstances. Whenever it shall be made to appear to the public service commission that any steam railroad corporation, which has obtained from it or from the board of railroad commissioners a certificate under section nine of this chapter since eighteen hundred and ninety-four, and whose road is less than ten miles in length, and was to be built in the counties of Saratoga and Washington, shall not have completed its construction and put it in operation within three years after obtaining such certificate, the said commission, on notice to such corporation, shall have the power to revoke the said certificate and consent and thereupon the corporate existence and power of such railroad corporation shall cease and determine.

Formerly L. 1890, ch. 565, § 59-b, as added by L. 1899, ch. 597.

§ 12. When corporate powers to cease. If any domestic railroad corporation shall not, within five years after its certificate of incorporation is filed, begin the construction of its road and expend thereon ten per centum of the amount of its capital, or shall not finish its road and put it in operation in ten years from the time of filing such certificate, its corporate existence and powers shall cease; provided, however, in case a railroad corporation has been heretofore incorporated to construct a railroad neither wholly nor in part within a city of the first class having more than one million inhabitants according to the last federal census, and the public service commission upon an application therefor presented and filed with said commission prior to January first, nineteen hundred and fourteen, shall have certified that public convenience and a necessity require the construction of such railroad as proposed in its certificate of incorporation as provided in this article, or shall have given its permission and approval to begin construction of such railroad pursuant to the provisions of the public service commissions law, then and in that case the corporate existence and powers of such a railroad corporation shall cease if said corporation shall not begin construction of its said road and expend thereon ten per centum of its capital within five years from the time when the public service commission shall have granted such

certificate or given such permission and approval, or shall not finish its road and put it in operation in ten years from the time when the public service commission shall have granted such certificate or given such permission and approval; and provided also, that the time during which such a railroad corporation may be stayed by an injunction, from beginning or completing such construction, or during which a legal proceeding is pending to review the determination of a public service commission, or while an appeal is pending in any such proceeding, shall not be a part of the time so limited for beginning or completing the construction of any such railroad, and this provision shall apply to any such railroad corporation to which such certificate or permission and approval have heretofore been granted by the proper public service commission if an application therefor shall have been made and filed with said commission prior to January first, nineteen hundred and fourteen. But if any such steam railroad corporation whose certificate of incorporation was filed since the year eighteen hundred and eighty, and whose road as designated in such certificate is wholly within one county and not more than ten miles in length, has acquired the real property necessary for its roadbed by purchase, its corporate existence and powers shall not be deemed to have ceased because of its failure to comply with the provisions of this article; and the time for beginning the construction of its road and expending thereon ten per centum of its capital, is extended until thirteen years from the date of the filing of such certificate and the time for finishing its road and putting it in operation, is extended until eighteen years from the date of such filing. Where any railroad corporation organized for the purpose of constructing and operating a tunnel railway upon or under any of the streets of a city having a population of more than one million inhabitants, within the time allowed by law after filing its certificate of incorporation, shall have obtained the consent of the municipal authorities and abutting property owners to the construction of such railway and shall have constructed a portion thereof, the said railway and all surviving franchises, consents, permits and property connected therewith shall vest in the directors of the said corporation, their survivors or successors; and if the public service commission of the district in which said railway is located shall find that public convenience and advantage will be best subserved by the completion and operation thereof, it shall be lawful for said directors, their successors or assigns, with the permission of the commission and the mayor of such city, to assign such railway and all surviv-

ing franchises, consents, permits and property to any railroad corporation created under the laws of the state, which shall hereafter receive a franchise or contract for the construction and operation of a railroad upon the whole or any portion of the route of said tunnel railway which has been so constructed as aforesaid, and when so assigned the said tunnel railway shall, to the extent that it shall be then completed, be deemed within the terms of said last named franchise or contract to have been constructed under and pursuant thereto. This section shall not apply to any street surface railroad company incorporated prior to July first, eighteen hundred and ninety-five, which has obtained or become the owner of the consents of the local authorities of any city of the first or second class, given under article five of the railroad law to the use of public streets, avenues or highways for the construction and operation of the railroad thereon.

Thus am'd by L. 1914, ch. 492.

Formerly L. 1890, ch. 565, § 5, as am'd by L. 1893, ch. 433; L. 1901, ch. 508.

Former section 5 was amended by Laws of 1910, chapter 478, but the amendment was not included in the Consolidated Railroad Law; nor was such amendment repealed by the consolidated law, but was saved by the operation of section 100 of the General Construction Law, which provides that a chapter of the consolidated law shall not be deemed to repeal an amendatory law passed at the same session of the Legislature, unless it is specifically designated in the repealing schedule. Said section 5, as amended by Laws of 1910, chapter 478, reads as follows, the new matter inserted in the section being contained in the third sentence thereof:

§ 5. **When corporate powers to cease.** If any domestic railroad corporation shall not, within five years after its certificate of incorporation is filed, begin the construction of its road and expend thereon ten per centum of the amount of its capital, or shall not finish its road and put it in operation in ten years from the time of filing such certificate, its corporate existence and powers shall cease. But if any such steam railroad corporation whose certificate of incorporation was filed since the year eighteen hundred and eighty, and whose road as designated in such certificate is wholly within one county and not more than ten miles in length, has acquired the real property necessary for its road-bed by purchase, its corporate existence and powers shall not be deemed to have ceased because of its failure to comply with the provisions of this article; and the time for beginning the construction of its road and expending thereon ten per centum of its capital, is extended until thirteen years from the date of the filing of such certificate and the time for finishing its road and putting it in operation, is extended until eighteen years from the date of such filing. Where any railroad corporation organized for the purpose of constructing and operating a tunnel railway upon or under any of the streets of a city having a population of more than one million inhabitants, within the time allowed by law after filing its certificate of incorporation, shall have obtained the consent of the municipal authorities and abutting property-owners to the construction of such railway and

shall have constructed a portion thereof, the said railway and all surviving franchises, consents, permits and property connected therewith shall vest in the directors of the said corporation, their survivors or successors; and if the public service commission of the district in which said railway is located shall find that public convenience and advantage will be best subserved by the completion and operation thereof, it shall be lawful for said directors, their successors or assigns, with the permission of the commission and the mayor of such city, to assign such railway and all surviving franchises, consents, permits and property to any railroad corporation created under the laws of the state, which shall hereafter receive a franchise or contract for the construction and operation of a railroad upon the whole or any portion of the route of said tunnel railway which has been so constructed as aforesaid, and when so assigned the said tunnel railway shall, to the extent that it shall be then completed, be deemed within the terms of said last named franchise or contract to have been constructed under and pursuant thereto. This section shall not apply to any street surface railroad company incorporated prior to July first, eighteen hundred and ninety-five, which has obtained or become the owner of the consents of the local authorities of any city of the first or second class, given under article four of the railroad law to the use of public streets, avenues or highways for the construction and operation of the railroad thereon.

Decisions Involving Forfeitures.

No proceeding is needed to declare and complete a forfeiture of corporate existence and powers under this section. In re Brooklyn, Winfield & Newtown R. R. Co., 72 N. Y. 245 (1878). The Legislature cannot waive this forfeiture by a special act without violating the Constitution, article 3, section 18. Id., 75 N. Y. 335 (1878). See, also, Farnham v. Benedict, 107 N. Y. 159; Day v. Ogd. & L. C. R. R. Co., 107 N. Y. 129; In re Kings Co. El. R. R. Co., 105 N. Y. 97 (1887); Troy & Boston R. R. Co. v. B. H. T. & W. R. Co., 86 N. Y. 107 (1881); In re Bklyn., Winfield & N. R. R. Co., 81 N. Y. 69 (1880); Bklyn. Steam T. Co. v. Brooklyn, 78 N. Y. 524 (1879); In re N. Y. El. R. R. Co., 70 N. Y. 327 (1877).

In the case of a corporation created by a special act which provided that the road should be commenced and completed within times specified, and in default thereof that it should "forfeit the rights acquired by" it under the act, the corporation is not by non-performance, ipso facto, dissolved or deprived of its corporate existence or corporate rights. It is simply exposed to proceedings, on behalf of the State, to establish and enforce the forfeiture. In re Brooklyn El. R. R. Co., 125 N. Y. 434 (1890), distg. B., W. & N. R. R. Co., 72 N. Y. 245 (1878), and B. S. T. Co. v. Brooklyn, 78 N. Y. 524, above.

The cases, In re Brooklyn, Winfield & Newtown R. R. Co., 72 N. Y. 245 (1878), and Bklyn. Steam T. Co. v. Brooklyn, 78 N. Y. 524 (1879), respectively, were discussed, but the principle established was not disturbed by the court in the Matter of New York & Long Island Bridge Co. v. Smith, 148 N. Y. 540 (1896). In the latter case it was held that the question as to whether a forfeiture clause is or is not self-executing depends wholly upon the language employed by the Legislature. The bridge company was incorporated by a special act (L. 1867, ch. 395), which provided that the bridge shall be commenced within two years, or "this act and all rights and privileges granted hereby shall be null and void." The words quoted do not constitute a self-executing forfeiture clause, but the meaning of "null and void" in such

connection is that the corporate existence shall be "voidable," i. e., that in case of default the corporation may be dissolved through appropriate legal proceedings by the Attorney-General. In re N. Y. & Long Island Bridge Co., supra.

The State may, by subsequent legislation, waive forfeitures which otherwise would have resulted from the failure of a railroad corporation to complete its road within the time fixed by law. Bohmer v. Haffen, 161 N. Y. 390 (1900), affg. 35 A. D. 381, affg. 22 Misc. 565; Matter of N. Y. El. R. R. Co., 70 N. Y. 327 (1877).

Charters of railroad corporations are not forfeited or annulled as damages for the violation of private contracts. Matter of Long Island R. R. Co., 143 N. Y. 67 (1894).

A corporation cannot avoid the expenditure required by leasing a portion of its route to another company and granting the latter the privilege of laying tracks thereon. In re Brooklyn, W. & N. R. R. Co. v. Grand St. & N. R. R. Co. of Brooklyn, 81 N. Y. 69 (1880).

A foreclosure and sale of the road works a forfeiture of its right to construct and operate a road thereafter, except as such right vests in a purchaser. Sodus B. & C. R. R. Co. v. Lapham, 43 Hun 314 (1887).

The fact that a railroad corporation removes its tracks from and abandons for a certain period a part of its road does not determine or forfeit its franchise, so as to prevent it from relaying its tracks upon that part of its road. Trelford v. Coney Island & Brooklyn R. R. Co., 6 A. D. 204 (1896).

A preliminary injunction, sought by a railroad corporation to restrain a similar corporation from constructing roads in the same county, is properly refused where it appears that the plaintiff has failed to expend at least ten per cent. of its capital stock within five years after its incorporation and has not constructed its road and is not ready to construct it. N. Y. City & Westchester Ry. Co. v. Portchester St. Ry. Co., 23 A. D. 407 (1897).

This statute is not applicable to a corporation willfully and intentionally neglecting construction of its road. Peo. v. Broadway R. R. Co. of Brooklyn, 126 N. Y. 29 (1891). Or to one whose rights had become extinct by omitting to begin construction within the period limited by the statute. Farnham v. Benedict, 107 N. Y. 159 (1887). Nor to any road which was not in default at the time the statute took effect. In re Brooklyn, W. & N. R. R. Co. v. Broadway R. R. Co. of Brooklyn, 72 N. Y. 245 (1878); Brooklyn S. T. Co. v. Brooklyn, 78 N. Y. 524 (1879).

The self-executing forfeiture provisions of section 5 of the Railroad Law, although found in article 1 of that act, which relates to steam railroads, are applicable to street surface railroads, since section 99 of said law, which also relates to forfeitures, is not exclusive and does not in its terms or by implication exempt street surface railroads from the provisions of section 5. Matter of Brooklyn, Queens Co. & Suburban R. R. Co., 185 N. Y. 171 (1906).

The provisions of L. 1901, ch. 494, amending section 93 of the Railroad Law, and L. 1901, ch. 508, amending section 5 of that act, have no application to a street surface railroad which had absolutely forfeited and lost its franchise to construct an extension of its route before an enactment of such statutes, for its failure to comply with the requirements of section 5 of the Railroad Law. Matter of Brooklyn, Queens Co. & Suburban R. R. Co., 185 N. Y. 171 (1906).

A certificate of extension filed by a street surface railroad company is in effect an amendment of its original articles of incorporation, describing the route of an addition to the route described in its original certificate. The period within which such corporation must act to construct such extension

commences to run from the date of the filing of the certificate of extension, and a failure to comply with the requirements of section 5 of the Railroad Law within the time therein fixed results in a forfeiture of the franchise to build the extension. Matter of Brooklyn, Queens Co. & Suburban R. R. Co., 185 N. Y. 171 (1906).

Meaning of Forfeiture Clause.

The statute provides not only that the corporate existence shall cease, but the corporate powers also. In other parts of the statute is an enumeration of the powers conferred upon corporations organized under the act, to wit, to build their railroads, acquire lands for that purpose, etc.; in other words, their franchises. When the Legislature enacted that the powers of the corporation should cease it intended thereby that in the same contingency the franchises conferred on the corporation should cease. City of New York v. Bryan, 196 N. Y. 158, 166 (1909).

Legal Status of Franchises of Partly Constructed Railroad.

The legal status of a railroad partly constructed where there has been a failure to complete it before the expiration of the time limit prescribed by statute should be determined only in a litigation between the people of the State, from whom the franchise sprang, and the persons claiming to be the owners of such franchise, so that the determination shall be binding and conclusive upon everybody. City of New York v. Bryan, 196 N. Y. 158, 168 (1909).

Failure to Construct on Separate Extensions.

The purpose of this section is to prevent a railroad company from obtaining a franchise for the operation of a railroad through a large number of designated streets and then indefinitely postponing actual construction through any portion thereof. Hence where a street railroad company filed a certificate of extension naming eight separate and distinct routes, each route was deemed a separate extension, under this section, and the company forfeited its rights in six on which no work was commenced within five years. Peo. ex rel. Bklyn., Queens Co. & Sub. R. R. Co. v. Steers, 158 A. D. 153 (1913). revsg. 80 Misc. 324; affd., 211 N. Y. 538 (1914).

Exercise of Franchise Granted Without Time Limit.

The fact that the consent of municipal authorities permitting a railroad company to construct its road and a tunnel in the city streets, prescribe no limit of time within which the road should be completed, does not preserve the franchise and corporate rights from forfeiture and defeasance for the failure of the corporation to finish the road and put it into operation within the time prescribed by this section, although the company had commenced the construction of the road within five years and expended ten per cent. of its capital thereon. City of New York v. Bryan, 196 N. Y. 158 (1909). The consent of the municipal authorities was not the grant of an independent franchise. Not only the franchise to be a corporation, but also the franchises granted to a corporation, when formed, for use of the public streets, spring from the State; and the fact that the Legislature cannot, because of the constitutional inhibition, authorize the laying of railroad tracks in the streets without the consent of the local authorities in no way modifies the principle that the grant proceeds from legislative authority. Id. It is the elementary

definition of a franchise that it is a grant from the sovereign power. Municipalities have only such power in this regard as has been delegated to them by the Legislature. Id.; Village of Phoenix v. Gannon, 195 N. Y. 471, 474 (1909). In the granting of consent to construct a railroad, if no time is prescribed, the franchise must be exercised within a reasonable time. Id.

§ 13. **Corporations failing to finish road.** Any railroad corporation that was duly incorporated after the year eighteen hundred and eighty-five, under the provisions of chapter one hundred and forty of the laws of eighteen hundred and fifty, and the acts amendatory thereof, and that within two years after its certificate of incorporation was filed, began the construction of its road and expended five hundred thousand dollars thereon, but failed to finish its road and put it in operation within ten years from the time of filing such certificate, shall be entitled to and have all the rights and be subject to all the obligations intended or provided by the next section of this chapter.

Formerly L. 1898, ch. 263, § 1.

§ 14. **Time extended.** Any such corporation may finish its road and put it in operation; and the rights, powers, privileges, franchises, obligations, duties, restrictions and limitations of any such corporation shall be as though the time heretofore provided by law to finish its road and put it in operation, had been fifteen years from the date of filing its certificate of incorporation; and all rights or franchises acquired by any such corporation to construct its road in, upon, along or across any street or highway, and all proceedings to locate or extend its route or change its termini, or acquire any franchise, and all liens or obligations against any such corporation are hereby expressly conferred, imposed and continued to the same effect as though the time for finishing its road had been fifteen years as aforesaid. This section and the preceding one shall not apply to any street railroad, whether surface, elevated or depressed, nor to any railroad more than twenty miles in length.

Formerly L. 1898, ch. 263, § 2.

§ 15. **Time extended where there has been a receiver.** In every case where a receiver of the property or franchise of a domestic railroad corporation was appointed prior to the fifteenth day of May, nineteen hundred and three, by a court of this state or by a court of the United States having jurisdiction within the

limits of this state, the time intervening between the entry of the order, judgment or decree appointing a receiver in the first instance and the entry of the order, judgment or decree finally terminating the receivership, shall not be or be taken to be part of the time limited by law for beginning the construction of its road by such railroad corporation, or for the expenditure by it of ten per centum on the amount of its capital stock on such construction, or for finishing its road or putting it in operation, and the expiration heretofore or hereafter during such receivership of the time so limited shall not be taken to have terminated or in any way to have affected the existence, franchises, rights or privileges of said corporation; but such corporation shall have all rights, privileges, powers and franchises to which if a valid corporation it would have been entitled by law at the time of filing its certificate of incorporation, together with such rights, privileges, powers and franchises as have since been or may hereafter be granted by law to such corporation; provided that nothing in this section contained shall in any way alter, affect or impair any vested right or interest. And such corporation, or in case of a sale of its franchises by the court, then the successor corporation acquiring the franchise, shall be entitled to the same period of time for the performance of said acts and things after the termination of receivership, as remained to said corporation at the time of entry of the order, judgment or decree appointing a receiver in the first instance. This section shall not apply to or affect any street surface railroad company the route of which in whole or in part lies within any city of the first or second class in this state, and shall not apply to or affect any railroad corporation incorporated under any private or local act.

Formerly L. 1903, ch. 626.

§ 16. Location of route. Every railroad corporation, except a street surface railroad corporation and an elevated railroad corporation, before constructing any part of its road in any county named in its certificate of incorporation, or instituting any proceedings for the condemnation of real property therein, shall make a map and profile of the route adopted by it in such county, certified by the president and engineer of the corporation, or a majority of the directors, and file it in the office of the clerk of the county in which the road is to be made. The corporation shall give written notice to all actual occupants of the lands over which

the route of the road is so designated, and which has not been purchased by or given to it, of the time and place such map and profile were filed, and that such route passes over the lands of such occupants. Any such occupant or the owner of the land aggrieved by the proposed location, may, within fifteen days after receiving such notice, give ten days' written notice to such corporation and to the owners or occupants of lands to be affected by any proposed alteration, of the time and place of an application to a justice of the supreme court, in the judicial district where the lands are situated, by petition duly verified, for the appointment of commissioners to examine the route.

The petition shall state the objections to the route designated, shall designate the route to which it is proposed to alter the same, and shall be accompanied with a survey, map and profile of the route designated by the corporation, and of the proposed alteration thereof, and copies thereof shall be served upon the corporation and such owners or occupants with the notice of the application. The justice may, upon the hearing of the application, appoint three disinterested persons, one of whom must be a practical civil engineer, commissioners to examine the route proposed by the corporation, and the route to which it is proposed to alter the same, and after hearing the parties, to affirm the route originally designated, or adopt the proposed alteration thereof, as may be consistent with the just rights of all parties and the public, including the owners or occupants of lands upon the proposed alterations; but no alteration of the route shall be made except by the concurrence of the commissioner who is a practical civil engineer, nor which will cause greater damage or injury to lands or materially greater length of road than the route designated by the corporation, nor which shall substantially change the general line adopted by the corporation.

The commissioners shall, within thirty days after their appointment, make and certify their written determination, which with the petition, map, survey and profile, and any testimony taken before them shall be immediately filed in the office of the county clerk of the county. Within twenty days after such filing, any party may, by written notice to the other, appeal to the appellate division of the supreme court from the decision of the commissioners, which appeal shall be heard and decided at the next term held in the department in which the lands of the petitioners or any of

them are situated, for which the same can be noticed, according to the rules and practice of the court. On the hearing of such appeal, the court may affirm the route proposed by the corporation or may adopt that proposed by the petitioner.

The commissioners shall each be entitled to six dollars per day for their services, and to their reasonable and necessary expenses, to be paid by the persons who applied for their appointment. If the route of the road, as designated by the corporation, is altered by the commissioners, or by the order of the court, the corporation shall refund to the petitioner the amount so paid, unless the decision of the commissioners is reversed upon appeal taken by the corporation. No such corporation shall institute any proceedings for the condemnation of real property in any county until after the expiration of fifteen days from the service by it of the notice required by this section. Every such corporation shall transmit to the public service commission the following maps, profiles and drawings exhibiting the characteristics of its road, to wit:

A map or maps showing the length and direction of each straight line; the length and radius of each curve; the point of crossing of each town and county line, and the length of line of each town and county accurately determined by measurements to be taken after the completion of the road.

Whenever any part of the road is completed and used, such maps and profiles of such completed part shall be filed with the commission within three months after the completion of any such portion and the commencement of its operation; and when any additional portion of the road shall be completed and used, other maps shall be filed within the same period of time, showing the additional parts so completed. If the route, as located upon the map and profile filed in the office of any county clerk, shall have been changed, it shall also cause a copy of the map and profile filed in the office of the public service commission, so far as it may relate to the location in such county, to be filed in the office of the county clerk.

Formerly § 6, as am'd by L. 1892, ch. 676.

For forms in proceedings under this section, see post, Forms Nos. 411–419.

The amendment of 1892 exempted street surface railroads and elevated railways from the requirements that maps and profiles be filed, and omitted the prohibition against beginning condemnation proceedings "until after the final determination of all applications that may be made for a change of route in such county."

The preliminary survey (§ 4, subd. 1) must be made, and notice (under § 6) must be given prior to the application for commissioners of appraisal. In re N. Y. & B. R. R. Co. v. Godwin, 62 Barb. 85 (1871), 12 Abb. N. S. 21. Commissioners of appraisal cannot be appointed until the expiration of fifteen days after the service of notice. Id. Such notice must be served on all occupants affected. In re N. F. & W. Ry. Co. v. De V. College, 46 Hun 94 (1887), affd., 108 N. Y. 375. It need not, however, be served upon occupants of land, no part of which is covered by the route designated, but which may be required for the corporate purposes of the company. In re N. Y., L. & W. Ry. Co. v. Scheu, 33 Hun 148, affd., 98 N. Y. 664 (1885). Due service of the notice is a prerequisite to the appointment of commissioners. Peo. ex rel. E. & G. V. R. R. Co. v. Tubbs, 49 N. Y. 356 (1872); In re L. I. R. R. Co., 45 N. Y. 364 (1871); In re Norton v. W. V. R. R. Co., 63 Barb. 77 (1872). The statute contemplates but one commission in a county, which should complete its work by affirming the route proposed by the company or making all necessary alterations, and when this is done the route through the county is established. Id. The justice of the Supreme Court merely determines whether or not there is sufficient cause for appointment of commissioners. He cannot try the matter on its merits. Norton v. W. V. R. R. Co., 61 Barb. 476 (1872).

A notice subscribed "James M. Milne, secretary of the Cortland and Homer Horse Railroad Company," is properly signed by the company. In re C. & H. R. R. Co. v. S., B. & N. Y. R. R. Co., 31 Hun 72 (1883), affd., 95 N. Y. 663. The notice by an aggrieved occupant or owner must be served personally. Peo. ex rel. N. B. & C. R. R. Co. v. L. & B. R. R. Co., 13 Hun 211 (1878).

Where a landowner fails to institute proceedings to review the location within fifteen days from service of notice upon him he cannot thereafter oppose the location. Stillwater & M. S. R. R. Co. v. Slade, 36 A. D. 587 (1899).

When a map and survey has been made and filed and the required notice given and no change of route is made as a result of proceedings by any landowner or occupant the corporation has acquired the right to construct and operate a railroad upon such line. R., H. & L. R. R. Co. v. N. Y., L. E. & W. R. R. Co., 110 N. Y. 128 (1888); S. R. T. R. R. Co. v. New York, 128 N. Y. 510 (1891).

Where error has been committed by commissioners the courts will send the report back. In re L. S. & M. S. Ry. Co. v. N. Y., L. & W. Ry. Co., 89 N. Y. 442 (1882). Whether the order by the General Term upon an appeal from the decision of the commissioners is appealable, quære. In re N. Y., L. E. & W. R. R. Co. v. N. Y., L. & W. Ry. Co., 99 N. Y. 338 (1885).

The Court of Appeals will not review questions of fact passed upon by the commissioners. Id.

Scope of review by Appellate Division, 68 Hun 391 (1893), affd., 143 N. Y. 669.

A law designating the streets through which a company may construct and operate its road is a practical location. In re Coney Isl. & B. R. R. Co. v. Ridley, 12 Hun 451 (1877).

Contents of Map.

A map which shows the alignment and profile is sufficient, without showing all the connections, turnouts and switches. Peo. v. Brooklyn, F. & C. I. R. R. Co., 89 N. Y. 75 (1882). It seems that filing a map is not necessary by a company purchasing, after foreclosure, a railroad already constructed. Id.

A map showing the general course of the road, not indicating whether it is an exterior, a center, or any other certain line, is insufficient. N. Y. & B. R. R. Co. v. Godwin, 12 Abb. N. S. 21 (1872), 62 Barb. 85; N. Y. & A. R. R. Co. v. N. Y., W. S. & B. Ry. Co., 11 Abb. N. C. 386 (1880); In re B. H. T. & W. Ry. Co., 10 Abb. N. C. 104 (1878).

Additional land required for cuttings and embankments need not be shown. In re S. B. R. R. & T. Co. v. Gates, 50 Hun 405 (1888).

A map of part of the road only could not work an abandonment of another portion. Mason v. B'klyn City & N. R. R. Co., 35 Barb. 373 (1861).

This section is not applicable to the matter of crossing existing railroad tracks. See R. R. L. § 12, post; In re N. Y., L. E. & W. R. R. Co. v. P., L. & N. E. R. R. Co., 110 N. Y. 374 (1888); In re L. S. & M. S. Ry. Co. v. N. Y., L. & W. R. Co., 89 N. Y. 442 (1882); In re B. H. T. & W. R. Co. v. T. & B. R. R. Co., 79 N. Y. 64 (1879); see, also, N. Y., L. E. & W. R. R. Co. v. N. Y., L. & W. Ry. Co., 99 N. Y. 338 (1885); L. & B. R. R. Co. v. N. Y. C. & H. R. R. R. Co., 77 N. Y. 557 (1879).

Condemnation for Terminal.

A railroad condemning land for additional terminal facilities merely and not seeking to change its route or lay out a new one need not file a map and profile. N. Y. C. & H. R. R. R. Co. v. Ernst, 114 A. D. 874 (1906).

§ 17. Acquisition of title to real property; additions, betterments and facilities. All real property required by any railroad corporation for the purpose of its incorporation or for any purpose stated in this chapter shall be deemed to be required for a public use, and may be acquired by such corporation. If the corporation is unable to agree for the purchase of any such real property, or of any right, interest or easement therein, required for any such purpose, or if the owner thereof shall be incapable of selling the same, or if after diligent search and inquiry the name and residence of any such owner cannot be ascertained, it shall have the right to acquire title thereto by condemnation. Every railroad corporation shall have the power from time to time to make and use upon or in connection with any railroad either owned or operated by it, such additions, betterments and facilities as may be necessary or convenient for the better management, maintenance or operation of any such railroad, and shall have the right by purchase or by condemnation, to acquire any real property required therefor, and it shall also have the right of condemnation in the following additional cases:

1. Where title to real property has been acquired, or attempted to be acquired, and has been found to be invalid or defective.

2. Where its railroad shall be lawfully in possession of a lessee, mortgagee, trustee or receiver, and additional real property shall be required for the purpose of running or operating such railroad.

3. Where it shall require for any railroad owned or operated by it any further rights to lands or the use of lands for additional main tracks or for branches, sidings, switches, or turn-outs or for connections or for cut-offs or for shortening or straightening or improving the line or grade of its road or any part thereof. Also where it shall require any further rights to lands or the use of lands for filling any structures of its road, or for constructing, widening or completing any of its embankments or roadbeds, by means of which greater safety or permanency may be secured, and such lands shall be contiguous to such railroad and reasonably accessible.

4. Where it shall require any further right to lands or to the use of lands for the flow of water occasioned by railroad embankments or structures now in use, or hereafter rendered necessary, or for any other purpose necessary for the operation of such railroad, or for any right to take and convey water from any spring, pond, creek or river to such railroad, for the uses and purposes thereof, together with the right to build or lay aqueducts or pipes for the purpose of conveying such water, and to take up, relay and repair the same, or for any right of way required for carrying away or diverting any water, stream or floods from such railroad for the purpose of protecting its road or for the purpose of preventing any embankment, excavation or structure of such railroad from injuring the property of any person who may be rendered liable to injury thereby.

Waters commonly used for domestic, agricultural or manufacturing purposes, shall not be taken by condemnation to such an extent as to injuriously interfere with such use in future. No railroad corporation shall have the right to acquire by condemnation any right or easement in or to any real property owned or occupied by any other railroad corporation, except the right to intersect or cross the tracks and lands owned or held for right of way by such other corporation, without appropriating or affecting any lands owned or held for depots or gravel-beds.

Whenever any real property is required by any steam surface railroad corporation, the lines of which within this state are situated wholly within a city of over one million inhabitants, for the purposes mentioned in this section, it shall be a condition precedent to the bringing, or, if heretofore brought, to the continuing of condemnation proceedings by any railroad corporation to ac-

quire said real property that it procure the consent of the public service commission having jurisdiction of the district within which the land is situated, to acquire such real property, and unless such consent is given and procured the said property shall not be condemned. The last preceding requirement shall apply to all proceedings pending at the time this amendment takes effect.

Thus am'd by L. 1913, ch. 284.

Formerly L. 1890, ch. 565, § 7, as am'd by L. 1892, ch. 676, and L. 1905, ch. 727.

For condemnation procedure, see Condemnation Law (Code, §§ 3357–3384, post).

Amendment Superseding Former Decisions.

The amended section gives railroads additional powers in acquiring lands for additions and betterments, such as main tracks, branches, sidings, or connections which may be necessary for cutoffs or for shortening the line. In this respect the statute has now rendered obsolete former decisions which were based upon the absence of legislative power. The statute is not designed to change any route or right of way, but to empower the acquiring of additional lands to be used in betterments. Consequently where a railroad wishes to acquire land one hundred feet in width between its branches, it is not necessary to take the statutory proceedings for a change of route in order to acquire title to the land. Long Island R. R. Co. v. Sherwood, 205 N. Y. 1 (1912), revsg. 147 A. D. 895. In view of this decision the construction of the statute as it existed in Erie R. R. Co. v. Steward, 170 N. Y. 172, is no longer controlling it.

State Lands May Be Acquired.

State lands under the waters of the Hudson river may be acquired for railroad purposes under this section, since such purposes are a public use, as in such cases, under section 18, such lands are subject to grants for such purposes by the Commissioners of the Land Office. N. Y. Central & H. R. R. R. Co. v. Matthews, 70 Misc. 567 (1911).

Extension of Road; Condemnation.

The construction of a high power transmission line around a village so as to avoid danger to its inhabitants may be regarded not as an extension, but as an addition or facility for the railroad necessary to its operation, and does not require the approval of the Public Service Commission, and it may condemn lands for such purposes. Syracuse, Lake Shore & Northern R. R. Co. v. Carrier, 149 A. D. 411 (1912). On condemnation for such purposes the railroad need not obtain permission of the local authorities to lead the electric wires across highways, where the lands to be condemned do not adjoin the highways at any point and the plaintiff is the owner in fee of so much of the highway as it seeks to occupy with its line. Id.

Foreign Corporations.

A foreign corporation is entitled to the benefits of this provision. In re Marks, 25 St. Rep. 502, 6 N. Y. Supp. 105 (1889); N. Y., N. H. & H. R. R. Co. v. Welsh, 142 N. Y. 411 (1894).

What Land May Be Condemned.

Under this section lands may be acquired for passenger and freight depots; for places for keeping cars and engines not in use; lands for proper tracks and curves to enable trains with safety, dispatch and convenience to approach the station, cattle yards, elevator and water front structures of the company; also land under water for piers, etc. In re N. Y. C. & H. R. R. R. Co., 77 N. Y. 248 (1879); Same v. Met. Gas Lt. Co., 63 N. Y. 326 (1875).

It is no objection that other lands in the same vicinity equally well adapted may be acquired by purchase. Same v. Kip, 46 N. Y. 546 (1871).

Land for prospective uses may also be acquired. In re Staten Isl. R. T. Co., 103 N. Y. 251 (1886).

Lands cannot be taken for speculation or to obstruct competing lines. In re R. & S. R. R. Co. v. Davis, 43 N. Y. 137 (1870).

Lands under water may be condemned. In re N. Y. C. & H. R. R. R. Co., 77 N. Y. 249 (1879), 29 Hun 269.

A railroad corporation may perfect a defective title to its lands. In re Prospect Pk. & C. I. R. R. Co., 67 N. Y. 371 (1876); In re N. Y. C. R. R. Co., 20 Barb. 419, 428 (1854).

This section only confers the right to proceed in invitum when an attempt to purchase of the owner has proven a failure. N. Y. & B. R. R. Co. v. Godwin, 12 Abb. N. S. 21 (1871).

And when such failure is caused either by the owner's unwillingness to sell it all, or only at an excessive price. In re Prospect Pk. & C. I. R. R. Co., above.

Pending an action to restrain a railroad company from operating its road in a certain street, it entered into a stipulation not to prosecute proceedings to condemn property pending a stay. Held, when the stay ceased to operate by reason of reversal, the company was free to act. In re Met. El. Ry. Co., 136 N. Y. 500 (1893).

The act does not imply that an outstanding judgment affecting the interest of an owner who had been compensated is recognized as a defect in the title. Watson v. N. Y. C. R. R. Co., 47 N. Y. 157 (1872).

Where a corporation which is organized under the General Railroad Act and became possessed of the powers conferred by the Rapid Transit Act takes real property in condemnation proceedings, the two statutes may be read together to ascertain the extent of the fee to be taken, and as so read require the construction that the property condemned thereunder is not to be held in fee simple, but only for the uses and purposes of the corporation during the corporate existence. Hudson & Manhattan R. R. Co. v. Wendel, 193 N. Y. 166 (1908).

Damages.

The grant to a corporation by an abutting owner, who owns the fee of the street, of the right to construct a railroad thereon includes the right to operate such railroad, and precludes a recovery by such owner or his grantee of damages to the abutting premises arising from such operation, unless it is shown that the road is improperly constructed or negligently operated. Conabeer v. N. Y. C. & H. R. R. R. Co., 84 Hun 34 (1895).

Where the lease of property abutting upon a street on which is erected an elevated railroad was made subsequent to the construction of such road the exclusive right of action for rental damages is in the landowner. Crimmins v. Metropolitan El. Ry. Co., 87 Hun 187 (1895); Storms v. Manhattan Ry. Co., 178 N. Y. 493 (1904).

§ 18. Railroads through public lands. The commissioners of the land office may grant to any domestic railroad corporation land belonging to the people of the state, except the reservation at Niagara and the Concourse lands on Coney Island, which may be required for the purposes of its road on such terms as may be agreed upon by them; or such corporation may acquire title thereto by condemnation; and the county or town officers having charge of any land belonging to any county or town, required for such corporation for the purposes of its road, may grant such land to the corporation for such compensation as may be agreed upon. In case the land or any right, interest or easement therein, required by such railroad corporation is used for prison purposes the commissioners of the land office may grant such land, or any right, interest or easement therein, provided the plans of such railroad corporation for the use of such prison lands, or such right, interest or easement therein, have the approval of the superintendent of state prisons.

Formerly L. 1890, ch. 565, § 8, as am'd by L. 1904, ch. 313.

Relative to grants of land under water, see Public Lands Law, §§ 75, 76.

The authority conferred by law upon the Commissioners of the Land Office to be deemed modified by this section. In re N. Y., W. S. & B. Ry. Co. v. Swain, 29 Hun 269 (1883); see, also, Gould v. Hudson R. R. R. Co., 6 N. Y. 522 (1852), held to have been overruled in Rumsey v. N. Y. & N. E. R. R. Co., 133 N. Y. 79 (1892).

Submerged lands may be taken by a railroad under this section; no notice need be served upon the owner of the adjoining upland. Matter of the N. Y., West Shore & Buffalo R. R. Co., 29 Hun 269 (1883), 103 N. Y. 251 (1886).

Land under water granted to New York city by the Legislature is held in trust for the uses prescribed, but may be appropriated for railroad purposes. In re N. Y., W. S. & B. Ry. Co. v. Walsh, 89 N. Y. 453 (1882), affg. 27 Hun 57; In re N. Y. C. & H. R. R. R. Co., 77 N. Y. 248 (1879).

This provision confers power to grant lands under water for necessary docks. 77 N. Y. 248 (1879), above; see, also, Kerr v. W. S. R. R. Co., 127 N. Y. 269 (1891); Rumsey v. N. Y. & N. E. R. R. Co., 114 N. Y. 423, 130 N. Y. 88, 133 N. Y. 79, 136 N. Y. 543 (1893).

A patent granted by the Commissioners of the Land Office for State Lands under navigable waters, which is not void on its face, can only be assailed in a direct proceeding to review the action of the commissioners, or by an action in equity to set aside the grant. N. Y. C. & H. R. R. R. Co. v. Aldridge, 135 N. Y. 83 (1892), distg. Rumsey v. N. Y. & N. E. R. R. Co., 114 N. Y. 423 (1889). Where the owner of land bounded by a navigable river conveys a strip of the land along the water front to a railroad company for the use of its road he does not lose nor does the company gain the character of riparian owner. The company can only use the land for the purposes of its road. Id.

Notice to the owner of the upland need not be given when land under water is condemned pursuant to this section. 29 Hun 269 (1883), above.

§ 19. Railroads through Indian lands. Any railroad corporation may contract with the chiefs of any nation of Indians, over whose lands it may be necessary to construct its railroad, for the right to make such road upon such lands, but such contract shall not vest in the corporation the fee to the land, nor the right to occupy the same for any purposes other than may be necessary for the construction, occupancy and maintenance of such railroad, and such contract shall not be valid or effectual until it shall be ratified by the county court of the county where the land shall be situated.

Formerly § 9.

§ 20. Railroads through Chautauqua assembly grounds. No railroad corporation shall build, construct or operate any railroad in, upon, over or through the grounds, lands or premises owned by the Chautauqua assembly corporation in the town and county of Chautauqua, without the written consent of a majority of the board of trustees of such assembly corporation.

Formerly § 10.

§ 21. Railroads along highways. No railroad corporation shall erect any bridge or other obstruction across, in or over any stream or lake, navigated by steam or sail boats at the place where it may be proposed to be erected, except as hereinafter provided, nor shall it construct its road in, upon or across any street of any city without the assent of the corporation of such city, nor across, upon or along any highway in any town or street in any incorporated village, without the order of the supreme court of the district in which such highway or street is situated, made at a special term thereof, after at least ten days' written notice of the intention to make application for such order shall have been given to the superintendent of highways of such town, or board of trustees of the village in which such highway or street is situated. A railroad corporation may construct and maintain a bridge for the purposes of its railroad, over any creek within this state, navigated as aforesaid, provided that the consent of the public service commission be granted; and provided further, that in case such waters are used as a part of the canal system, that the consent of the canal board be obtained. Every railroad corporation which shall build its road along, across or upon any stream, water-

course, street, highway, plankroad or turnpike, which the route of its road shall intersect or touch, shall restore the stream or watercourse, street, highway, plankroad and turnpike, thus intersected or touched, to its former state, or to such state as not to have unnecessarily impaired its usefulness, and any such highway, turnpike or plankroad may be carried by it, under or over its track, as may be found most expedient. Where an embankment or cutting shall make a change in the line of such highway, turnpike or plankroad desirable, with a view to a more easy ascent or descent, it may construct such highway, turnpike or plankroad, on such new line as its directors may select, and may take additional lands therefor by condemnation if necessary. Such lands so taken shall become part of such intersecting highway, turnpike or plankroad, and shall be held in the same manner and by the same tenure as the adjacent parts of the highway, turnpike or plankroad are held for highway purposes. Every railroad corporation shall pay all damages sustained by any turnpike or plankroad corporation in consequence of its crossing or occupation of any turnpike or plank-road, and in case of inability to agree upon the amount of such damages it may acquire the right to such crossing or occupation by condemnation.

Thus am'd by L. 1913, ch. 743.
Formerly L. 1890, ch. 565, § 11.
See provisions of section 146 of the Highway Law, post.

Right of Municipality to Impose Conditions.

The right of a municipality to withhold its consent to construct a railroad in its streets carries by implication the right to impose any conditions, and if they be unreasonable the only remedy of the railroad corporation is to reject the franchise. Peo. ex rel. Frontier Elec. Ry. Co. v. No. Tonawanda, 70 Misc. 91 (1910).

Duty to Restore.

The part of this section which requires every railroad which shall build its roads along, across or upon any stream, watercourse, street, etc., to restore the stream, highway, street, etc., to its former state, cannot be construed to give additional rights. If use of the street is unauthorized, a judgment should not give the railroad the alternative to restore the street to its former state or so as not to impair its usefulness. Peo. ex rel. Sibley v. Gresser, 205 N. Y. 24 (1912), affg. 146 A. D. 919.

Although a railroad company, maintaining tracks across a creek in such a manner as to allow free passage of water, contracted with the grantor to construct and maintain proper ditches, it has no authority to dam up the creek, close the openings and force the successors of the grantor to an action for breach of contract. Its duty is to restore the watercourse to its former state of usefulness. Howard v. City of Buffalo, 151 A. D. 198 (1912).

The benefits secured by this section are for the private advantage of the owners of land adjoining a watercourse, and may be by them granted or conveyed to others. Howard v. City of Buffalo, 151 A. D. 198 (1912).

A railroad is responsible for the condition of the highway during alterations made by permission of the Supreme Court under this section. It cannot delegate the duty to an independent contractor. Deming v. Terminal Ry. of Buffalo, 169 N. Y. 1, affg. 49 A. D. 493 (1901).

The provision for restoration of streams, water-courses, etc., was designed to protect public rights, not private interests, and applies only to navigable streams. Kerr v. W. S. R. R. Co., 127 N. Y. 269 (1891), distg. Langdon v. Mayor, etc., 93 N. Y. 129; Williams v. Mayor, etc., 105 N. Y. 420; Kingsland v. Mayor, etc., 110 N. Y. 569. It does not entitle an owner of upland, where access to his dock is cut off, to have a draw-bridge constructed. 127 N. Y. 269, above. A stream diverted must be restored to its former usefulness as nearly as practicable. Cott v. Lewiston R. R. Co., 36 N. Y. 214 (1867).

The duty to restore is a continuous one. If, after restoration of a highway, increased travel require changes to be made, the company must make them. Hatch v. S., B. & N. Y. R. R. Co., 50 Hun 64 (1888). When the railroad company is in default in restoring a highway, a highway commissioner may do the necessary work and maintain an action against the company for the expense. Bryant v. Town of Randolph, 133 N. Y. 70 (1892).

The duty to restore and maintain a highway appropriated by a railroad company is a continuing obligation incident to the franchise, which passes and attaches to the successors of the corporation. Allen v. Buffalo, Rochester & Pittsburg Ry. Co., 151 N. Y. 434 (1897), affg. 81 Hun 615; Bush v. D., L. & W. R. R. Co., 166 N. Y. 210 (1901).

A railroad which has constructed its track upon a highway does not fulfill its duty of restoration by merely laying out a new highway of the same width and grade and in the same general direction, but must take all reasonable precautions to make the new highway safe with reference to all the surroundings. Allen v. Buffalo, Rochester & Pittsburg Ry. Co., 151 N. Y. 434 (1897), affg. 81 Hun 615.

Whether the duty to restore has been performed may be a jury question. Payne v. T. & B. R. R. Co., 83 N. Y. 572; Wasmer v. D., L. & W. R. R. Co., 80 N. Y. 212. The remedy of the public for a failure to restore is by indictment or mandamus. L. 1890, ch. 568, § 15; Bryant v. Town of Randolph, 133 N. Y. 70; Peo. v. N. Y. C. & H. R. R. R. Co., 74 N. Y. 302; see, also, Peo. ex rel. Green v. D. & C. R. R. Co., 58 N. Y. 152; Peo. v. N. Y., N. H. & H. R. R. Co., 89 N. Y. 266.

As to repaving streets, see Gilmore v. Utica, 121 N. Y. 561, 131 N. Y. 26; Masterson v. N. Y. C. & H. R. R. R. Co., 84 N. Y. 247.

The duty imposed upon a railroad company of restoring a highway was not expressly or impliedly repealed by the Highway Law. Bush v. D., L. & W. R. R. Co., 166 N. Y. 210 (1901), affg. 54 A. D. 616.

If a highway is removed, lands for restoration may be acquired by purchase or condemnation. Post v. West S. R. R. Co., 123 N. Y. 580; see, also, Peo. ex rel. Schaghticoke v. T. & B. R. R. Co., 37 How. 427, affd., 6 Alb. L. J. 174 (1870).

Enforcement of Obligation to Restore.

Mandamus will lie at the instance of a private citizen in the name of the People of the State to compel the restoration of the highway "to its former state or to such state as not to have its usefulness impaired," and the pro-

ceeding is entirely independent of the remedy given by the Highway Law for the removal of encroachments. Peo. ex rel. Bacon v. Northern Central Railway Co., 164 N. Y. 289 (1900).

Nor is the remedy by mandamus confined to cases where the road is a "public" highway. The duty is absolute and may be enforced by mandamus by any person having a special interest therein. Peo. ex rel. Frost v. N. Y. C. & H. R. R. R. Co., 61 A. D. 494 (1901), revsd. on other grounds, 168 N. Y. 187 (1901).

Damage to Private Property.

A case for equitable interposition and for the recovery of damages arises when an unlawful change in and obstruction of a highway diverts travel from the premises of an abutting property owner, and seriously interrupts his business. Buchholz v. N. Y., Lake Erie & W. R. R. Co., 148 N. Y. 640 (1896), revsg. 66 Hun 377, and distg. 58 N. Y. 152.

Where a grade is changed and the abutting owner's fee to the center of the highway is not subjected to a new or different use he suffers no damage. Conklin v. N. Y., O. & W. Ry. Co., 102 N. Y. 107 (1886); Rauenstein v. N. Y., L. & W. R. R. Co., 136 N. Y. 528 (1893), 31 St. Rep. 911, 19 N. Y. Supp. 833, 47 St. Rep. 139, 120 N. Y. 661; Ottenot v. Same, 119 N. Y. 603 (1890); Fobes v. Rome, W. & O. R. R. Co., 121 N. Y. 505 (1890); but see, also, Reining v. N. Y., L. & W. Ry. Co., and Jeaume v. Same, 128 N. Y. 157, 623 (1891).

Changing a street grade, thereby cutting off an abutting owner's access to his premises, entitles the latter to damages, although that portion of the street had been discontinued by the municipal authorities. Egerer v. N. Y. C. & H. R. R. R. Co., 130 N. Y. 108 (1891).

Where the primary purpose of an improvement in the manner of constructing railroad crossings in city streets is not for the benefit of a railroad company or its patrons, but is an exercise of the police power of the State for the protection of the lives and limbs of its inhabitants, the court will not grant an injunction but will leave an abutting owner, claiming damages, to his remedy by action. Pratt v. N. Y. C. & H. R. R. R. Co., 90 Hun 83 (1895).

Where the appropriation of a street by a railroad corporation was legal, no merely consequential damage to an abutting owner, having no title to the street, affords a ground of action against the company. Conabeer v. N. Y. C. & H. R. R. R. Co., 156 N. Y. 474 (1898), affg. 84 Hun 34.

A release or abandonment of easements of light, air and access which are appurtenant to property abutting upon a public street may be established by any evidence which clearly indicates an intention upon the part of the abutting owner to abandon the right. Conabeer v. N. Y. C. & H. R. R. R. Co., 156 N. Y. 474 (1898), affg. 84 Hun 34.

Where the public use authorized by law takes no land of an individual, but merely affects him by its proximity, the necessary annoyance of that use furnishes no basis for damage. Conabeer v. N. Y. C. & H. R. R. R. Co., 156 N. Y. 474 (1898), affg. 84 Hun 34.

Damages must be appraised and paid before the land is entered upon. J. & B. R. R. Co. v. N. Y. & M. B. Ry. Co., 25 Hun 585 (1881); E. & G. V. P. R. Co. v. Buf. & P. R. R. Co., 20 Barb. 644 (1855).

The provision of a city charter permitting the common council to consent to the construction of a railroad across a street is not independent of the General Railroad Act, but the two statutes may be read together, and when

so read they simply authorize a railroad to cross a street, but not necessarily in such a way as to obstruct its use. D., L. & W. R. R. Co. v. Buffalo, 158 N. Y. 478 (1899).

The municipal corporation in determining whether a street should be laid out is the sole judge as to the necessity therefor. Peo. ex rel. City of Ithaca v. D., L. & W. R. R. Co., 11 A. D. 280, affd., 159 N. Y. 545 (1899); Matter of Folts St., 18 A. D. 571 (1897).

A resolution of a municipal corporation which lays out a street from a given point, south "to the track" of a railroad company, "and thence to the south line of said city" carries the street across, and does not omit therefrom the space between the tracks of the railroad company. Peo. ex rel. City of Ithaca v. D., L. & W. R. R. Co., 11 A. D. 280, affd., 159 N. Y. 545 (1899).

Powers and Duties of Corporation.

As a general rule the election as to the mode of crossing is with the company, and is not reviewable, if exercised in good faith. Peo. v. N. Y. C. & H. R. R. R. Co., 74 N. Y. 302 (1878); see, also, Peo. v. N. Y., N. H. & H. R. R. Co., 89 N. Y. 266 (1882); Peo. ex rel. Town of Colesville v. D. & H. Co., 177 N. Y. 343 (1904).

A railroad company, for the purpose of crossing a turnpike road, may make a new road to connect with the undisturbed portions. In re N. Y., W. S. & B. Ry. Co. v. N. & N. W. T. R. Co., 28 Hun 472 (1882).

A corporation in constructing a dam or culvert should construct it in such a manner as to resist such extraordinary floods as may be reasonably expected to occur occasionally. Mundy v. N. Y., L. E. & W. R. R. Co., 75 Hun 479 (1894). So, also, in the construction of a bridge. Van Duzer v. Elmira, C. & N. R. R. Co., 75 Hun 487 (1894).

A railroad company in constructing a bridge must provide an opening sufficient for all ordinary exigencies of the climate and situation of the stream, and also such extraordinary emergencies as may occur. Higgins v. N. Y., L. E. & W. R. R. Co., 78 Hun 567 (1894); Greeley v. State of New York, 94 A. D. 607 (1904).

Street cars have no right of way over other vehicles at the intersection of streets, but the right of each to cross should be exercised in a reasonable and careful manner, so as not to unreasonably abridge or interfere with the rights of the other. Reilly v. Third Ave. R. R. Co., 16 Misc. 11 (1896); O'Neil v. D. D., E. B. & B. R. R. Co., 129 N. Y. 125 (1891); Brooks v. International Ry. Co., 112 A. D. 558 (1906).

The Legislature has power to authorize the laying of a street across the tracks of a railroad company, and to require the company to carry such street across its tracks without compensation. Peo. ex rel. City of Ithaca v. D., L. & W. R. R. Co., 11 A. D. 280, affd., 159 N. Y. 545 (1899).

The right to change the line of a highway "where an embankment or cutting shall make a change in the line of such highway desirable, with a view to a more easy ascent or descent," has no application to the case of the discontinuance of a highway at a grade crossing, the removal of the grade crossing, and the change of the line of travel by a new way to a bridge crossing, when no embankment or cutting existed at the grade crossing. Bucholz v. N. Y., Lake Erie & W. R. R. Co., 148 N. Y. 640 (1896), revsg. 66 Hun 377, and distg. 58 N. Y. 152.

Rights of Municipal Authorities.

Municipal authorities are not authorized to surrender to a railroad exclusive use of a considerable portion of the street for the erection of abutments and piers to sustain an elevated structure. D., L. & W. R. R. Co. v. Buffalo, 158 N. Y. 266, 478 (1899), and affg. 4 A. D. 562.

An application under this section should be refused where the company shows nothing in its favor and the local authorities are opposed. Matter of Keesville, A. C. & L. C. R. R. Co., 116 A. D. 72 (1906).

§ 22. Proceedings to determine point at which a new railroad shall intersect one already established; compensation; duties of intersecting roads. Every railroad corporation, whose road is or shall be intersected by any new railroad, shall unite with the corporation owning such new railroad in forming the necessary intersections and connections, and grant the requisite facilities therefor. If the two corporations can not agree upon the amount of compensation to be made therefor or upon the line or lines, grade or grades, points or manner of such intersections and connections, the same shall be ascertained and determined by commissioners, one of whom must be a practical civil engineer and surveyor, to be appointed by the court, as is provided in the condemnation law. Such commissioners may determine whether the crossing or crossings of any railroad before construction shall be beneath, at, or above the existing grade of such railroad, and upon the route designated upon the map of the corporation seeking the crossing or otherwise. All railroad corporations whose roads are or shall hereafter be so crossed, intersected or joined, shall receive from each other and forward to their destination all goods, merchandise and other property intended for points on their respective roads, with the same dispatch as, and at a rate of freight not exceeding the local tariff rate charged for similar goods, merchandise and other property, received at or forwarded from the same point for individuals and other corporations.

Formerly L. 1890, ch. 565, § 12, as am'd by L. 1892, ch. 676.

Intersection by street surface railroads, see §§ 98–100, post.

For condemnation procedure, see Condemnation Law (Code, §§ 3357–3384).

Requisites for Consent to Construct Over a Public Highway.

Before a street railway company will be permitted to construct and operate its road over a public highway it must obtain, first, the certificate of convenience and necessity from the Public Service Commission provided by the Railroad Law, section 9, or the consent of said Commission pursuant to the Public Service Commissions Law, section 53 or both, as the case may be;

second, the consent of the local authorities pursuant to section 18 of article 3 of the Constitution and section 171 of the Railroad Law; and, third, the consent of the abutting property owners, or in lieu thereof the determination of commissioners in favor of the construction of the road, pursuant to said constitutional provision and sections 171 and 174 of the Railroad Law. Manhattan Bridge Three Cent Line v. Bklyn. Heights R. R. Co., 78 Misc. 220 (1912). The consent of existing railroads on other parallel streets is not necessary. Id.

Application of Section.

The provisions of this section authorizing the crossing or intersection of one railroad by another are applicable to street surface railroads. Buffalo, Bellevue & Lancaster R. R. Co. v. N. Y., L. E. & W. R. R. Co., 72 Hun 583 (1893).

The section applies to the intersection and connection of a street railroad operated by electricity with a steam railroad. Matter of Stillwater & M. St. Ry. Co., 177 N. Y. 589 (1902), revsg. 72 A. D. 294.

An agreement for a crossing will bar proceedings for appointment of commissioners under this section. In re Rome, W. & O. R. R. Co. v. Ont. S. R. R. Co., 16 Hun 445 (1879).

A petition for appointment of commissioners must allege an attempt and failure to agree. In re B., H. T. & W. Ry. Co. v. T. & B. R. R. Co., 79 N. Y. 64. It must be proved if denied. In re L. & B. R. R. Co. v. N. Y. C. & H. R. R. R. Co., 77 N. Y. 557. Otherwise it need not be. 79 N. Y. 64, above. See, also, Matter of Cortland & H. H. R. R. Co. v. S., B. & N. Y. R. R. Co., 31 Hun 72, affd., 95 N. Y. 663. As to defective verification, see 79 N. Y. 64, above.

Under this section the Supreme Court has power to appoint commissioners to determine the point and the manner at which a connection shall be made and under section 35 a limited power is granted to the railroad commissioners to determine the terms upon which a crossing shall be made from one railroad over the tracks of an intervening road to the tracks of a third road. N. Y., L. & W. R. R. Co. v. Erie R. R. Co., 31 A. D. 378 (1898), affd., 157 N. Y. 674.

The petition of a street surface railroad must show that it has secured the consents of the property owners and local authorities. See section 91, Railroad Law; In re Saratoga Elec. R. R. Co., 58 Hun 287 (1890). See, also, 22 Abb. N. C. 427 (1899). In case commissioners are appointed, their determination should include all particulars relative to the manner of crossing. In re L. & B. R. R. Co. v. N. Y. C. & H. R. R. R. Co., 19 Hun 38 (1879). In re N. Y., L. & W. Ry. Co. v. N. Y. & E. R. R. Co., 35 Hun 275 (1885). Review of their determination considered. In re L. V. Ry. Co. v. N. Y. C. & H. R. R. R. Co., 93 N. Y. 639 (1883). Nominal damages are not inadequate when no evidence is given on that point. In re C. & H. H. R. R. Co. v. S., B. & N. Y. R. Co., 98 N. Y. 336 (1885). Costs are in discretion of the court. Id.

The report is not to be appealed from in fragments. N. Y. L. & W. Ry. Co. v. N. Y., L. E. & W. R. R. Co., 44 Hun 275 (1887).

The commissioners are the tribunal by which all questions in regard to the place and manner of the crossing of one railroad by another are to be determined, and that determination must necessarily be made in view, among other things, of the motive power employed and the mode of its application. Buffalo, Bellevue & Lancaster R. R. Co. v. N. Y., L. E. & W. R. R. Co., 72 Hun 583 (1893).

A railroad corporation which has contracted with two other companies to construct a curve to connect their tracks, in consideration of a right to operate its cars thereon, has the same right to construct the curve which the two companies themselves would have had, under this section and need not obtain the consent of property owners or municipal authorities. Kunz v. Brooklyn Heights R. R. Co., 25 Misc. 334 (1898); Gallagher v. Keating, 27 Misc. 136 (1899).

An injunction will not lie in behalf of a municipal corporation to prevent a street railroad company from removing a crossing over its tracks which has been constructed by a steam railroad without authority. City of Kingston v. Colonial City Trac. Co., 17 A. D. 274 (1897).

What Are Intersecting Roads.

Considered in N. Y., L. & W. Ry. Co. v. Erie R. R. Co., 31 A. D. 378 (1898;, affd., 157 N. Y. 674.

Application of Condemnation Law.

Although this section provides for the appointment of commissioners as provided in the Condemnation Law, that act does not govern the proceedings. Matter of Lockport & B. R. R. Co., 77 N. Y. 557. It is not necessary to give eight days' notice of motion for the appointment of commissioners as provided by section 3361 of the Condemnation Law. Oneonta, C. & R. S. R. Co. v. C. & C. V. R. R. Co., 85 A. D. 288 (1903).

If a steam railroad refuses to consent to an interchange of cars with a street railway corporation the latter may maintain an action to restrain it from persisting in such refusal and may obtain an injunction pendente lite. Hudson Valley R. R. Co. v. Boston & Maine R. R., 106 A. D. 375 (1905).

§ 23. Highway exempted. No railroad shall be constructed, maintained or operated and no railroad tracks shall be laid upon the state road known as the Buffalo and White's Corners plank-road in the county of Erie, where none now exists, excepting such as may be necessarily laid for the purpose only of crossing said highway. The provisions of this section shall not affect any consents granted prior to the eighteenth day of April, nineteen hundred and five, or any rights acquired for the construction of any such railroad.

Formerly L. 1905, ch. 222.

§ 24. Change of route, grade or terminus. Every railroad corporation, except elevated railroad corporations, may, by a vote of two-thirds of all its directors, alter or change the route or any part of the route of its road or its termini, or locate such route, or any part thereof, or its termini, in a county adjoining any county named in its certificate of incorporation, if it shall appear to them that the line can be improved thereby, upon making and filing in the clerk's office of the proper county a survey, map and certifi-

cate of such alteration or change. If the same is made after the corporation has commenced grading the original route, compensation shall be made to all persons for injury done by such grading to any lands donated to the corporation. But neither terminus can be changed, under this section, to any other county than one adjoining that in which it was previously located; nor can the route or terminus of any railroad be so changed in any town, county or municipal corporation, which has issued bonds and taken any stock or bonds in aid of the construction of such railroad without the written consent of a majority of the taxpayers appearing upon the last assessment-roll of such town, county or municipal corporation, unless such terminus, after the change, will remain in the same village or city as theretofore. No alteration of the route of any railroad after its construction shall be made, or new line or route of road laid out or established, as provided in this section, in any city or village, unless approved by a vote of two-thirds of the common council of the city or trustees of the village. Any railroad corporation whose road as located terminates at any railroad previously constructed or located, whereby communication might be had with any incorporated city of the state, may amend its certificate of incorporation so as to terminate its road at the point of its intersection with any railroad subsequently located to intersect it, and thereby, by itself or its connection, afford communication with such city, with the consent of the stockholders owning two-thirds of the stock of the corporation. Any railroad corporation may, by a vote of its directors, change the grade of any part of its road, except that in the city of Buffalo such change must conform to the general plan heretofore adopted and filed by the grade crossing commissioners of said city, or any modification thereof, within the territory covered by said general plan, in such manner as it may deem necessary to avoid accidents and facilitate the use of such road; and it may by such vote alter the grade of its road, for such distance and in such manner as it may deem necessary, on each or either side of the place where the grade of its road has been changed by direction of the superintendent of public works, at any point where its road crosses any canal or canal feeder, except that in the city of Buffalo such change must conform to the general plan heretofore adopted and filed by the grade crossing commissioners of said city, or any modification thereof, within the territory covered by said general

plan. The superintendent of public works shall have a general and supervisory power over that part of any railroad which passes over, or approaches within ten rods of any canal or canal feeder belonging to the state so far as may be necessary to preserve the free and perfect use of such canals or feeders, or to make any repairs, improvements or alterations, in the same. Any railroad corporation whose tracks cross any of the canals of the state, and the grade of which may be raised by direction of the superintendent of public works, with the assent of such superintendent, may lay out a new line of road to cross such canal at a more favorable grade, and may extend such new line and connect the same with any other line of road owned by such corporation upon making and filing in the clerk's office of the proper county a survey, map and certificate of such new or altered line. No portion of the track of any railroad, as described in its certificate of incorporation, shall be abandoned under this section.

Formerly L. 1890, ch. 565, § 13. as am'd by L. 1892, ch. 676, and L. 1897, ch. 235.

For form of certificate of change of route, see post, Form No. 420.

Application of Section.

In ordering the elimination of dangerous grade crossings, under section 91, the Public Service Commission has authority to change an existing route and to require the State and a municipality to pay their statutory proportion. Section 13 (now 24) applies only to a change of route made for the benefit of the railroad. In re N. Y. Central & H. R. R. R. Co. (Vil. of White Plains), 136 A. D. 756 (1910); Danner v. N. Y. & Harlem R. R. Co., 152 A. D. 405 (1912).

Appropriation of Right of Way of Railroad for State Canal; Acquirement of Easement Thereon for Railroad Purposes.

The provisions of section 8, article 7, of the State Constitution do not interdict the Legislature from authorizing the appropriation of an estate less than the fee in lands required for canals; hence, the provision of a contract which requires the State to convey to a railroad corporation by a quitclaim deed a permanent easement to use for railroad purposes the land of the railroad company's right of way which was appropriated by the State does not violate this constitutional provision, nor does the Barge Canal Act of 1913, chapter 147, require the acquisition and retention of a title in fee to the lands appropriated under it. Peo. ex rel. N. Y. Central & H. R. R. R. Co. v. Walsh, 211 N. Y. 90 (1914).

Decisions Generally.

The only prerequisite to change the route is a vote of two-thirds of the directors, sanctioning the new location, followed by filing of a survey and map. Matter of N. Y., L. & W. R. Co., 88 N. Y. 279 (1882).

But a change of route through a village cannot be made nor may land be acquired for the purpose unless such change be first approved by a two-thirds

vote of the trustees of the village since the language of the statute is mandatory. Erie Ry. v. Steward, 170 N. Y. 172 (1902), affg. 61 A. D. 480.

A change of route cannot be effected by filing an amended certificate pursuant to General Corp. Law, § 7. Matter of Riverhead, Q. & S. R. R. Co., 36 A. D. 514 (1899).

Exercise by the board of directors of the authority conferred by this section considered. In re N. Y. C. & H. R. R. R. Co., 77 N. Y. 248 (1879); N. Y., L. & W. R. Co. v. N. Y., L. E. & W. R. R. Co., 88 N. Y. 279 (1882); B., C. & N. Y. R. R. Co. v. Pottle, 23 Barb. 21 (1856).

A street railroad company operating its cars over the canal by means of a bridge owned by the State does not make such bridge an appliance of its own, and its liability while on the bridge is no different than when traversing the street. Birmingham v. R. C. & B. R. R. Co., 137 N. Y. 13 (1893).

This section does not permit a railroad corporation to change its terminus where the change is not for the purpose of benefiting the line located by the articles of association but is a mere reaching out into another county for the purpose of increasing the business of the road. Matter of G. & J. Ry. Co. v. G. & S. R. R., 172 N. Y. 462 (1902), affg. 75 A. D. 220.

A change of route is permitted by the General Railroad Law only for its physical improvement, not for the purpose of increasing the company's revenues nor of changing its route. Webb v. Forty-second St., M. & St. Nich. Ave. Ry., 52 Misc. 46 (1881).

§ 25. Change of gauge. Any railroad company incorporated under chapter one hundred and forty of the laws of eighteen hundred and fifty, entitled "An act to authorize the formation of railroad corporations and to regulate the same," and acts amendatory thereof and supplementary thereto, may change the gauge of its road on consent of the public service commission and approval of the stockholders of said railroad company owning three-fourths in amount of the capital stock, said approval of said stockholders to be made at a special meeting of the stockholders of said company called for that purpose; and upon like consent of said commission, and upon like approval of the stockholders of said railroad company owning three-fourths in amount of the said capital stock of said company, the floating and bonded indebtedness of said railroad company may be increased to an amount necessary to make such change of gauge and to provide for the operating expenses of said railroad, notwithstanding restrictions or limitations contained in the original certificate of incorporation of said railroad company.

Formerly L. 1891, ch. 267.

§ 26. Construction of part of line in another state. Any railroad corporation, whose proposed railroad is to be built between any two points in this state, may, by a vote of two-thirds

of all its directors, locate and construct a part of its road in an adjoining state; and the sections of its road within this state shall be deemed a connected line, according to the certificate of incorporation, and the directors may reduce the capital stock of the corporation to such amount as may be deemed proper, but not less than ten thousand dollars per mile for the number of miles of road to be actually constructed in this state.

Formerly § 14, L. 1890, ch. 565.

§ 27. Two roads having the same location. If two railroad corporations for a portion of their respective lines embrace the same location of line, or if their lines connect, or are tributary to each other, such corporations may by agreement provide for the construction by one of them of so much of such line as is common to both, or connects with its own line, and for the manner and terms upon which the business thereon shall be performed, and the corporation that is not to construct the part of the line which is common to both, may amend its certificate of incorporation, and terminate its line at the point of intersection, and may reduce its capital to a sum not less than ten thousand dollars for each mile of road proposed to be constructed in such amended certificate.

Formerly § 15, ch. 565, L. 1890.

When a company shortens its line and reduces its capital stock under this provision, a subscriber to stock will not thereby be released from payment of his subscription. Troy & Rut. R. R. Co. v. Kerr, 17 Barb. 581 (1854).

§ 28. Tunnel railroads. When, according to the route and plan for the building of its road, adopted by any railroad corporation, including corporations organized under chapter one hundred and forty of the laws of eighteen hundred and fifty, and the acts amendatory thereof, and supplementary thereto, it shall be necessary or proper to build it or any part of it under ground, or to tunnel or bridge any river or waters, such corporation may enter upon, acquire title to and use such lands under water and uplands, except on or along any canals of the state, as shall be necessary for the purpose herein mentioned, and may construct, erect and secure the necessary foundations and other structures which may be required for operating and maintaining such road, or connecting the same with another, and to acquire, in the manner provided by law, such lands or rights or easements in lands along its route, upon, over or beneath the surface thereof as may be necessary for

the construction of its road and making such connections. Where such road runs underneath the ground, at such depth as to enable the corporation to tunnel the same, such tunnel shall be so built and at all times kept in such condition as to make the surface of the ground above the same and in the neighborhood thereof firm and safe for buildings and other erections thereon, and if surface excavations are made the surface shall be restored to its former condition as soon as can be done, except so far as may be actually required for ventilation of the tunnel beneath the same or access thereto. Such road or any part of it may be built within the limits of any city or incorporated village of this state, and run by means of a tunnel underneath any of the streets, roads or public places thereof, provided such corporation shall before constructing the same underneath any such street, road or public place, have obtained the consent of the owners of one-half in value of the property bounded on the line of such street, road or public place, and the consent of the board of trustees of the village, by a resolution adopted at a regular meeting and entered on the records of the board, or of the proper authorities of the city having control of such streets, road or public places. If the consent of such property owners can not be obtained, the appellate division of the supreme court in the department in which said city or village or any part thereof is situated, may upon application appoint three commissioners, who shall determine, after a hearing of all parties interested, whether such railroad ought to be built underneath such streets, roads or public places, or any of them, and in what manner the same may be so built with the least damage to the surface and to the use of the surface by the public and the determination of the commissioners confirmed by the court may be taken in lieu of the consent of the property owners. All railroad corporations constructing their road under this section shall be subject to all the provisions of this chapter applicable thereto. Any other railroad corporation may connect its road therewith, at such points or places as it may elect, and where such connections shall be made by connecting roads, the railroad corporations owning such roads shall build, at their joint expense, and for their joint use, such passenger and freight depots, and other accommodations for handling passengers and freight, as may be required for the convenience of the public. All railroad corporations, constructing any tunnel under this section shall be liable to any person or corporation for all damages which may be sustained by reason of the construction of such tun-

nel. Whenever it shall be necessary in constructing any railroad authorized by this section through any city or incorporated village, to alter the position or course of any sewer, or water or gas pipes, it shall be done at the expense of the railroad corporation under the direction of the department or corporation having charge thereof, so as not to interfere with such work. In all cases the uses of streets, docks and lands beneath which such railroad is constructed, and on the route thereof and the right of way beneath the same, for the purpose of such railroad shall be considered, and is hereby declared, a public use, consistent with and one of the uses for which streets and docks are publicly held. No public park or square in any city or village of this state shall be used or occupied by any corporation for any of the purposes of this section, and every road constructed hereunder in or through any such street or public place shall be wholly underground and constructed in a tunnel and not otherwise. But nothing in this section shall operate to revive any charter or franchise heretofore granted by or in the city of Brooklyn. This section does not authorize the construction of any bridge over or across the East or North rivers.

Formerly L. 1890, ch. 565, § 16, as am'd by L. 1892, ch. 676; L. 1892, ch. 702; L. 1893, ch. 316.

For provisions authorizing the Public Service Commission to compel ventilation and lighting of tunnels, see sections 102–108, post.

Where a railroad has acquired the right by prescription to use land for tunnel and railroad purposes, such right is limited to the original lines of the tunnel and if the tunnel is rebuilt the railroad cannot change the exterior lines and compel the landowner to accept the abandoned land in place of that taken. Jones v. Delaware, L. & W. R. R. Co., 208 N. Y. 40 (1913).

A railroad proposed to be built and confined exclusively within the limits of a city and under the surface of a street thereof is a street railway within the meaning of the State Constitution, article 3, section 18. In re N. Y. Dist. R. Co., 107 N. Y. 42 (1887). As applied to such a railroad a provision that the determination of commissioners may be taken in lieu of the consent of city authorities is unconstitutional. Id.; see, also, In re Broadway Underg'd Ry. Co., 23 Hun 693 (1881).

§ 29. Railroads in other countries. A railroad corporation may be formed under this chapter for the purpose of constructing, maintaining and operating in any foreign country a railroad for public use in the transportation of persons and property, or for the purpose of maintaining and operating therein any railroad already constructed, in whole or in part, for the like public use, and of constructing, maintaining and operating, in connection therewith, telegraph lines and lines of steamboats or sailing vessels. Any

corporation formed for the construction and operation of a railroad by stationary power, may construct, operate and maintain a railroad in any other state or country, if not in conflict with the laws thereof, but the assent of the inventors or patentees of the method of propulsion used must be first obtained in the same manner and to the same extent as would be necessary within the United States. The term "foreign" in this and the next section shall include Porto Rico.

Formerly § 17, as am'd by L. 1892, ch. 676; L. 1902, ch. 225.

For form of certificate of incorporation, see post, Form No. 421.

The last sentence, relating to Porto Rico, was added by the amendment of 1902.

Such a corporation is not liable in this State for an injury occurring in another State. Whitford v. Panama R. R. Co., 23 N. Y. 465 (1861); see, also, 30 Barb. 99 (1859); 126 N. Y. 10 (1891); 112 N. Y. 315 (1889); 77 N. Y. 546 (1879).

§ 30. Additional corporate powers of such road. The corporation specified in the preceding section shall have the following additional powers:

1. To expend money in making preliminary examinations and surveys for its proposed railroad, telegraph lines, and lines of steamboats and sailing vessels, and in acquiring from foreign countries, nations or governments, the grants, concessions and privileges herein authorized.

2. To take and receive from foreign countries, nations and governments, such grants, concessions or privileges, for the construction, acquisition, maintenance and operation of railroads, telegraph lines and vessels, as may be consistent with the purposes of the corporation, and as may be granted and conceded to it, and to hold the same under such restrictions and with such duties and liabilities as may be fixed by the laws of such foreign country, nation or government, or as may be annexed to such grants or concessions.

3. To construct, acquire, maintain and operate the lines of railroad, telegraph and shipping provided for by its certificate of incorporation, and to take and hold by purchase or by voluntary grant such real estate and other property in foreign countries as may be necessary and convenient for the construction, maintenance and accommodation of such lines, and to sell, convey, mortgage or lease such real estate or other property; and to acquire by purchase or otherwise any railroad or lines of telegraph constructed or in process of construction in any foreign country, and any grants, concessions, franchises, rights, privileges and immunities

relating thereto, and to issue therefor the capital stock of the company or any part thereof at such valuation or valuations and on such terms as may be agreed upon, and to mortgage or sell and convey such railroad or lines of telegraph constructed or in process of construction in any foreign country, and any grants, concessions, franchises, rights, privileges and immunities relating thereto, or any part of its property to any person or corporation created by this or any other state or foreign government, subject to the laws of the country or countries where such property may be, and the power of sale hereby granted shall be exercised only by a majority of the entire board of directors of the corporation, with the written concurrence of the holders of two-thirds in amount of its capital stock.

4. To take and convey persons and property on its transportation lines by the power or force of steam or of animals, or by mechanical or other power, and receive compensation therefor subject to the laws of the place or country where the same are situated.

5. To acquire and use such real estate and other property in this state as may be necessary in the conduct of its business, but the value of such real estate held at any one time shall not exceed the sum of one million dollars.

Formerly L. 1890, ch. 565, § 18, as am'd by L. 1897, ch. 504.

§ 31. Location of principal office of such road. Every such corporation shall maintain its principal office within this state and shall have during business hours, an officer or agent upon whom service of process may be made, and shall hold in this state at least one meeting of the stockholders in each year for the choice of directors, which shall be known as the annual meeting and be held at the time and place fixed by the by-laws of the corporation.

Formerly L. 1890, ch. 565, § 19, as am'd by L. 1892, ch. 676.

§ 32. Individual, joint-stock association, or other corporation may lay down and maintain railroad tracks in certain cases. Any individual, joint-stock association or corporation, engaged in any lawful business in this state, may, except in any city of the state, lay down and maintain such railroad tracks on or across any street or highway, not exceeding three miles in length, as shall be necessary for the transaction of its business, and to

connect any place of business owned by them with the track of any railroad corporation, and render such place of business more accessible to the public, upon obtaining the written consent of the owners of all the lands bounded on and of the local authorities having control of that portion of the street or highway, upon which it is proposed to construct or operate such railroad. If the consent of such property owners cannot be obtained, the appellate division of the supreme court of the department in which such railroad is to be constructed, may upon application, appoint three commissioners, who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and the amount of damages, if any, to be paid to such property owners, and their determination confirmed by the court may be taken in lieu of the consent of the property owners. But no such railroad shall be so located, graded, built or operated as to interfere with or obstruct the traveled part of any highway, or its use as a highway, or the use of any street or highway intersecting the same.

Formerly L. 1890, ch. 565, § 20.

Constitutionality of the Section.

Private property cannot be taken by eminent domain for private use, and this section, so far as it assumes to authorize the taking of private property for private use, is unconstitutional and void. Matter of Sweet Mfg. Co. v. Van Der Hoof. 137 A. D. 492 (1910). Nor can an individual invade a public street or highway for his private use. Id.

Construction of Switch by a Private Manufacturing Corporation.

A private manufacturing corporation will not be permitted to construct a railroad switch upon a public highway for private use where the plan includes condemnation of lands belonging to private owners as well as easements in the highway owned by the abutting owners. Matter of Sweet Mfg. Co. v. Van Der Hoof, 137 A. D. 492 (1911).

Permit to Use New York City Streets.

The board of estimate and apportionment of the city of New York has no authority to grant to the proprietors of a department store a permit to lay down private railroad tracks in front of their premises and operate express cars thereon for the conveyance of goods to their store from the street railroads. Hatfield v. Straus, 189 N. Y. 208 (1907).

§ 33. Powers of electric light and power corporations. Whenever all of the stockholders of any domestic electric light and power company, incorporated under a general or special law, having not less than five stockholders, and actually engaged in carry-

ing on business in this state, shall execute and file, in the offices in which its original certificates of incorporation are filed, an amended certificate of incorporation, complying in every other respect than as to the number of signers and directors, who shall not be less than five, with the provisions of this chapter, and in which certificate the corporate name of such corporation shall be amended by adding before the word "company," in its corporate name, the words, "and railroad," or the words, "railroad and land," such corporation shall have the right to build, maintain and operate by electricity as a motive power, a railroad or railroads, not exceeding twenty-five miles in length, and within that distance from the power station, and shall also have the right to acquire the property and franchises of a railroad company or companies owning such a railroad or railroads, already constructed, and so operated, and to maintain and operate the same, provided that the directors of such railroad company or companies and all of its or their stockholders shall first have assented in writing to the transfer of the property and franchises of such railroad company or companies, to such corporation; in which event and by the filing of such assent of directors and stockholders in the offices where the certificates of incorporation of the railroad company or companies were required to be filed, the rights, property and franchises of such railroad company or companies shall be transferred to, and shall vest in such corporation, and such corporation so acquiring such railroad or railroads shall be subject to all the provisions of this chapter with respect to the railroad property or properties and franchises, and shall have all the powers, rights and privileges conferred by this chapter upon railroad corporations; provided that no such corporation shall construct any railroad which is in whole or in part a street surface railroad without complying with the provisions of article five of this chapter. Upon filing such certificate, such corporation shall also have the right to acquire by gift or by voluntary purchase and sale land not exceeding two thousand acres along the line of, or contiguous to, said railroad, and to hold, improve, lease or sell same. Whenever any such corporation shall furnish power to any water-works corporation carrying on its business in the county, or in a county adjoining that in which the operations of such corporation are carried on, it may acquire the shares of the capital stock of said water-works corporation, and, if

such corporation shall become the owner of all the stock of said water-works corporation, it may, on executing and filing a certificate in accordance with the requirements of section fifteen of the stock corporation law, become possessed of all the estate, rights, property, privileges and franchises of such water-works corporation, with the effect provided in said section. This section shall not confer any powers upon any corporation located in, or authorize the construction, maintenance or operation of a railroad in a city of the first or second class, except in that part of any city of the first class which is or may be situate in a county of less than one hundred thousand inhabitants, according to the last preceding enumeration for the national census.

Formerly L. 1890, ch. 565, § 21, as am'd by L. 1892, ch. 676; L. 1894, ch. 648; L. 1898, ch. 170; L. 1901, ch. 731.

§ 34. Substituted lines in certain cases. Where a portion of a steam surface railroad or branch thereof, shall be specifically authorized by statute to be taken for any other public use, and such portion lies wholly outside of any city, any corporation owning or operating such portion may locate, as provided in section sixteen of this article, and may construct and operate, in substitution for such portion, and with proper connections with the former line, a new line of steam surface railroad, wholly or partly in the same or any adjoining county, and wholly outside of any city, and not exceeding twenty-five miles in length, in the manner, with the powers and subject to the limitations and requirements provided in this chapter with respect to steam surface railroads.

Formerly L. 1890, ch. 565, § 22, as added by L. 1898, ch. 656.

§ 35. Canal corporation may construct railroad. It shall be lawful for any corporation of this state owning and operating a canal to construct and operate along or in lieu of such canal a railroad, and the exercise of the authority hereby conferred shall not be deemed to forfeit or impair its corporate rights under its charter or act of incorporation.

Formerly L. 1881, ch. 452, § 1.

§ 36. Powers of such corporations. Such corporation in the construction and maintenance of any such railroad under the authority of the preceding section shall have, possess and enjoy all

the powers and privileges contained in an act entitled "An act to authorize the formation of railroad corporations and to regulate the same," passed April second, eighteen hundred and fifty, and the several acts amending the same, and be subject to all the duties, liabilities and provisions, so far as relates to any powers or privileges conferred by the preceding section upon said corporation and exercised after June fourth, eighteen hundred and eighty-one.

Formerly L. 1881, ch. 452, § 2.

§ 37. **Saving clause.** Nothing in the two preceding sections contained shall authorize the construction of any railroad in any locality except upon or along such canal owned and operated by any such corporation.

Formerly L. 1881, ch. 452, § 3.

§ 38. **Bridge companies in cities containing more than one million inhabitants.** Any company incorporated for the purpose of constructing and maintaining a bridge or bridges over any river, bay, arm of the sea or other body of water, connecting different portions of any city in the state of New York containing more than one million inhabitants, is hereby empowered to lay tracks and operate a railroad upon said bridge or bridges.

Formerly L. 1893, ch. 225.

§ 39. **Change of time for holding elections.** Any railroad company, the time for the annual election of directors in which is now fixed for any day in the month of June, may by a vote of the majority of its stock, either in person or by proxy, to that effect, and filing in the office of the secretary of state a copy of such proceedings, certified by the secretary of the company under its corporate seal, change the time for holding such annual election to any day in the month of April; provided, however, that the first election held under such resolution shall be held in the month of April which shall precede the time at which such election would otherwise have been held.

Formerly L. 1881, ch. 317.

ARTICLE 3

Construction, Operation and Management

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§ 50. Liability of corporation to employees of contractor. An action may be maintained against any railroad corporation by any laborer for the amount due him from any contractor for the construction of any part of its road, for ninety or any less number of days' labor performed by him in constructing such road, if within twenty days thereafter a written notice shall have been served upon the corporation, and the action shall have been commenced after the expiration of ten days and within six months after the service of such notice, which shall contain a statement of the month and particular days upon which the labor was performed and for which it was unpaid, the price per day, the amount due, the name of the contractor from whom due, and the section upon which performed, and shall be signed by the laborer or his attorney and verified by him to the effect that of his own knowledge the statements contained in it are true. The notice shall be served by delivering the same to an engineer, agent or superintendent having charge of the section of the road upon which the labor was performed, personally, or by leaving it at his office or usual place of business with some person of suitable age or discretion; and if the corporation has no such agent, engineer or superintendent, or in case he can not be found and has no place of business open, service may in like manner be made on any officer or director of the corporation.

Formerly § 30 (R. R. L., 1890, ch. 565).

"Contractors."

The term "contractor" also includes a sub-contractor. Kent v. N. Y. C. R. R. Co., 12 N. Y. 628 (1855).

Notice.

A notice served within twenty days after the completion of the number of days for which pay is claimed is in time. Chapman v. U. & B. R. R. R. Co., 4 Lans. 96 (1871).

"Laborer" and "Labor."

The words "laborer and labor" are used in the ordinary and usual sense, and imply personal service and work of the individual designed to be protected. One who contracts for and furnishes the labor and services of others is not included, nor is one who contracts for and furnishes a team or teams for work, whether with or without his own services. Balch v. N. Y. & O. M. R. R. Co., 46 N. Y. 521 (1871); Cummings v. Same, 1 Lans. 68 (1869); see, also, More v. Taylor, 42 Hun 45 (1886).

§ 51. Weight of rail. The rail used in the construction or the relaying of the track of every railroad hereafter built or relaid in whole or in part shall be of iron or steel, weighing not less than twenty-five pounds to the lineal yard on narrow-gauge roads, and on all other roads not less than fifty-six pounds to the lineal yard on grades of one hundred and ten feet to the mile or under, and not less than seventy pounds to the lineal yard on grades of over one hundred and ten feet to the mile, except for turnouts, sidings and switches.

Formerly § 31 (R. R. L., 1890, ch. 565).

§ 52. Fences,* farm crossings and cattle-guards. Every railroad corporation, and any lessee or other person in possession of its road, shall, before the lines of its road are opened for use, and so soon as it has acquired the right of way for its roadway erect and thereafter maintain fences on the sides of its road of height and strength sufficient to prevent cattle, horses, sheep and hogs from going upon its road from the adjacent lands with farm cross-

* The Town Law (L. 1909, ch. 63), § 369, regulating the use of barbed wire fences, reads as follows, to-wit:

§ 369. **Use of barbed wire for division fence.** Barbed wire may be used in the construction of any division fence, provided, however, that the person or corporation desiring to use such material shall first obtain from the owner of the adjoining property his written consent that it may be so used. If the owner of the adjoining property refuses to consent to the building of such a fence, it may nevertheless be built in the following manner: The fence shall be of four strands of wire with a sufficient bar of wood at the top; and the size of such top bars and of the posts and supports of such fence, and their distances apart, shall be such as the fence viewers of the town may prescribe. Whenever such fence shall become so out of repair as to be unsafe, it shall be the duty of the owner or owners to immediately repair the same. But any person building such a fence without the written consent of the owner of the adjoining property, shall be liable to all damages that may be occasioned by reason of such fence. But this section shall not be so construed as to permit railroad corporations to use barbed wire in the construction of fences along their lines contrary to the provisions of section fifty-two of the railroad law. Formerly L. 1890, ch. 569, § 109, as added by L. 1896, ch. 524.

ings and openings with gates therein at such farm crossings whenever and wherever reasonably necessary for the use of the owners and occupants of the adjoining lands, and shall construct where not already done, and hereafter maintain, cattle-guards at all road crossings, suitable and sufficient to prevent cattle, horses, sheep and hogs from going upon its railroad. So long as such fences are not made, or are not in good repair, the corporation, its lessee or other person in possession of its road, shall be liable for all damages done by their agents or engines or cars to any domestic animals thereon. When made and in good repair, they shall not be liable for any such damages, unless negligently or willfully done. A sufficient post and wire fence of requisite height shall be deemed a lawful fence within the provisions of this section, but barbed wire shall not be used in its construction.

No railroad need be fenced, when not necessary to prevent horses, cattle, sheep and hogs from going upon its track from the adjoining lands. Every adjoining land owner, who, or whose grantor, has received compensation for fencing the line of land taken for a railroad, and has agreed to build and maintain a lawful fence along such line, shall build and maintain such fence. If such owner, his heir or assign shall not build such fence, or if built, shall neglect to maintain the same during the period of thirty days after he has been notified so to do by the railroad corporation, such corporation shall thereafter build and maintain such fence, and may recover of the person neglecting to build and maintain it the expense thereof. And when such railroad shall cross timbered or forest lands, the company shall construct and maintain suitable and sufficient crossings, whenever and wherever reasonably necessary to enable the respective owners of said lands, to transport logs, timber and lumber for manufacture or sale, or for banking on any stream, to be floated or driven down the same. In case of any neglect or dispute the supreme court may by mandamus or other appropriate proceedings, compel the same, and also fix the point or location of any such crossing.

Formerly § 32 (R. R. L., 1890, ch. 565), as am'd by L. 1891, ch. 367; L. 1892, ch. 676.

Construction and Application of Section.

This section requires railroad companies to erect and maintain fences along their rights of way and limits their liability for failure to do so to "dam-

ages done by their agents or engines or cars to any domestic animals thereon;" hence, there is no liability for injuries sustained by animals which by reason of such failure have escaped from a pasture and are injured by falling through a bridge on the roadway of a railroad company. Jimerson v. Erie R. R. Co., 203 N. Y. 518 (1911), revsg. 138 A. D. 914.

Duty to Construct Fences.

These provisions apply to a foreign corporation, even if it be a lessee. 130 N. Y. 152 (1892), infra; Purdy v. N. Y. & N. H. R. R. Co., 61 N. Y. 353 (1875).

This section applies to street railways. Evans v. Utica Ry. Co., 44 Misc. 345.

Vacant lots fronting upon tracks through village streets must be fenced. Crawford v. N. Y. C. & H. R. R. R. Co., 18 Hun 108 (1879).

The defendant is not relieved because the land on both sides of its track is occupied by tracks of other companies. Kelver v. N. Y., C. & St. L. R. R. Co., 126 N. Y. 365 (1891). See, also, Buf. Stone & Cement Co. v. D., L. & W. R. Co., 130 N. Y. 152 (1892).

An award, in proceedings to condemn lands for railroad purposes, to the owner of a farm crossed by the track, does not extinguish the owner's right to compel the railroad company to construct proper crossings. Beardsley v. Lehigh Valley Ry. Co., 142 N. Y. 173 (1894), affg., 62 Hun 502.

A conveyance in fee of a right of way, without a reservation, is not a release of the obligation to erect and maintain fences. 63 N. Y. 58 (1875), infra; 51 N. Y. 568 (1873), infra; Clarke v. R. L. & N. F. R. R. Co., 18 Barb. 350 (1854).

After judgment requiring a railroad company to construct a farm crossing it came into possession of a receiver. Held, that it was no defense that the receiver had no means with which to comply with the requirements of the judgment. Peckham v. Dutchess County R. R. Co., 81 Hun 399; J. K. O. Sherwood, as Receiver, 145 N. Y. 385 (1895).

The owner of lands crossed by a railroad is not confined to an action for damages for a failure to erect and maintain fences. He may enforce the performance by an equitable action. Jones v. Seligman, 81 N. Y. 190; Wademan v. A. & S. R. R. Co., 51 N. Y. 568 (1873); Haynes v. B., N. Y. & P. R. R. Co., 38 Hun 17; Leggett v. Rome, W. & O. R. R. Co., 41 Hun 80 (1886); Thomas v. Utica & B. R. R. R. Co., 97 N. Y. 245; Smith v. N. Y. & O. M. R. R. Co., 63 N. Y. 58 (1875).

Companies for whose use a railroad has been built by another corporation are liable. Tracy v. T. & B. R. R. Co., 38 N. Y. 433 (1868). A defendant is not relieved where the train itself was operated by another company. Dolan v. N. D. & C. R. R. Co., 120 N. Y. 571 (1890).

The corporation is liable for injuries to passengers and employees upon a failure to comply. Donnegan v. Erhardt, 119 N. Y. 468 (1890); see, also, Dolan v. N., D. & C. R. R. Co., 120 N. Y. 571 (1890); Langlois v. B., R. & P. R. R. Co., 19 Barb. 364. An adjoining landowner who has covenanted to maintain fences cannot recover from the company for his own failure. Talmadge v. R. & S. R. R. Co., 13 Barb. 493 (1852); Duffy v. N. Y. & H. R. R. Co., 2 Hilt. 496 (1859); Tombs v. Roch. & S. R. R. Co., 18 Barb. 583 (1854); Terry v. N. Y. C. R. R. Co., 22 Barb. 574 (1855); see, also, Shepard v. N. Y. & E. R. R. Co., 35 N. Y. 641 (1866).

Such a covenant runs with the land and is binding upon a subsequent grantee thereof. Satterly v. Erie Ry., 99 N. Y. Supp. 309 (1906).

After fences and guards are duly made and maintained the liability for damages ceases unless negligently or willfully done. Boyle v. N. Y., L. E. & W. R. R. Co., 39 Hun 171 (1886); Corwin v. N. Y. & E. R. R. Co., 13 N. Y. 42 (1855); Hance v. C. & S. R. R. Co., 26 N. Y. 428 (1863); White v. U. & B. R. R. R. Co., 15 Hun 333 (1878); Brady v. R. & S. R. R. Co., 1 Hun 378 (1874). The liability extends to cattle of others than adjoining owners. 13 N. Y. 42 (1855) above. But not to injuries which the cattle cause to themselves by straying on the track. Knight v. N. Y., L. E. & W. R. R. Co., 99 N. Y. 25 (1885), 13 Barb. 594, infra. This section not applicable to fences to protect persons traveling on a highway. Ditchett v. Spuy. Duyv. & P. M. R. R. Co., 67 N. Y. 425 (1876); Prendegast v. N. Y. C. & H. R. R. R. Co., 58 N. Y. 652 (1874).

In an action for damages for injuries to a horse, resulting from a failure to maintain fences, the plaintiff cannot recover merely upon proof that the defendant ran a train over the road, it appearing that the railroad belonged to another company, and there being no proof that the defendant was a lessee, or authorized to hold possession. Edwards v. Buffalo, Rochester & Pittsburg Ry. Co., 8 A. D. 390 (1896); Throne v. Lehigh Valley Ry. Co., 88 Hun 141 (1895).

Character and Maintenance of Fence.

Experts cannot give opinions as to whether a wire fence was sufficient when a complete description of the construction and condition of the fence has been given upon the trial. Green v. Hornellsville & Canisteo Ry. Co., 24 A. D. 434 (1897).

A wire riven fence having a tooth edge is not a barbed wire fence. Stisser v. N. Y. C. & H. R. R. R. Co., 32 A. D. 98 (1898).

As to cattle guards, see Bradley v. Buf., N. Y. & E. R. R. Co., 34 N. Y. 427 (1866); Hyatt v. N. Y., L. E. & W. R. R. Co., 64 Hun 542 (1868), 38 N. Y. supra; Brooks v. N. Y. & E. R. R. Co., 13 Barb. 594 (1852); Brace v. N. Y. C. R. R. Co., 27 N. Y. 269 (1863); Clarke v. R. L. & N. F. R. R. Co., 18 Barb. 350. A Virginia rail fence is a proper one. Ferris v. Van Buskirk, 18 Barb. 397. As to barbed wire. Rehler v. West. N. Y. & P. R. R. Co., 28 St. Rep. 311 (1854); 8 N. Y. Supp. 286 (1889). Height of fence. Leyden v. N. Y. C. & H. R. R. R. Co., 55 Hun 114 (1889).

Where a railroad corporation has once constructed a proper gate at a farm crossing, and the gate, by lapse of time, has become, to the knowledge of the abutting landowner, difficult to fasten, it is a question for the jury whether the owner should not have readjusted the fastenings to prevent his horse escaping upon the track. Magilton v. N. Y. C. & H. R. R. R. Co., 11 A. D. 373 (1896).

A railroad does not maintain a fence if it knowingly permits a barway in it to remain open for a long period. Connolly v. Central Vermont R. R. Co., 4 A. D. 221, affd., 158 N. Y. 675 (1899).

Liability for injuries when the fence is out of repair. Hodge v. N. Y. C. & H. R. R. R. Co., 27 Hun 394 (1882); Murray v. N. Y. C. R. R. Co., 4 Keyes 274 (1868); Wheeler v. E. Ry. Co., 2 T. & C. 634 (1874); Morrison v. N. Y. & N. H. R. R. Co., 32 Barb. 568 (1860); Munch v. N. Y. C. R. R. Co., 29 Barb. 647 (1859); McGuire v. O. & L. C. R. R. Co., 44 St. Rep. 348 (1892); Poler v. N. Y. C. R. R. Co., 16 N. Y. 476 (1857); Potter v. N. Y. C. & H. R. R. R. Co., 60 Hun 313 (1891); Klock v. Same, 62 Hun 291 (1891).

Railroad Crossings.

The corporation may determine the location of the crossing, which should be convenient and suitable. 130 N. Y. 152 (1892), above; 51 N. Y. 568 (1873), above.

The opening gates or bars are for the use of the adjoining landowner. Spinner v. N. Y. C. & H. R. R. R. Co., 67 N. Y. 153 (1876). He must close the gate after using it. Diamond Brick Co. v. N. Y. C. & H. R. R. R. Co., 58 Hun 396 (1890); 28 St. Rep. 95.

Trains may pass over a country railroad crossing at any speed, but must give adequate signals of their approach. Hunt v. Fitchburg R. R. Co., 22 A. D. 212 (1897).

A railroad company is not required to give any warning of the approach of its trains at a private crossing. Burk v. D. & H. C. Co., 86 Hun 519 (1895), distg. Byrne v. N. Y. C. & H. R. R. R. Co., 104 N. Y. 362 (1887).

§ 53. Sign boards and flagmen at crossings. Every railroad corporation shall cause a sign board to be placed, well supported and constantly maintained, at every crossing where its road is crossed by a public highway at grade. Such sign board shall be of a shape and design to be approved by the public service commission, and shall have suitable words painted thereon to warn travelers of the existence of such grade crossing. The commission shall have power to describe the location and elevation of such sign and the words of warning thereon. The commission may dispense with the use of such sign boards at such crossings as it may designate in cities and villages. At any point where a railroad crosses a street, highway, turnpike, plank-road, or traveled way at grade, or where a steam railroad crosses a street railroad at grade, and the corporation owning or operating such railroad, refuses, upon request of the local authorities, to station a flagman or erect gates, to be opened and closed when an engine or train passes, the public service commission may, upon the application of the local authorities and upon ten days' notice to the corporation, order that a flagman be stationed at such point, or that gates shall be erected thereat, and that a person be stationed to open and close them when an engine or train passes, or may make such other order respecting the same as it deems proper. Whenever the crossing by a railroad at grade of the streets, highways, turnpike, plank-roads, or traveled ways of any village or city, having a population by the last state or federal enumeration of less than fifty thousand, shall be protected by gates with persons to open and close the same, when an engine or train passes, the local authorities of the city or village shall not impose

any limitation, less than forty miles an hour, on the rate of speed at which such engine or train shall be run, or enforce any existing limitation upon such rate of speed, less than forty miles an hour.

Formerly § 33 (R. R. L., 1890, ch. 565), as am'd by L. 1892, ch. 676; L. 1901, ch. 301.

Power of Village Trustees.

The provisions of the Village Law, section 90, subdivision 10, empowering the village trustees by a two-thirds vote to require railroad companies to erect gates at crossings and to employ competent flagmen thereat, was not repealed by the foregoing section. Vil. of Depew v. Lehigh Valley R. R. Co., 85 Misc. 71 (1914).

Local Authorities of a Town.

The words "local authorities," as used in this section (formerly 33), authorizing said authorities to apply to the court for an order compelling railroads to place gates or station a flagman at grade crossings, mean persons having control and authority over the highways. Such person, under section 80 of the Town Law, is the superintendent of highways, elected or appointed by the town board. Town of Pawling v. N. Y., N. H. & H. R. R. Co., 144 A. D. 791 (1911). The supervisor, town clerk and justices of the peace constituting a town board are not the "local authorities" entitled to act under the statute. Id.

Decisions Generally.

Provision not unconstitutional as a delegation of legislative power to the court. Peo. v. L. I. R. R. Co., 58 Hun 412 (1890), affd., 134 N. Y. 506. Before negligence to erect gates can be imputed, an order must be obtained. Daniels v. Staten I. R. T. Co., 125 N. Y. 407 (1891).

While there is no longer any statutory requirement that railroad companies shall give notice of the approach of a train to a highway crossing by the ringing of a bell or the blowing of a whistle, yet such companies are not absolved from the obligations to give such a warning as will afford reasonable notice to one approaching the crossing. Durkee v. D. & H. C. Co., 88 Hun 471 (1895).

Negligence of a railway company does not relieve a traveler from looking and listening before crossing tracks to escape the danger of moving trains. Miller v. N. Y. C. & H. R. R. R. Co., 82 Hun 164 (1894).

For other cases construing section, see Kane v. N. Y., N. H. & H. R. R. Co., 132 N. Y. 160 (1892); Rodrian v. Same, 125 N. Y. 526; Oldenburg v. N. Y. C. & H. R. R. R. Co., 124 N. Y. 414 (1891); Palmer v. Same, 112 N. Y. 234; Haywood v. Same. 35 St. Rep. 145, affd., 128 N. Y. 596; Glushing v. Sharp, 96 N. Y. 676 (1884).

See, also, Edgerley v. L. I. R. R. Co., 46 A. D. 284 (1899); Henn v. L. I. R. R. Co., 51 A. D. 292 (1900).

§ 54. Notice of starting trains; no preferences. Every railroad corporation shall start and run its cars for the transportation of passengers and property at regular times, to be fixed by public notice, and shall furnish sufficient accommodations for the transportation of all passengers and property which shall be

offered for transportation at the place of starting, within a reasonable time previously thereto, and at the junctions of other railroads, and at the usual stopping places established for receiving and discharging way passengers and freight for that train; and shall take, transport and discharge such passengers and property at, from and to, such places, on the due payment of the fare or freight legally authorized therefor. No station established by any railroad corporation for the reception or delivery of passengers or property, or both, shall be discontinued without the consent of the public service commission first had and obtained. No preference for the transaction of the business of a common carrier upon its cars, or in its depots or buildings, or upon its grounds, shall be granted by any railroad corporation to any one of two or more persons, associations or corporations competing in the same business, or in the business of transporting property for themselves or others. Any such station in an incorporated village shall have the same name as the village; if any road shall have more than one such station in any such village the station nearest the geographical center thereof shall have such name.

Formerly § 34 (R. R. L., 1890, ch. 565), as am'd by L. 1892, ch. 676.

Compare Public Service Commissions Law, §§ 26, 31, 32 and 51, ante.

A company may be compelled by mandamus to perform its duty as a common carrier. Peo. v. N. Y. C. & H. R. R. R. Co., 28 Hun 543 (1883). But damages for a wrongful refusal to receive and transport goods are recoverable by an action at law. Peo. ex rel. Ohlen v. N. Y., L. E. & W. R. R. Co., 22 Hun 533 (1880); Peo. ex rel. Walker v. Babcock, 16 Hun 313 (1878).

A railroad company receiving perishable property for transportation is bound to forward it immediately to its destination. Cartwright v. Rome, W. & O. R. R. Co., 85 Hun 517 (1895).

Neglect to run trains at regular intervals for five days not sufficient to forfeit corporate rights. Under Code of Civil Procedure, section 1785, nonuser for a year is necessary. Peo. v. Atl. Ave. R. R. Co., 125 N. Y. 513 (1891); Peo. v. B'dway R. R. Co. of Brooklyn, 126 N. Y. 29.

A contract, by which for a valuable consideration a railroad company gives to a hackman the exclusive privilege of carrying away from its station incoming passengers, is valid. N. Y. C. & H. R. R. R. Co. v. Warren, 31 Misc. 571 (1900).

Assuming that the business of a common hackman comes under the general definition of a common carrier, it does not come within the protection of this section. Brown v. N. Y. C. & H. R. R. R. Co., 75 Hun 355 (1894). A contract between a railroad company and a coach company whereby the latter, for a valuable consideration, was given the exclusive right to have agents upon trains of the former was not against public policy. Id.

The provisions of this section do not authorize a rival steamboat company to occupy the terminal facilities of a railroad company upon the same terms as those enjoyed by another steamboat company, with which the railroad company has contractual relations. Alexandria Bay Steamboat Co. v. N. Y. C. & H. R. R. R. Co., 18 A. D. 527 (1897).

See also cases before Public Service Commission cited under § 32 of the Public Service Commissions Law, ante.

As to reasonable stops at stations, see Flanagan v. N. Y., N. H. & H. R. R. Co., 8 N. Y. Supp. 744 (1890), 29 St. Rep. 543, affd., 125 N. Y. 773; McDonald v. Long Isl. R. R. Co., 116 N. Y. 546 (1889); Hickenbottom v. D., L. & W. R. R. Co., 122 N. Y. 312 (1890); Paulitsch v. N. Y. C. & H. R. R. R. Co., 102 N. Y. 280 (1886).

It is the duty of railroads to have announced on board a train its arrival at a station and to keep it at a station until passengers have sufficient time to alight. Mahar v. N. Y. C. & H. R. R. R. Co., 5 A. D. 222 (1896).

Where a passenger is carried past the station and the train is stopped on a steep embankment and the passenger, in alighting, slides down the embankment and is injured, a proper case is presented for a jury. Minor v. Lehigh Valley R. R. Co., 21 A. D. 307 (1897).

The railroad commissioners have no power to enforce or set aside contracts, but may receive in evidence, in a contested proceeding for discontinuance of a station, a contract between citizens and the railroad company under which subscriptions for a station were paid in consideration of a company's stopping its trains there. Peo. ex rel. Loughran v. Railroad Commissioners, 158 N. Y. 421 (1899), affg. 32 A. D. 158.

Proceedings of the railroad commissioners in consenting to the discontinuance of a station, are subject to review by certiorari. Peo. ex rel. Loughran v. Railroad Commissioners, 158 N. Y. 421, affg. 32 A. D. 158 (1898).

See, also, Tierney v. N. Y. C. & H. R. R. R. Co., 76 N. Y. 305 (1879); Wibert v. N. Y. & E. R. R. Co., 12 N. Y. 245; Barney v. Oyster Bay, etc., Co., 67 N. Y. 301; Cary v. C. & T. R. R. Co., 29 Barb. 57; Bissell v. N. Y. C. R. R. Co., 25 N. Y. 442.

Where a railroad has only one stopping place, located on the boundary line between two incorporated villages which are situated in some township after which the station is named, the station not being wholly in either village, neither village is entitled, under this section, to have the station bear its particular name. Peo. ex rel. Village of North Pelham v. N. Y., N. H. & H. R. R. Co., 125 A. D. 641 (1908).

§ 54-a. Full crews for certain trains. No person, corporation, trustee, receiver, or other court officer, shall run or operate, or cause to be run or operated, outside of the yard limits, on any railroad of more than fifty miles in length within this state, a freight train of more than twenty-five cars, unless said train shall be manned with a crew of not less than one engineer, one fireman, one conductor and three brakemen; nor any train other than a freight train of five cars or more, without a crew of not less than one engineer, one fireman, one conductor and two brakemen, and if the train is a baggage train or a passenger train having a baggage car or baggage compartment without a baggageman in addition to said crew; nor any freight train of twenty-five cars or less without a crew of not less than one engineer, one fireman, one conductor and two brakemen; nor any light engine without a

car or cars, without a crew of not less than one engineer, one fireman and one conductor or brakeman. Each separate violation of the provisions of this section shall be a misdemeanor punishable by a fine of not less than one hundred dollars nor more than five hundred dollars. Each train or light engine run in violation of the provisions of this section shall be deemed to be a separate offense.

New section, added by L. 1913, ch. 146.

§ 55. Accommodation of connecting roads Every railroad corporation whose road, at or near the same place, connects with or is intersected by two or more railroads competing for its business, shall fairly and impartially afford to each of such connecting or intersecting roads equal terms of accommodation, privileges and facilities in the transportation of cars, passengers, baggage and freight over and upon its roads, and over and upon their roads, and equal facilities in the interchange and use of passenger, baggage, freight and other cars required to accommodate the business of each road, and in furnishing passage tickets to passengers who may desire to make a continuous trip over any part of its roads and either of such connecting roads. The public service commission may, upon application of the corporation owning or operating either of the connecting or intersecting roads, and upon fourteen days' notice to the corporation owning or operating the other road, prescribe such regulations as will secure, in its judgment, the enjoyment of equal privileges, accommodations and facilities to such connecting or intersecting roads as may be required to accommodate the business of each road, and the terms and conditions upon which the same shall be afforded to each road. The decision of the commission shall be binding on the parties for two years, and the supreme court shall have power to compel the performance thereof by attachment, mandamus or otherwise.

Formerly L. 1890, ch. 565 (Railroad Law), § 35, originally revised from L. 1847, ch. 222.

See § 22, supra, and Pub. Serv. Com. L. § 35.

See 29 Barb. 36–57.

Three railroads extending through a village, whose rights of way are contiguous for a considerable distance, are intersecting or connecting roads within the meaning of sections 4, 12 and 35 of this act, as the provisions of these sections are not exclusively applicable to cases where the roads cross or intersect each other, it being the intention of the statute to embrace roads whose

lines are contiguous or so near each other in villages and cities, that the public interests require that the roads should grant facilities for the interchange of cars, freight and passengers. N. Y., L. & W. R. R. Co. v. Erie R. R. Co., 31 A. D. 378 (1898), affd., 157 N. Y. 674.

§ 56. Locomotives must stop at grade crossings. All trains and locomotives on railroads crossing each other at grade shall come to a full stop before crossing, not less than two hundred nor more than eight hundred feet from the crossing, and shall then cross only when the way is clear and upon a signal from a watchman stationed at the crossing. If the corporations can not agree as to the expense of the watchman, it shall be determined by the public service commission upon application thereto by either of them. If the corporations disagree as to the precedence of trains the public service commission may, after hearing, upon the application of either corporation, prescribe rules in relation thereto. The full stop and crossing on signal may be discontinued if the commission shall decide it to be impracticable, or if, with the approval of the commission, an interlocking switch and signal apparatus is adopted and put in operation at such a crossing. The full stop and crossing on signal shall not be required in depot yards, or the approaches thereto, if the crossing roads are under lease or subject to the same management or control in the use of tracks. An engineer, violating the foregoing provisions of this section, or any such rule of the commission, shall be liable to a penalty of one hundred dollars; and any corporation or person operating the railroad, violating any of such provisions or rules, shall be liable to a penalty of five hundred dollars. The commission may, whenever in its judgment the public safety requires the erection of interlocking switch and signal devices at points where steam and street surface railroads intersect at grade, direct the erection of such devices and apportion the expense of construction, operating and maintenance thereof between the companies affected thereby. No railroad corporation, nor any officer, agent or employee thereof, shall stop its cars, horses, or locomotives upon a grade crossing of a railroad of another corporation, for the purpose of receiving or delivering passengers or freight, or other purpose, and any person or corporation violating this provision, shall be liable to a penalty of two hundred and fifty dollars.

Formerly L. 1890, ch. 565 (Railroad Law), § 36, as am'd by L. 1898, ch. 466; originally revised from L. 1879, ch. 415; L. 1884, ch. 439, § 5.

On the trial of an action for damages for personal injuries when it is shown that the injury was caused by the failure of the railroad company to comply with section 36, requiring trains to stop at grade crossings, if no negligence is shown to have existed on the part of the plaintiff, it will be assumed that he was free from contributory negligence. Rowe v. N. Y. C. & H. R. R. R. Co., 82 Hun 153 (1894).

§ 57. Rates of fare. Subject to the provisions of the public service commissions law, every railroad corporation may fix and collect the following rates of fare as compensation to be paid for transporting any passenger and his baggage, not exceeding one hundred and fifty pounds in weight, for each mile or fraction of a mile:

1. Where the motive power is rope or cable, propelled by stationary power, five cents, with right to a minimum fare of ten cents; but if the railroad is less than two miles in length, and overcomes an elevation of five hundred feet or more to the mile, five cents for each one hundred feet of elevation so overcome, and the same rates of fare if the motive power is locomotives, furnished with cogs working into cogs on the railroad, and the length of road does not exceed four miles.

2. If a road not incorporated prior to May fifteenth, eighteen hundred and seventy-nine, and not located in the counties of New York and Kings, or within the limits of any incorporated city, and not more than twenty-five miles in length, five cents; if over twenty-five and not more than forty miles, four cents; and if over forty miles, three cents. Where by the laying down of a third rail upon a railroad of the ordinary gauge, a narrow-gauge track is created and used for the transportation of passengers, and the length of road does not exceed six miles, including any connecting road of the same gauge, such railroad, for the purpose of fare, shall be deemed a narrow gauge road.

3. If its railroad overcomes an elevation of two hundred feet to the mile, for at least two consecutive miles, and does not exceed twenty miles in length, ten cents; if it overcomes an elevation exceeding three hundred feet to the mile, within a distance of two miles, five cents for each one hundred feet of elevation; and where it overcomes an elevation of more than one thousand feet, within a distance of two miles, seven cents for each one hundred feet of elevation in a mile.

4. If the line of its road does not exceed fifteen miles in length, and does not enter or traverse the limits of any incorporated city,

and the distance traveled thereon by the passenger does not exceed one mile, five cents.

5. In all other cases three cents for every such mile or fraction thereof, with a right to a minimum single fare of not less than five cents.

This chapter shall not be construed to allow any rate of fare for way passengers greater than two cents per mile to be charged or taken over the track or tracks of the railroad known as the New York Central Railroad Company, and the rate of fare for way passengers over the track or tracks of such company shall continue to be two cents per mile and no more, wherever it is restricted to that rate of fare, nor shall any consolidated railroad corporation charge a higher rate of fare per passenger per mile, upon any part or portion of the consolidated line than was allowed by law to be charged by each existing corporation thereon previous to such consolidation.

Formerly L. 1890, ch. 565 (Railroad Law), § 37, as am'd by L. 1892, ch. 676.

Section 38 of the former Railroad Law (L. 1890, ch. 565), authorizing the Legislature to alter or reduce fares, was repealed by the consolidated Railroad Law and not re-enacted. The provisions of said section were rendered unnecessary by the provisions of the Public Service Commissions Law, §§ 26, 28, 29, 33 and 49.

Laws of 1895, ch. 1027, as am'd by L. 1896, ch. 835; L. 1897, ch. 484; L. 1898, ch. 577, relative to mileage books, has been repealed and the provisions thereof embodied in section 60 of this law, post.

The Penal Law, § 1562, post, provides for the redemption of unused passage tickets and mileage books.

For Penal Law provisions relative to passage tickets, see said law, §§ 1560–1571, post.

A portion of section 1562 of the Penal Law (formerly § 616), which prohibited the selling of passage tickets by any person except common carriers and their specially authorized agents, was declared unconstitutional. Peo. ex rel. Tyroler v. Warden, etc., 157 N. Y. 116 (1898). But the portion requiring the redemption of passage tickets is still in force. See, also, Weil v. Hagen, 35 Misc. 155 (1901).

A special law authorizing a railroad company to charge fare at the rate of four cents per mile is not affected by this section. Parker v. Elmira, C. & N. R. R. Co., 165 N. Y. 274 (1901), affg. 27 A. D. 383.

The right of a railroad to charge fare at a specified rate, secured to it by special act, is a privilege or franchise in the nature of property, alienable or transferable by mortgage, and not lost by a transfer of the road. Parker v. Elmira, C. & N. R. R. Co., 165 N. Y. 274 (1901), affg. 27 A. D. 383. See, also, Dillon v. Erie R. R. Co., 19 Misc. 116 (1897); Johnson v. Hudson R. R. R. Co., 49 N. Y. 455 (1872).

A railroad corporation which acting in good faith erroneously construed this section as applying to street railroads does not become liable to the penalty prescribed by section 39 of this law. Goodspeed v. Ithaca St. Ry. Co., 184 N. Y. 351 (1906), affg. 88 A. D. 147.

A ticket issued by a railroad company as a family ticket cannot be used by a neighbor under the claim that she is a visitor, even though the ticket permits of its use by visitors of the family. Odell v. N. Y. C. & H. R. R. R. Co., 18 A. D. 12, affd., 162 N. Y. 625 (1900). See Buffalo East Side R. R. Co. v. Buffalo Street R. R. Co., 111 N. Y. 132.

§ 58. Excess charge when fare paid on cars. It shall be lawful for any company owning or operating a steam railroad in this state, to demand and collect an excess charge of ten cents over the regular or established rate of fare, from any passenger who pays fare in the car in which he may have taken passage, except where such passage is wholly within the limits of any incorporated city in this state, provided, however, that it shall be the duty of such company to give to any passenger paying such excess a receipt or other evidence of such payment, which shall legibly state that it entitles the holder thereof to have such excess charge refunded, upon the delivery of the same at any ticket office of said company, upon the line of their railroad, and said company shall refund the same upon demand; and provided further that this section shall not apply to any passenger taking passage from a station or stopping place when tickets can not be purchased during half an hour previous to the schedule time for the departure of said train, on which such passenger takes passage.

Formerly L. 1889, ch. 38.

§ 59. Penalty for excessive fare. Any railroad corporation, which shall ask or receive more than the lawful rate of fare, unless such overcharge was made through inadvertence or mistake, not amounting to gross negligence, shall forfeit fifty dollars, to be recovered with the excess so received by the party paying the same; but no action can be maintained therefor, unless commenced within one year after the cause of action accrued.

Formerly L. 1890, ch. 565 (Railroad Law), § 39.

See the Public Service Commissions Law, §§ 31–33, ante.

Penalty.

See, also, section 181, post, and cases there cited.

This section is not limited to railroads operated by steam power, but is also applicable to street surface railroads. Kent v. Jamestown St. Ry. Co., 205 N. Y. 361 (1912), citing several cases and discussing various other sections.

This section imposes no penalty for a refusal to issue transfers, but only for exacting "more than the lawful rate of fare," and taken in connection with the first part of section 101 (now 181) merely entitles a passenger to a continuous trip from any point on the road of the carrying company, or any of the roads operated or controlled by it by lease or other contract, to

any other point on any of said roads over the connecting roads of the company as far as the car which receives him runs or could run. O'Connor v. Bklyn. Heights R. R. Co., 123 A. D. 784 (1908).

The plaintiff suing for a penalty under this section must establish that the charge was illegal and he must show whether the railroad was operating under authority obtained of the common council or by consent of owners of abutting property pursuant to this section. Enton v. Coney Island & B. R. R. Co., 136 A. D. 800 (1910).

This section being penal, the plaintiff is required to bring his case clearly within its terms and may not recover where the overcharge was made through inadvertence or mistake, not amounting to gross negligence. Wysocki v. Erie R. R. Co., 155 A. D. 798 (1913).

In an action for a penalty the plaintiff is bound to show the relation between the defendant and the line to which a transfer was claimed. Mannion v. Internl. Ry. Co., 66 Misc. 420 (1910).

The corporation is not liable where a street car conductor demanded and collected a five-cent fare the second time under the mistaken belief that the fare had not been previously paid. Robinson v. International Ry. Co., 54 Misc. 163 (1907).

Where a surface railroad owns two lines operated on separate streets which intersect, and neither line was operated under a lease or other contract, and the company issued a transfer which it was not legally required to do, but compelled a passenger to pay another fare on such intersecting line, he cannot recover a penalty. As such railroad owning both intersecting lines could legally require another fare for passage on the second line, it did not, by demanding the same, ask or receive more than the legal fare, although it had issued a transfer, and hence is not subject to an action for the penalty. King v. Nassau Elec. R. R. Co., 128 A. D. 130 (1908).

When a common council limits the fare to be charged within the city limits, this does not extend to other towns which subsequently become part of the city. Enton v. Coney Island & B. R. R. Co., 136 A. D. 800 (1910).

The sanction given by the Legislature to the "Milburn agreement" between the city of Buffalo and the street car lines of that city substitutes such agreement for sections 101 (now 181) and 104 (now repealed) of the Railroad Law, and the penalty is enforceable for breach of it by collecting fares not authorized under it. Bingemann v. Internatl. Ry. Co., 73 Misc. 458 (1911).

The fact that a contract, under which a railroad runs its cars over a connecting line, is invalid because it does not comply with the provisions of section 78 (now 148) does not compel the company to carry a passenger free, and the exaction of a fare does not subject it to the penalty. Enton v. Nassau Electric R. Co., 68 Misc. 385 (1910).

Where a railroad has been constructed and operated for a long period of years, it is presumed that the construction and operation are in accordance with some lawful consent. Enton v. Coney Island & B. R. R. Co., 136 A. D. 800 (1910).

The right to recover a penalty for a refusal to issue a transfer does not apply to every railroad, but is confined to such street railway corporations as are referred to in section 78 (now 148). Mannion v. Internl. Ry. Co., 66 Misc. 420 (1910).

Where the Legislature passed an act authorizing a railroad to construct its line on certain streets after first having obtained permission of the common council or the consent of a majority of the property owners, and without regulation as to the rate of fare, such act operates to repeal pro tanto, the

existing provisions of the Railroad Law under which said railroad was incorporated, relative to consent of the local authorities. Enton v. Coney Island & B. R. R. Co., 136 A. D. 800 (1910).

Miscellaneous Cases.

The provisions that any railroad corporation, which shall ask or receive more than the lawful rate of fare, shall forfeit fifty dollars, are penal in their nature and are not extended to cases which were not within the legislative intent. Stewart v. Metropolitan St. Ry. Co., 20 Misc. 605 (1897).

Only one penalty of fifty dollars can be recovered for all acts committed prior to the commencement of the action. Fisher v. N. Y. C. & H. R. R. R. Co., 46 N. Y. 644 (1871); for other cases under this section, see 49 N. Y. 455; 30 N. Y. 505; 26 N. Y. 523; 49 Barb. 330.

Recovery may be had by one paying excessive fare while riding, simply for the purpose of obtaining the penalty. Fisher v. N. Y. C. & H. R. R. R. Co., 46 N. Y. 645 (1871). Compare Meyers v. B. H. R. R. Co., 10 A. D. 335. The penalty is incurred if a conductor exacts a greater fare than is allowed by law, because the passenger had no ticket, unless its ticket office were open at the time of starting, though at midnight. Nellis v. N. Y. C. R. R. Co., 30 N. Y. 505 (1864); Chase v. Same, 26 N. Y. 523; Porter v. Same, 34 Barb. 353 (1861). An extra fare is permissible on a spur built on land owned by the company and used only during races. Palm v. N. Y., N. H. & H. R. R. Co., 42 St. Rep. 219, 17 N. Y. Supp. 471 (1893).

This section contemplates that the mistake of relieving the corporation from penalty may be one of law as well as of fact, and where there is shown to have been a mistake by the company in the consideration of its statutory rights — not as a result of carelessness, but honestly — the corporation is exempt from the penalty. A street railroad company having a road which overcomes an elevation exceeding 300 feet to the mile within a distance of two miles is not liable to the penalty under section 39, for collecting a fare of ten cents, where it construed section 37 as comprehending within its provisions a street surface railroad. Goodspeed v. Ithaca Street Ry. Co., 184 N. Y. 351 (1906).

A corporation organized as a steam railroad under the statute, which alters its plant so as to run after the manner of an electric street railroad, is liable for the penalty prescribed by section 39 of the Railroad Law, if, instead of charging a uniform fare of five cents, it charges ten cents for a trip of less than three miles, such charge not being made "through inadvertence or mistake not amounting to gross negligence." Petz v. Coney Island & Brooklyn R. R. Co., 127 A. D. 371 (1908).

§ 60. Issue and use of mileage books. Every railroad corporation operating a railroad in this state, the line or lines of which are more than one hundred miles in length, and which is authorized by law to charge a maximum fare of more than two cents per mile, and not more than three cents per mile, and which does charge a maximum fare of more than two cents per mile, shall issue mileage books having either five hundred or one thousand coupons attached thereto, entitling the holder thereof, upon complying with the conditions hereof, to travel either five hundred or one thousand miles on the line or lines of such railroad, for

which the corporation may charge a sum not to exceed two cents per mile. Such mileage books shall be kept for sale by such corporation at every ticket office of such corporation in an incorporated village or city, and any of such books shall be issued immediately upon application therefor. Upon presentation of such mileage book to a conductor on any train, on any line of railroad owned or operated by said railroad corporation, the holder thereof, or any member of his family or firm, or any salesman of his firm, shall be entitled to travel for a number of miles equal to the number of coupons detached by such conductor. Such mileage book shall entitle the holder thereof to the same rights and privileges in respect to the transportation of person and property to which the highest class ticket issued by such corporation would entitle him. Such mileage books shall be good until all coupons attached thereto have been used. Any railroad corporation which shall refuse to issue a mileage book, as provided by this section, or in violation hereof, to accept such mileage book for transportation, shall forfeit fifty dollars, to be recovered by the party to whom such refusal is made; but no action can be maintained therefor unless commenced within one year after the cause of action accrues.

Formerly L. 1895, ch. 1027, as am'd by L. 1896, ch. 835; L. 1897, ch. 484; L. 1898, ch. 577.

This act is unconstitutional as to existing corporations, being an illegal invasion of their property rights. Beardsley v. N. Y., L. E. & W. R. R. Co., 162 N. Y. 230 (1900), revsg. 15 A. D. 251; Lake Shore & M. S. Ry. Co. v. Smith, 173 U. S. 684 (1898). This statute is, however, constitutional as to railroad corporations formed subsequent to its enactment. Purdy v. Erie R. R. Co., 162 N. Y. 42 (1900), affg. 33 A. D. 643. The amendment of 1896, ch. 835, did not increase the burdens of railroad corporations, and hence the amendment is constitutional in all cases where the original act would be upheld. Id.

Statutes relative to mileage books, when limited to railroad transportation wholly within the State, are a valid exercise of the power of the State and are not regulations of interstate commerce. Purdy v. Erie R. R. Co., 162 N. Y. 42 (1900), affg. 33 A. D. 643.

See, also, Trolan v. N. Y. C. & H. R. R. R. Co., 31 A. D. 320 (1898); Watson v. N. Y., O. & W. Ry. Co., 24 Misc. 628 (1898); Corcoran v. N. Y. C. & H. R. R. R. Co., 25 A. D. 479, affd., 164 N. Y. 587 (1900).

§ 61. Passenger refusing to pay fare may be ejected. If any passenger shall refuse to pay his fare the conductor of the train, and the servants of the corporation, may put him and his baggage out of the cars, using no unnecessary force, on stopping the train, at any usual stopping place, or near any dwelling house, as the conductor may elect.

Formerly L. 1890, ch. 565 (Railroad Law), § 40.

As to compliance with the reasonable rules of a railroad company by a passenger using a transfer and the liability of the company for assault in ejecting passengers, see Monnier v. N. Y. C. & H. R. R. R. Co., 175 N. Y. 281 (1903), and Weber v. Rochester, Syracuse & Eastern R. R. Co., 145 A. D. 84 (1911).

Where a passenger has been wrongfully ejected from a street car after a dispute with the conductor as to a transfer, if the jury finds for the plaintiff it must award compensatory damages. Wachs v. N. Y. Ry. Co., 84 Misc. 632 (1914).

A passenger, who, through mistake of a station agent, boards a train not scheduled to stop at the place indicated by his ticket, may be ordered to leave the train at an intermediate stop and the company does not thereby render itself liable for a tortious ejection. Miller v. King, as Receiver of N. Y., L. E. & W. R. R. Co., 21 A. D. 192 (1897). A corporation is liable for breach of its contract to carry him to his destination, and his recovery is not necessarily limited to nominal damages. Id.

Where a commuter mutilates his monthly railroad ticket to such an extent that a collector inadvertently punches more trips than have actually been made, such commuter, where all the trips have apparently been used and he is ejected from the company's premises, is not entitled to any recovery against the railroad for an assault or anything except the price of the ticket which he had to buy. Henly v. D., L. & W. R. R. Co., 28 Misc. 499 (1899), affg. 27 Misc. 811.

A common carrier is bound by the unauthorized act of a conductor in improperly issuing stopover tickets. Ray v. Cortland & Homer Traction Co., 19 A. D. 530 (1897).

A railroad company has a right to refuse to allow a person, who is without a ticket, and so intoxicated as to be helpless, to enter its passenger car. Freedon v. N. Y. C. & H. R. R. R. Co., 24 A. D. 306 (1897).

Upon the ejection of a person from a car it is not essential that he should have been violently assaulted to warrant a recovery. Miller v. King, as Receiver of N. Y., L. E. & W. R. R. Co., 84 Hun 308 (1895).

The fact that the conductor of the first train took up the wrong coupon of an excursion ticket does not render the carrier liable for a refusal by the conductor of the return train to accept the other coupon and his ejection of the passenger unless the latter started on the return trip in ignorance of the other conductor's mistake and such mistake could not have been discovered by the use of ordinary diligence. Wiggins v. King, as Receiver, 91 Hun 340 (1895).

A rule of a street car company in a large city, requiring its conductors to furnish change to passengers to the amount of two dollars, is reasonable; and a tender, by a passenger, of five dollars to be changed for a five-cent fare is unreasonable and need not be accepted. Barker v. Central Park, North & East R. R. Co., 151 N. Y. 237 (1896).

The fact that a person is a trespasser upon a street car does not lawfully expose him to the use of excessive force or means of ejecting him which are necessarily menacing to his life and limb. Baber v. Broadway & Seventh Ave. R. R. Co., 10 Misc. 109 (1894).

While it is the duty of a street car conductor to keep the car free of trespassers, and he has the right to put one off, he must do so in a proper manner. Ansteth v. Buffalo Ry. Co., 9 Misc. 419 (1894).

It is a general rule that a carrier of passengers is answerable for all the consequences which may result to a passenger from the willful misconduct

or negligence of employees, and where a railroad company has undertaken, for a consideration paid, to carry a person to his destination, such person has the right of passage, and as between him and such company he is at liberty to refuse to repay his fare and to insist upon having his continuous passage. Muckle v. Roch. Ry. Co., 79 Hun 32 (1894), and numerous cases therein cited.

Where, in consequence of the refusal of a passenger to pay his fare, the train is stopped for the sole purpose of putting him off, he is not entitled to insist on continuing his trip on paying the fare, but may be removed from the train; but where the train stops at a regular stopping place and the passenger, before being ejected, or others in his behalf, offer to pay the full fare, it is the duty of the conductor to accept it, and if he refuses and ejects the passenger the company is liable. O'Brien v. N. Y. C. & H. R. R. R. Co., 80 N. Y. 236 (1880). See, also, 35 Hun 313; 14 Barb. 590; 31 Barb. 558.

A passenger for a way station who boards an express train not stopping at such station, may be ejected upon refusing to pay fare to the next regular stopping place. Fink v. A. & S. R. R. Co., 4 Lans. 147 (1871). The passenger must produce a ticket or pay fare although another conductor has wrongfully taken up his ticket. Townsend v. N. Y. C. & H. R. R. R. Co., 56 N. Y. 295 (1874). There is no question for the jury when a passenger was ejected six rods from a dwelling-house for non-payment of fare. When the question whether or not a dwelling-house is "near" should be submitted to the jury. Loomis v. Jewett, 35 Hun 313 (1885); Johnson v. N. Y., O. & W. Ry. Co., 14 W. D. 495 (1882). Payment of fare to a ticket agent previous to entering the cars does not excuse non-production of a ticket. Weaver v. Rome, W. & O. R. R. Co., 3 T. & C. 270. A passenger having a ticket "good for this date only" may be ejected upon refusing to pay fare. Elmore v. Sands, 54 N. Y. 512 (1874); Gale v. D., L. & W. R. R. Co., 7 Hun 670 (1876); Boice v. H. R. R. R. Co., 61 Barb. 611 (1872); Barker v. Coffin, 31 Barb. 556 (1860). See, also, Hill v. S., B. & N. Y. R. R. Co., 63 N. Y. 101 (1875); Beebe v. Ayres, 28 Barb. 275 (1858); Eliott v. N. Y. C. & H. R. R. R. Co., 53 Hun 78 (1889); Maxon v. Penn. Ry., 97 N. Y. Supp. 962 (1906). Tickets must be produced or surrendered when required by the conductor. Hibbard v. N. Y. & E. R. R. Co., 15 N. Y. 455 (1855); N. R. R. Co. v. Page, 22 Barb. 130 (1856).

An action by a passenger on a surface car to recover for injuries received when forcibly ejected for a refusal to pay the fare, except upon invalid transfer, is not on contract, but for assault and battery and the Municipal Court of the City of New York has no jurisdiction. Miller v. Brooklyn Heights R. R. Co., 127 A. D. 197.

It is the duty of a passenger to obey the reasonable and valid rules of the company, and of the conductor to enforce them. The fact that, by reason of the absence of the ticket agent, a passenger was unable to obtain a ticket before entering the train does not justify him in forcibly resisting an attempt of the conductor to eject him upon refusal to pay a higher fare fixed by a reasonable rule of the railroad for passengers without tickets. Monnier v. N. Y. C. R. R. Co., 175 N. Y. 281 (1903), revsg. 70 A. D. 405. Compare Porter v. N. Y. C. R. R. Co., 34 Barb. 353 (1861).

The company may limit the trains on which a ticket shall be used. Nolan v. N. Y., N. H. & H. R. R. Co., 41 N. Y. Super. (J. & S.) 541 (1877). But see Martin v. N. Y. C. & H. R. R. R. Co., 1 St. Rep. 738. It may also prescribe the route. Bennett v. Same, 69 N. Y. 594 (1877); Adwin v. Same, 60

Barb. 590 (1871). A ticket "good this trip only" is not limited to any particular day or train. Pier v. Finch, 24 Barb. 514 (1857). A ticket without limitation as to continuity of trip does not give the holder a right to leave the train and finish his journey on another. Hamilton v. N. Y. C. R. R. Co., 51 N. Y. 100 (1872); Kelsey v. M. C. R. R. Co., 28 Hun 460 (1882); Denny v. N. Y. C. & H. R. R. R. Co., 5 Daly 50 (1874); Terry v. F., N. S. & C. R. R. Co., 13 Hun 359; Ward v. N. Y. C. & H. R. R. R. Co., 56 Hun 268. A passenger may stop over on the conductor's assurance. Tarbell v. N. C. Ry. Co., 24 Hun 51 (1881). A ticket for a continuous trip, within a time specified, may be used if the journey begins before the expiration of the time. Auerbach v. N. Y. C. & H. R. R. R. Co., 89 N. Y. 281 (1882). See also, Wentz v. Erie R. R. Co., 3 Hun 241. Where a train is stopped solely to eject a passenger he is not entitled to continue his trip on offering to pay fare. O'Brien v. N. Y. C. & H. R. R. R. Co., 80 N. Y. 236 (1880); Hibbard v. N. Y. & E. R. R. Co., 15 N. Y. 455 (1857). See, also, Guy v. N. Y., O. & W. Ry. Co., 30 Hun 399 (1883); Nelson v. L. Isl. R. R. Co., 7 Hun 140 (1876). But if the stop is at a regular station, see same cases; also, Pease v. D., L. & W. R. R. Co., 101 N. Y. 367 (1886). A passenger lawfully on a train may protect himself against removal. Sanford v. Eighth Ave. R. R. Co., 23 N. Y. 343 (1861); English v. D. & H. C. Co., 66 N. Y. 454 (1876). A trespasser may not be removed in a reckless and illegal manner. Hoffman v. N. Y. C. & H. R. R. R. Co., 87 N. Y. 25 (1881). See Peck v. Same, 70 N. Y. 587 (1877); Rounds v. D., L. & W. R. R. Co., 64 N. Y. 129 (1876); Clark v. N. Y., L. E. & W. R. R. Co., 40 Hun 605 (1886); Bartlett v. N. Y. & S. B. F. & S. T. Co., 57 Super. Ct. 348. When all the seats in ordinary cars are occupied, a passenger is justified in using a drawing-room seat until another is provided. Thorpe v. N. Y. C. & H. R. R. R. Co., 76 N. Y. 402 (1879). See, also, Yates v. N. Y. C. & H. R. R. R. Co., 67 N. Y. 100 (1876); Townsend v. Same, 56 N. Y. 295 (1874); Hamilton v. Third Ave. R. R. Co., 53 N. Y. 25 (1873); Fink v. A. & S. R. R. Co., 4 Lans. 147 (1871); Barker v. N. Y. C. R. R. Co., 24 N. Y. 599 (1862).

When a passenger has mislaid his ticket he is entitled to a reasonable time to find it. Hayes v. N. Y. C. & H. R. R. R. Co., 20 W. D. 237 (1884).

The only duty owing by those in charge of a railroad train to one who is on the train without right is to abstain from wanton and reckless injury to him when rightfully expelled. Toledo, St. L. & W. R. R. Co. v. Gordon, 143 Fed. 95 (1906).

§ 62. Sleeping and parlor cars. Any railroad corporation may contract with any person, association or corporation for the hauling by the special or regular trains of said railroad corporation, the parlor, drawing-room or sleeping car or cars of such person, association or corporation, in which extra accommodations shall be furnished, for which said person, association or corporation furnishing such parlor, drawing-room or sleeping car or cars, may charge for the carriage and transportation of persons and property therein, a reasonable compensation for such extra accommodation, in addition to the fare and charges now allowed by law for the carriage and transportation of passengers and property in

the ordinary cars of said railroad corporation. But said railroad corporation so contracting shall be liable in the same way and to the same extent as if the said car or cars were owned by it, and shall furnish sufficient ordinary cars for the reasonable accommodation of the traveling public.

Formerly L. 1890, ch. 565 (Railroad Law), § 41, as am'd by L. 1892, ch. 676.

A sleeping car company is neither an insurer of its customer's baggage or property, nor under an obligation of a common carrier or innkeeper; its liability for loss of baggage or property of its passengers rests upon negligence. Goldstein v. Pullman Co., 161 A. D. 756 (1914).

A distinction exists between the degree of responsibility resting upon a steamboat company for the personal effects of a passenger occupying a stateroom, and that resting upon a railroad company in respect to a passenger occupying a berth in a sleeping car; the former is an insurer, the latter liable only for negligence. Adams v. New Jersey Steamboat Co., 151 N. Y. 163 (1896), affg. 9 Misc. 25.

A sleeping car company is not an insurer of the effects of passengers, but is bound to maintain a reasonable watch during the night while the passenger is asleep or is using the necessary conveniences of the car, and must so manage the car as not to expose unreasonably the property of the passenger to unusual risk or loss by thieves or otherwise. Williams v. Wagner Palace Car Co., 27 Misc. 508 (1899), modg. and affg. 22 Misc. 513.

The measure of liability is the same as that of a carrier for the loss of a passenger's baggage and, while the latter may recover the reasonable amount of the expenses of his trip, he cannot recover for a sum of money which he was carrying separately in a fob-pocket for deposit in a bank when he reached his destination. Williams v. Wagner Palace Car Co., 27 Misc. 508 (1899), modg. and affg. 22 Misc. 513.

While the law does not make a sleeping car company the insurer of the effects of passengers, it does not absolve it from all liability. The ground of its liability rests solely in negligence. Carpenter v. N. Y., N. H. & H. R. R. Co., 124 N. Y. 53 (1891); Sessions v. N. Y., L. E. & W. R. R. Co., 78 Hun 541 (1894); Pullman Palace Car Co. v. Gardner, 3 Pennyp. 78; Dawley v. Wagner Palace Car Co., 169 Mass. 315.

A passenger on a sleeping car has a right to expect to find the conveniences which are furnished by such cars and for which he has paid. Piper v. N. Y. C. & H. R. R. R. Co., 76 Hun 44 (1894).

Right of passenger to take a drawing-room seat until a seat in the ordinary car is vacated. Thorpe v. N. Y. C. & H. R. R. R. Co., 76 N. Y. 402 (1879); De Long v. D., L. & W. R. R. Co., 37 Hun 282 (1885). Purchase of a drawing-room seat ticket by the holder of a free pass does not make the company liable for injuries. Ulrich v. N. Y. C. & H. R. R. R. Co., 108 N. Y. 80 (1888). Servants in drawing-room cars to be regarded as employees of the railroad company. 76 N. Y. 402, supra; Palmieri v. Man. Ry. Co., 133 N. Y. 261 (1892); Dwinelle v. N. Y. C. & H. R. R. R. Co., 120 N. Y. 117 (1890). Loss of baggage, money and parcels in such cars. Welch v. Pullman P. C. Co., 1 Sheld. 457, 16 Abb. Pr. N. S. 352 (1874); Tracy v. Same, 67 How. 154 (1884); Carpenter v. N. Y., N. H. & H. R. R. Co., 124 N. Y. 53 (1891), and cases there cited.

A verdict of $750 is not excessive in the case of a sleeping car passenger, who after paying for his berth, was compelled to sit up during a cold night

in a day coach, because the company by mistake had sold the same berth to another person. Braun v. Wagner Palace Car Co., 32 Misc. 243 (1900). See, also, Aplington v. Pullman Co., 97 N. Y. Supp. 329 (1905).

§ 63. Persons employed as drivers, conductors, motormen or gripmen. Any railroad corporation may employ any inhabitant of the state, of the age of twenty-one years, not addicted to the use of intoxicating liquors, as a car driver, conductor, motorman or gripman, or in any other capacity, if fit and competent therefor. All applicants for positions as motormen or gripmen on any street surface railroad in this state shall be subjected to a thorough examination by the officers of the corporation as to their habits, physical ability and intelligence. If this examination is satisfactory, the applicant shall be placed in the shop or power house where he can be made familiar with the power and machinery he is about to control. He shall then be placed on a car with an instructor, and when the latter is satisfied as to the applicant's capability for the position of motorman or gripman, he shall so certify to the officers of the company, and, if appointed, the applicant shall first serve on the lines of least travel. Any violation of the provisions of this section shall be a misdemeanor.

Formerly L. 1890, ch. 565 (Railroad Law), § 42, as am'd by L. 1895, ch. 513.

Cross References.

Person unable to read not to act as engineer. Penal Law, § 1982. Intoxication of railroad employee while on duty a misdemeanor. Penal Law, § 1984. Hours of labor on street surface and elevated railroads; see Labor Law, §§ 6, 7. Cash payment of wages, Id., § 10. Weekly payment of wages by railroad corporations, other than steam, Id., § 11. Semi-monthly payment by steam railroad corporations, Id., § 11. Assignment to corporation of future wages prohibited, Id., § 13. Safe and adequate service, see Public Service Commissions Law, § 26.

§ 64. Injuries to employees. In all actions against a railroad corporation, foreign or domestic, doing business in this state, or against a receiver thereof, for personal injury to, or death resulting from personal injury of any person, while in the employment of such corporation, or receiver, arising from the negligence of such corporation or receiver or of any of its or his officers or employees, every employee, or his legal representatives, shall have the same rights and remedies for an injury, or for death, suffered by him, from the act or omission of such corporation or receiver or of its or his officers or employees, as are now allowed by law, and, in addition to the liability now existing by law, it

shall be held in such actions that persons engaged in the service of any railroad corporation, foreign or domestic, doing business in this state, or in the service of a receiver thereof, who are entrusted by such corporation or receiver, with the authority of superintendence, control or command of other persons in the employment of such corporation or receiver, or with the authority to direct or control any other employee in the performance of the duty of such employee, or who have, as a part of their duty, for the time being, physical control or direction of the movement of a signal, switch, locomotive engine, car, train or telegraph office, are vice-principals of such corporation or receiver, and are not fellow-servants of such injured or deceased employee. If an employee, engaged in the service of any such railroad corporation, or of a receiver thereof, shall receive any injury by reason of any defect in the condition of the ways, works, machinery, plant, tools or implements, or of any car, train, locomotive or attachment thereto belonging, owned or operated, or being run and operated by such corporation or receiver, when such defect could have been discovered by such corporation or receiver, by reasonable and proper care, tests or inspection, such corporation or receiver shall be deemed to have had knowledge of such defect before and at the time such injury is sustained; and when the fact of such defect shall be proved upon the trial of any action in the courts of this state, brought by such employee or his legal representatives, against any such railroad corporation or receiver, on account of such injuries so received, the same shall be prima facie evidence of negligence on the part of such corporation or receiver. This section shall not affect actions or causes of action existing on May twenty-ninth, nineteen hundred and six; and no contract, receipt, rule or regulation, between an employee and a railroad corporation or receiver, shall exempt or limit the liability of such corporation or receiver from the provisions of this section.

Formerly L. 1890, ch. 565 (Railroad Law), § 42a, added by L. 1906, ch. 657.

Construction and Application of Section.

These statutes enlarge the remedies given to employees by withdrawing from the employer the common law defense of a common employment between the injured and the designated employees. They are an innovation upon the common law and should not be applied to cases not plainly within the legislative intent. Utess v. Erie R. R. Co., 204 N. Y. 324 (1912), revsg. 138 A. D. 914.

This section applies to employees of all railroad corporations, without reference to the form of their incorporation or the manner of doing business.

It is therefore applicable to both steam and electric roads and to street-surface roads. Kent v. Jamestown St. Ry. Co., 205 N. Y. 361 (1912), affg. 146 A. D. 902.

The direction and control referred to in the statute means that which is conferred by or proceeds from superior authority not from the mere fact that one employee had to rely on an inferior employee to discern something which he could not see for himself. Eagen v. Buffalo Union Term. R. R. Co., 200 N. Y. 478 (1910); Hallock v. N. Y., Ont. & Westn. Ry. Co., 197 N. Y. 450 (1910).

The statute cannot be extended so as to include cases where the notice or information or warning conveyed by one employee to another is a mere incident of the employee's duty. Eagen v. Buffalo Union Term. R. R. Co., 200 N. Y. 478 (1910); Hallock v. N. Y., Ont. & Westn. Ry. Co., 197 N. Y. 450 (1910).

This section is designed to protect only persons actually engaged in the business of operating a railroad. Gill v. Erie R. R. Co., 151 A. D. 131, 137 (1912), and cases cited.

Application to Street Surface Railroads.

The Legislature, by placing this section in the General Railroad Law and referring therein to all railroad corporations, intended it as a general act for the benefit of employees of railroad corporations without regard to the form of their incorporation or the manner of their doing business; therefore, it is applicable to a street surface railroad corporation. Kent v. Jamestown St. Ry. Co., 205 N. Y. 361 (1912), affg. 146 A. D. 902.

Liability to Employee Riding on Pass.

Although a passenger riding gratuitously on a pass which by its terms relieves the railroad from liability for negligence, cannot recover for personal injuries yet he may recover if he is an employee of the railroad and the pass was delivered pursuant to the contract of employment. Gill v. Erie R. R. Co., 151 A. D. 131, 135 (1912), and cases cited. The Interstate Commerce Act permits such passes. Id.

Negligence of Fellow-Motorman.

Where a motorman is killed by the negligence of a fellow-motorman operating another car of the same company, the plaintiff is entitled to the benefit of this section. Gorman v. Queens Co. & S. R. R. Co., 147 A. D. 21 (1911).

Waiver of Right to Recover.

A contract by which an employee accepts the benefits of the relief department of a railroad and by so accepting waives his right to recover for injuries is not void as against public policy and is not contrary to the provisions of section 64 of the Railroad Law. Colaizzi v. Penn. R. R. Co., 208 N. Y. 275 (1913), affg. 143 A. D. 638.

Vice-Principal.

An engineer who is running a locomotive is a vice-principal. Hart v. N. Y. C. & H. R. R. R. Co., 205 N. Y. 317 (1912), affg. 146 A. D. 885.

An engineer in charge of a train, having under his direction the fireman and head brakeman, is a vice-principal within the meaning of this section. Reynolds v. Lehigh Valley R. R. Co., 148 A. D. 345 (1911), and cases cited; affd. 210 N. Y. 569 (1914); followed in Hildebrandt v. Lehigh Valley R. R. Co., 157 A. D. 828 (1913).

The conductor of a street railway is vice-principal as to the motorman in the matter of directing him, and the motorman is vice-principal to the conductor in directing the car. Simons v. Brooklyn Heights R. R. Co., 142 A. D. 36 (1910).

Notice Not a Prerequisite to an Action.

Chapter 657 of the Laws of 1906, which added this section to the Railroad Law, created a new rule of law. As said statute does not require a notice to be given as a prerequisite to action to enforce the liability so created and is a public statute, a plaintiff need not allege that the action is brought under the statute in order to recover for injuries received by the negligence of persons enumerated therein. Schradin v. N. Y. C. & H. R. R. R. Co., 124 A. D. 705, aff'd., 194 N. Y. 20.

§ 65. Conductors and employes must wear badges. Every conductor and employee of a railroad corporation employed in a passenger train, or at stations for passengers, shall wear upon his hat or cap a badge, which shall indicate his office or employment, and the initial letters of the corporation employing him. No conductor or collector without such badge shall demand or receive from any passenger any fare or ticket or exercise any of the powers of his employment. No officer or employee without such badge shall meddle or interfere with any passenger, his baggage or property.

Formerly L. 1890, ch. 565 (Railroad Law), § 43, as am'd by L. 1892, ch. 676.
Unauthorized wearing of uniform. See Penal Law, § 1989.
See Thorpe v. N. Y. C. & H. R. R. R. Co., 76 N. Y. 402 (1879).

§ 66. Checks for baggage. A check, made of some proper substance of convenient size and form, plainly stamped with numbers, and furnished with a convenient strap or other appendage for attaching to baggage, shall be affixed to every piece or parcel of baggage when taken for transportation for a passenger by the agent or employe of such corporation, if there is a handle, loop or fixture therefor upon the piece or parcel of baggage, and a duplicate thereof given to the passenger or person delivering the same to him. If such check be refused on demand the corporation shall pay to the passenger the sum of ten dollars, and no fare shall be collected or received from him; and if he shall have paid his fare it shall be refunded to him by the conductor in charge of the train. Such baggage shall be delivered, without unnecessary delay, to the passenger or any person acting in his behalf, at the place to which it was to be transported, where the cars usually stop, or at any other regular intermediate stopping

place upon notice to the baggage-master in charge of baggage on the train of not less than thirty minutes, upon presentation of such duplicate check to the officer or agent of the railroad corporation, or of any corporation, over any portion of whose road it was transported. Bicycles are hereby declared to be and be deemed baggage for the purposes of this article and shall be transported as baggage for passengers by railroad corporations and subject to the same liabilities, and no such passenger shall be required to crate, cover or otherwise protect any such bicycle; provided, however, that a railroad corporation shall not be required to transport, under the provisions of this section, more than one bicycle for a single person.

The last amendment eliminated the word "metallic," thereby permitting checks to be made of cardboard or other material.

By the amendment of 1896 bicycles were declared to be baggage.

Formerly L. 1890, ch. 565 (Railroad Law), § 44, as am'd by L. 1892, ch. 676; L. 1896, ch. 333; L. 1902, ch. 388.

Contracts Limiting Liability.

Mere delivery and acceptance of a receipt for baggage containing a special contract limiting liability does not make the limiting clause part of the contract unless the acceptor's attention is called thereto so that he may make himself acquainted therewith. Morgan v. Woolverton, 136 A. D. 351 (1910), affd. 203 N. Y. 52; followed in Meister v. Woolverton, 140 A. D. 926, and Wesslau v. L. I. R. R. Co., 150 A. D. 931.

Recovery by passenger for loss of baggage checked from point in Massachusetts to New York City is limited to sum specified on baggage check unless greater value than $100 is declared and excess charges paid at time of checking, where railroad taking baggage has complied with requirements of Federal statutes and Interstate Commerce Commission in noticing such limitation of liability, by filing in its stations for public inspection, schedules of rates, and notice of limitation if excess rate is not paid and has posted in baggage room and printed on tickets such notice, even though carrier's negligence is responsible for loss and passenger did not know and her attention was not specifically called to such regulation. Barstow v. N. Y., N. H. & H. R. R. Co., 158 A. D. 665 (1913). Legislation by Congress upon liability for negligence of carriers engaged in interstate commerce supersedes any State legislation upon that subject. Id.

Contracts of transportation companies who make their charges dependent upon the value of the property carried under contracts with the shipper will be upheld by the courts even though a loss be due to negligence of the carrier. Boyle v. Bush Terminal R. R. Co., 210 N. Y. 389 (1914), revsg. 151 A. D. 551.

Decisions Generally.

In an action against a baggage express company for damages to a trunk which said company obtained from a railroad company, the presumption is that the railroad company delivered the trunk to the express company in the same condition in which it was when checked. Springer v. Westcott Exp. Co., 19 A. D. 366, affd., 166 N. Y. 117 (1901).

Where a passenger includes in his baggage the goods of his employer, without the knowledge of the railroad company, the latter is only liable for loss resulting from gross negligence or willful misconduct. Cattaraugus Cutlery Co. v. Buff., Roch. & Pitts. R. R. Co., 24 A. D. 267 (1897); Gurney v. Grand Trunk Ry. Co., 37 St. Rep. 155, affd., 138 N. Y. 638 (1891).

A railroad company is liable for the loss of a trunk, containing merchandise in charge of a traveling salesman, and which is checked as baggage upon one of its passenger trains, when the railroad had notice through its agent that the trunk contained goods and not baggage. Trimble v. N. Y. C. & H. R. R. R. Co., 162 N. Y. 84 (1900), affg. 39 A. D. 403.

Where a trunk is carried merely as a passenger's baggage, or for his personal use, without charge, the carrier is not liable, in case of its loss, for the merchandise or samples contained therein intended to effect sales. Simpson v. N. Y., N. H. & H. R. R. Co., 16 Misc. 613 (1896).

A rule of a railroad company, which provides that baggage can be checked to the place for which the passenger holds a ticket only is a reasonable one. Howell v. Grand Trunk Ry. Co., 92 Hun 423 (1895). A stopover privilege does not include baggage. Id.

Where a contract for through transportation has been sold by one railroad over its own and a connecting line, the company selling the ticket is not liable for personal baggage of a passenger which was destroyed on the connecting line. Talcott v. Wabash R. R. Co., 159 N. Y. 461 (1899), modg. 89 Hun 492.

Where passenger baggage is checked through to any point over several connecting lines of railroad and is delivered in a damaged condition, that company only is liable upon whose road the baggage is injured. The owner may sue the company in whose custody he finds it damaged and may recover without proving that the company received it uninjured; the original good condition being presumed to continue; but the presumption may be rebutted by proof on the part of the company that the property was damaged when received by it. Fox v. Wabash Ry. Co., 16 Misc. 370 (1896).

For other cases in relation to a common carrier's liability for a passenger's baggage, see Isaacson v. N. Y. C. & H. R. R. R. Co., 94 N. Y. 278 (1884); Matteson v. Same, 76 id. 381 (1879); Fairfax v. Same, 73 id. 167 (1876); Perley v. Same, 65 id. 374 (1875); Burnell v. Same, 45 id. 184; Curtis v. D., L. & W. R. R. Co., 74 id. 116; Dininny v. N. Y., N. H. & H. R. R. Co., 49 id. 546 (1872); Rawson v. Penn. R. R. Co., 48 id. 212 (1872); Merrill v. Grinnell, 30 id. 594 (1864); Dexter v. S., B. & N. Y. R. R. Co., 42 id. 326; Sloman v. Gt. W. Ry. Co., 67 id. 208 (1876); Stoneman v. Erie Ry. Co., 52 id. 429 (1873); Roth v. Buff. & S. L. R. R. Co., 34 id. 548; Millard v. M., K. & T. R. R. Co., 86 id. 441 (1881); Estes v. St. P., M. & M. R. R. Co., 27 St. Rep. 594; Holdridge v. U. & B. R. R. R. Co., 56 Barb. 191; Jones v. Nor. & N. Y. T. Co., 50 id. 193; Curtis v. Avon, G. & Mt. M. R. R. Co., 49 id. 148; Powell v. Myers, 26 Wend. 591; Pardee v. Drew, 25 id. 459; Green v. N. Y. C. R. R. Co., 12 Abb. N. S. 473; N. Y. C. & H. R. R. R. Co. v. Fraloff, 100 U. S. 24 (1879).

§ 67. Penalties for injuries to baggage. Any person whose duty it is for or on behalf of the common carrier to handle, remove, or care for the baggage of passengers, who shall recklessly or willfully injure or destroy any trunk, valise, box, bag, package or parcel, while loading, unloading, transporting, delivering or

storing the same, or any railroad corporation, which shall knowingly keep in its employment any such willful or reckless person, or which shall permit any injury or destruction of such property, through failure to provide sufficient help and facilities for the handling thereof, shall pay to the party injured thereby the sum of fifty dollars, in addition to such damages.

Formerly L. 1890, ch. 565 (Railroad Law), § 45.

When Not Liable for Loss of Baggage Exceeding Value Stated on Ticket.

A clause in a railroad ticket simply releasing the carrier from liability for loss does not include loss arising from its own negligence unless such exemption is expressly stated, but a clause in consideration of reduced rates, properly and reasonably limiting the liability to a specified valuation of the goods, will include a loss or damage arising from the carrier's own negligence without express mention thereof. Gardiner v. N. Y. C. & Hudson R. R. R. Co., 201 N. Y. 387 (1911), following Tewes v. No. German Lloyd S. S. Co., 186 N. Y. 151 (1906).

A common carrier has two distinct liabilities, one for losses by accident or mistake, where he is liable as an insurer, and the other for losses by default or negligence, where he is answerable as an ordinary bailee. Bermel v. New York, N. H. & H. R. R. Co., 62 A. D. 389 (1901), affd., 172 N. Y. 639.

It has been the uniform practice of transportation companies in this country to make their charges dependent upon the value of the property carried, and the legality of contracts signed by the shipper agreeing upon a valuation of the property is upheld by the courts. Boyle v. Bush Terminal R. R. Co., 210 N. Y. 389 (1914).

Where the rates published, pursuant to the Interstate Commerce Act, provided a certain rate per 100 pounds on carload lots only if the shipper limited the valuation to $100 per ton, with a higher rate if there were no limitation of liability and the shipper took advantage of the lower rate, which fact was noted in the bill of lading, the rate of liability agreed upon is conclusive as between the parties. Union Lead Co. v. Lehigh Valley R. R. Co., 156 A. D. 525 (1913).

§ 68. Unclaimed freight and baggage. Every railroad or other transportation corporation, doing business in this state, which shall have unclaimed freight or baggage, not live stock or perishable, in its possession for the period of sixty days, may deliver the same to any warehouse company, or person or persons engaged in the warehouse business, within this state, and take a warehouse receipt for the storage thereof. Upon such delivery and upon taking such warehouse receipt, every such railroad or other transportation corporation shall be discharged of all liability in respect to any such unclaimed freight or baggage from and after such delivery. At any time within two years after such delivery, such railroad or other transportation corporation shall surrender

and transfer such warehouse receipt to the owner of any such unclaimed freight or baggage upon demand, and upon payment of all charges and expenses for transportation and storage then due, if any, to any such railroad or other transportation corporation. In case any such railroad or other transportation company shall have had unclaimed freight or baggage, not live stock or perishable, in its possession for a period of one year and shall not have delivered the same to a warehouse company or person or persons engaged in the warehouse business as above provided, then such railroad or other transportation company may proceed to sell the same at public auction, and out of the proceeds may retain the charges of transportation, handling and storage of such unclaimed freight or baggage, and the expenses of advertising and sale thereof; but no such sale shall be made until the expiration of four weeks from the first publication of notice of such sale, to be published weekly in a newspaper published in or nearest the town or city to which such unclaimed freight or baggage was consigned, or at which it was directed to be left, and also at the town or city where such sale is to take place; and said notice shall contain a general description of such unclaimed freight or baggage, the name of the shipper thereof, if known, and a statement of the consignment thereof, whether to a designated consignee or to order, if known, or the place at which the same was to be left, as near as may be; and the expenses incurred for advertising shall be a lien upon such unclaimed freight or baggage in a ratable proportion, according to the value of each article, package or parcel, if more than one. Such railroad or other transportation company shall make an entry of the balance of the proceeds of the sale, if any, of the unclaimed freight or baggage consigned to the same consignee or covered by each consignment, as near as can be ascertained, and at any time within five years thereafter, shall refund any surplus so retained to the owner of such unclaimed freight or baggage, his personal representatives or assigns, on satisfactory proof of such ownership. In case such balance shall not be claimed by the rightful owner within five years after the sale as above specified, then it shall be paid to the county treasurer, for the use of the county poor of the county where the sale is made.

Unclaimed live stock and perishable freight or baggage may be sold by any such railroad or other transportation corporation without notice, as soon as it can be, upon the best terms that can be obtained. All moneys arising from the sale of any such unclaimed

live stock, perishable freight or baggage, after deducting therefrom all charges and expenses for transportation, storage, keeping, commissions for selling the property, and any amount previously paid for its loss or non-delivery, shall be deposited by the corporation making such sale with a report thereof, and proof that the property was live stock or perishable freight, with the comptroller for the benefit of the general fund of the state, and shall be held by him in trust for reclamation by the person or persons entitled to receive the same.

Formerly L. 1890, ch. 565 (Railroad Law), § 46, as am'd by L. 1892, ch. 676; L. 1896, ch. 974; L. 1899, ch. 582.

Upon the same subject, see General Business Law, §§ 280–284; see, also, Pub. Serv. Com. Law, § 38, and cases there cited.

A common carrier discharges its duty as such when it tenders the goods to the consignee, and its subsequent liability is only that of a warehouseman. Manhattan Rubber Shoe Co. v. Chicago, B. & Q. R. R. Co., 9 A. D. 172 (1896).

§ 69. Tickets and checks for connecting steamboats. The proprietors of any line of steamboats, terminating or stopping for passengers at any place where a railroad corporation has a depot or station, may furnish tickets and baggage checks to such corporation for the use of passengers, traveling over its road, who desire to connect with such line of boats at any such place, and the railroad corporation shall sell such tickets and deliver a duplicate of one of such checks to any such passenger applying therefor, and shall account for and pay over to the proprietor of such line of boats all moneys received by it for the sale of such tickets; and any such railroad corporation may furnish tickets and checks for baggage to the proprietors of any such line of steamboats for the use of passengers traveling over any part of such line of boats, who desire to connect with the railroad of any such corporation at any such place, and such proprietors shall sell such tickets and deliver a duplicate of one of such checks to any such passenger applying therefor, and shall account for and pay over to such corporation all moneys received by them for the sale of such tickets. No greater rate of fare shall be charged by any railroad corporation to any such passenger for the distance traveled over its road than is charged to travelers for the same distance whose trip ends at the place where connection is made with any such line of boats, and no greater rate of fare shall be charged by the proprietors of any such steamboat line to any such passenger for the distance

traveled over its line, than is charged to travelers for the same distance whose trip ends at the place where connection is made with any such railroad. Any additional cost of transfer of a passenger or his baggage from railroad depot or station to steamboat landing, or from steamboat landing to depot or station, shall be borne by the passenger or the proprietors of the steamboat line or the railroad corporation at whose instance or for whose benefit such transfer is made. Every railroad corporation and the proprietors of any line of steamboats, their agents or servants, who shall neglect or refuse to sell tickets or furnish a check to any passenger applying for the same, when the same shall have been furnished to them, shall pay to such passenger the sum of ten dollars, and no fare or toll shall be collected from him for riding over such road or upon such boats, as the case may be; and in addition thereto any railroad corporation so neglecting or refusing, shall pay the proprietors of such line of boats two hundred and fifty dollars for each day it shall so neglect or refuse; and the proprietors of any such line of boats so neglecting or refusing, shall pay to such railroad corporation a like sum for each day they shall so neglect or refuse.

Every such railroad corporation shall also receive any freight which shall be delivered at any station on the line of its road, marked to go by way of boat or any particular line of boats from any station on its road at which such boat or line of boats terminates or stops for freight, and shall transport such freight with all convenient speed to such station, and on its arrival there cause the proprietors of the steamboat line by which it is directed to be sent, or their agent, to be notified of such arrival, and shall deliver such freight to such proprietors or their agent with the bill of charges thereon due such railroad corporations for the payment of which charges the proprietor or proprietors of such steamboat line shall be responsible, and shall account for and pay the same to such railroad corporation on demand. The railroad corporation shall not charge for the transportation of such freight over its road any greater sum pro rata than it charges for carrying the same kind of freight the same distance over its road, if it was to be transported by such corporation by rail to its final destination, or to the terminus of the road of such corporation in case it terminates before such final destination is reached. Any freight delivered by the proprietors of any steamboat or steamboat line, or their authorized

agent, at any station, at a place where such steamboat or steamboats have a landing, to any such railroad corporation, for transportation over its road or any part thereof, shall be transported by such corporation to its place of destination for the same price pro rata which would be charged for the same kind of freight the same distance over its road, if the same had been taken on at the point of first shipment by boat, or at the terminus of the road of such corporation, in case it does not extend to the point of first shipment.

Formerly L. 1890, ch. 565 (Railroad Law), § 47.

See Pub. Serv. Com. Law, § 35.

Exclusion of rival steamboat company from terminal facilities. Alexandria Bay S. Co. v. N. Y. C. & H. R. R. R. Co., 18 A. D. 527 (1897).

Where a carrier sells tickets over a connecting line and assumes to secure accommodations over that line, it is liable for the failure of the other line to furnish proper accommodations. Bussman v. Western Transit Co., 9 Misc. 410 (1894), and cases therein cited.

§ 70. Rights and liabilities as common carriers. Every railroad corporation doing business in this state shall be a common carrier. Any one of two or more corporations owning or operating connecting roads, within this state, or partly within and partly without the state, shall be liable as a common carrier, for the transportation of passengers or delivery of freight received by it to be transported by it to any place on the line of a connecting road; and if it shall become liable to pay any sum by reason of neglect or misconduct of any other corporation it may collect the same of the corporation by reason of whose neglect or misconduct it became liable.

Formerly L. 1890, ch. 565 (Railroad Law), § 48, as am'd by L. 1892, ch. 676.

See provisions of Pub. Serv. Com. Law, §§ 25–40.

Limitation of Liability.

It is the settled law of this State that a person riding upon a drover's pass is a gratuitous passenger and that a release from liability or injury caused by the negligence of the carrier or its servants is valid and bars recovery. Willcox v. Erie R. R. Co., 162 A. D. 94 (1914), citing several cases. See, also, Fish v. Del., Lack. & Westn. R. R. Co., 158 A. D. 92 (1913).

Liability of Separate Companies Operating a Through Route.

In an action for injury by a passenger against two railway companies owning separate routes, connected to make a through route, the fact that cars were furnished and manned by one company does not entitle the other to a dismissal of the complaint, although it could avail itself of the care exercised

by the associate company since, for the purpose of the use of the common track and of its own as regards passengers, it adopted the train and crew and shared the responsibility or alone bore it, and there was a question for the jury. Blumenthal v. B'klyn Union El. R. R. Co., 158 A. D. 558 (1913).

Liability in Case of Merger.

A cause of action existing against a corporation, but not commenced, before a merger, must be brought against the new corporation. Lee v. Stillwater & Mechanicville Ry. Co., 140 A. D. 779 (1910).

Duty in General.

While railroad companies are, in a certain sense, to be regarded as trading corporations, they are, at the same time, clothed with useful public functions; their franchises are sovereign and their uses are public; they are compellable to use their property in the interests of the entire community, and it is their duty to furnish accommodations for the transportation of persons and property. Bouker v. Long Island R. R. Co., 89 Hun 202.

Limitation of Liability.

The company may limit its liability by contract. Kenney v. N. Y. C. & H. R. R. R. Co., 125 N. Y. 422 (1891); Poucher v. N. Y. C. R. R. Co., 49 N. Y. 263 (1872); see, also, Perkins v. Same, 24 N. Y. 196 (1862); Bissell v. Same, 25 N. Y. 442 (1862); McElwain v. E. Ry. Co., 21 W. D. 21; Brewer v N. Y., L. E. & W. R. R. Co., 124 N. Y. 59; Porter v. Same, 59 Hun 177, affd., 129 N. Y. 624 (1892); Elliott v. N. Y. C. & H. R. R. R. Co., 33 St. Rep. 861 (1890).

Duty Toward Passengers.

Although a railroad company is not an insurer of the safety of passengers, it is bound to use a high degree of skill and vigilance to guard against accidents, and this duty is not discharged without the utmost care and diligence which human prudence and foresight will suggest. Palmer v. D. & H. C. Co., 120 N. Y. 170 (1890); see, also, Merwin v. Man. Ry. Co., 48 Hun 608, affd., 113 N. Y. 659 (1889); Taber v. D., L. & W. R. R. Co., 71 N. Y. 489 (1877); Wynn v. Cent. Pk., N. & E. R. R. Co., 133 N. Y. 575; Palmer v. Penn. Co., 111 N. Y. 488 (1888); Breen v. N. Y. C. & H. R. R. R. Co., 109 N. Y. 297 (1888); Birmingham v. R. C. & B. R. R. Co., 137 N. Y. 13; Brown v. N. Y. C. R. R. Co., 34 N. Y. 404 (1866); Carroll v. Staten I. R. R. Co., 58 N. Y. 126 (1874); Alden v. N. Y. C. R. R. Co., 26 N. Y. 102 (1862).

Where a passenger has been left at a wrong station, a recovery may be had for all damages naturally resulting from the corporation's fault. Childs v. N. Y., O. & W. Ry. Co., 77 Hun 539 (1894).

Carrier liable for a wilful assault by its servant on a passenger. Stewart v. Brooklyn, etc., R. R. Co., 90 N. Y. 588 (1882). Vigilance in protecting passengers from violence must be observed. Weeks v. N. Y., N. H. & H. R. R. Co., 72 N. Y. 50 (1878); Putnam v. Broadway & 7th Av. R. R. Co., 55 N. Y. 108 (1873).

Safe stations must be maintained and stops must be of sufficient duration. Onderdonk v. N. Y. & Sea Beach Ry. Co., 74 Hun 42 (1893); Truesdale v. Erie Ry., 99 N. Y. Supp. 694 (1906); Van Ostrand v. Del. & H. Ry., 99 N. Y. Supp. 548 (1906).

No liability attaches when the accident was an extraordinary one that could not reasonably have been anticipated. Cleveland v. N. J. S. Co., 125 N. Y.

299 (1891); McPadden v. N. Y. C. R. R. Co., 44 N. Y. 478, 133 N. Y. 575 (1871), above; see, also, Morris v. N. Y. C. & H. R. R. R. Co., 106 N. Y. 678 (1887); Wynn v. Cent. Park, N. & E. R. R. R. Co., 133 N. Y. 575 (1892).

The relation between a railroad company and a passenger is such as to require it to keep its cars and tracks in a perfect and safe condition for the transportation of passengers with entire safety, so far as human prudence can accomplish these results. The relation between a railroad and its employees is of a different character, in that as to them it is only required to exercise ordinary, reasonable care and caution to prevent accidents. Henson v. Lehigh Valley R. R. Co., 194 N. Y. 205 (1909).

Duty as Carriers of Freight.

Railroad corporations have the right to prescribe the times for the reception of freight for transportation; due care and diligence is all that can be required of them in an emergency, and if they are careful to make provision for traffic in ordinary times and under ordinary circumstances, no more can be required of them, and they are excused for delays, when large and unusual quantities of freight are offered for shipment, and they have utilized all their facilities for the purpose of transporting the property offered to them for that purpose. Bouker v. Long Island R. R. Co., 89 Hun 202 (1895).

A condition in a shipping bill that the carrier will not be responsible for loss, unless a memorandum, in writing, is delivered with the property describing the articles and their value, or that such property will only be taken at the owner's risk, does not exempt the carrier from liability for his own negligent acts. Rathbone v. N. Y. C. & H. R. R. R. Co., 140 N. Y. 48 (1893). Where the property is of extraordinary value, a condition that the carrier will not be responsible for loss if the character and value of the articles are not stated and extra freight paid, will exempt the carrier from liability, unless he was informed of such special and unusual value. Id.

A delivery of goods by a common carrier to a person other than the consignee, without the consent of the latter, constitutes a conversion and renders the carrier liable for the value of the goods, unless the consignee subsequently ratifies such delivery. McSwegan v. Penn. R. R. Co., 7 A. D. 301 (1896), revsg. 16 Misc. 157.

A common carrier has a right to limit its liability, and may, by a contract, fix the sum beyond which it will not be liable for a loss upon a carload of animals. Jones v. N. Y., L. E. & W. R. R. Co., 3 A. D. 341 (1896).

Where the last of several carriers delivers goods in a damaged condition the presumption is that the injury occurred on its line; a consignment in good order when delivered to the initial line is presumed to remain so. Berkowitz v. Chicago, M. & St. P. Ry. Co., 109 A. D. 878 (1905).

Duty Toward Employees.

An employer does not undertake, absolutely, with an employee for the sufficiency or safety of implements and facilities furnished for his work, but only for the exercise of reasonable care, and when injury to an employee results from defective implements, knowledge of the defect must be brought home to the employer, or proof given of omission of proper care to discover it. Doing v. N. Y., O. & W. R. Co., 73 Hun 270 (1893), and cases there cited; see, also, Fannessey v. W. U. Tel. Co., 6 Misc. 322 (1893).

A railroad company is bound to use reasonable care to protect its employees by using suitable machinery and keeping it in repair. Bailey v. R., W. & O. R. R. Co., 139 N. Y. 302 (1893).

The company is not liable to employees for negligence of co-servant. Potter v. N. Y. C. & H. R. R. R. Co., 136 N. Y. 77 (1892).

An employee paying fare has the rights of a passenger. Ross v. N. Y. C., etc., 5 Hun, 488, affd., 74 N. Y. 617 (1878); but see Vick v. Same, 95 N. Y. 267 (1884).

For other cases as to actions by passengers and others: Goldberg v. N. Y. C. & H. R. R. R. Co., 133 N. Y. 561; Akersloot v. 2d Av. R. R. Co., 131 N. Y. 599; Schneider v. Same, 133 N. Y. 583; Moylan v. Same, 128 N. Y. 583; Morrison v. 7th Av. R. R. Co., 130 N. Y. 166; Kenney v. N. Y. C. & H. R. R. R. Co., 125 N. Y. 422; Brewer v. N. Y., L. E. & W., 124 N. Y. 59; Wiwirowski v. L. S. & M. S. R. R. Co., 124 N. Y. 420; Medler v. Atl. Av. R. R. Co., 126 N. Y. 669, affg. 36 St. Rep. 89; Craigshead v. B. R. R. Co., 123 N. Y. 391; Hickenbottom v. D., L. & W. R. R. Co., 122 N. Y. 91; Lent v. N. Y. C. & H. R. R. R. Co., 120 N. Y. 467; Baker v. Man. Ry. Co., 118 N. Y. 533; Boyce v. Same, 118 N. Y. 314; Lehr v. Steinway & H. P. R. R. Co., 118 N. Y. 556; Alberti v. N. Y., L. E. & W. R. R. Co., 118 N. Y. 77; McClain v. B'klyn C. R. R. Co., 116 N. Y. 459; Webster v. R., W. & O. R. R. Co., 115 N. Y. 112; Coleman v. 2d Av. R. R. Co., 114 N. Y. 609; Parsons v. N. Y. C. & H. R. R. R. Co., 113 N. Y. 355; Lafflin v. B. & S. W. R. R. Co., 106 N. Y. 136; Archer v. N. Y., N. H. & H. R. R. Co., 106 N. Y. 589; Bucher v. N. Y. C. & H. R. R. R. Co., 98 N. Y. 128; Burrows v. E. Ry. Co., 63 N. Y. 556; Carpenter v. B. & A. R. R. Co., 97 N. Y. 494.

§ 71. Duties imposed. It shall be the duty of every railroad corporation operating its road by steam:

1. To lay, in the construction of new and in the renewal of existing switches, upon freight or passenger main line tracks, switches on the principle of either the so-called Tyler, Wharton, Lorenz, or split-point switch, or some other kind of safety switch, which shall prevent the derailment of a train, when such switch is misplaced or a switch interlocked with distant signals.

2. To erect and thereafter maintain such suitable warning signals at every road, bridge, or structure which crosses the railroad above the tracks, where such warning signals may be necessary, for the protection of employees on top of cars from injury.

3. To use upon every new freight car, built or purchased for use, couplers which can be coupled and uncoupled automatically, without the necessity of having a person guide the link, lift the pin by hand, or go between the ends of the cars.

4. To attach to every car used for passenger transportation an automatic air-brake or other form of safety-power brake, applied from the locomotive, excepting cars attached to freight trains, the schedule rate of speed of which does not exceed twenty miles an hour.

5. To provide each closed car in use in every passenger train owned or regularly used upon a railroad, with one set of tools,

consisting of an axe, sledge hammer, crowbar and hand saw and such other or additional tools as the public service commission may require, to be placed where directed by the commission.

6. To provide, in each passenger car, where the line of road shall exceed forty continuous miles in length, a suitable receptacle for water, with a cup or drinking utensil attached upon or near such receptacle, and to keep such receptacle, while the car is in use, constantly supplied with cool water.

Every corporation, person or persons, operating such railroad, and violating any of the provisions of this section, except subdivision six, shall be liable to a penalty of one hundred dollars for each offense, and the further penalty of ten dollars for each day that it shall omit or neglect to comply with any of such provisions. For every violation of the provisions of the sixth subdivision of this section every such corporation shall be liable to a penalty of twenty-five dollars for each offense.

Formerly L. 1890, ch. 565 (Railroad Law), § 49, as am'd by L. 1898, ch. 521; L. 1900, ch. 740.

Cross References.

Equipment of cars with air-brakes and automatic couplers, §§ 79, 80, post. Penalty for violation of said sections, § 81, post; see, also, Penal Law, § 1988.

Regulations respecting use of illuminating oils. Gen. Business Law, § 304; and in lighting elevated railroad cars, § 244, post.

Warning Signals.

A company is not necessarily liable for injuries to a brakeman who knew the location of a bridge, had passed under it at other times, and had been cautioned regarding it. Fitzgerald v. N. Y. C. & H. R. R. R. Co., 59 Hun 225 (1891); Ryan v. L. Isl. R. R. Co., 51 Hun 607 (1889), aff'd., 124 N. Y. 654; but see Wallace v. Cent. Vermont R. R. Co., 138 N. Y. 302 (1893).

The duty of a railroad company to use reasonable care to protect employees from injury embraces the obligation to use such care both in furnishing suitable machinery and in keeping it in repair. Bailey v. R., W. & O. R. R. Co., 139 N. Y. 302 (1893).

§ 72. Inspection of locomotive boilers. It shall be the duty of every railroad corporation operated by steam power, within this state, and of the directors, managers or superintendents of such railroad to cause thorough inspections to be made of the boilers and their appurtenances of all the steam locomotives which shall be used by such corporation or corporations, on said railroads. Said inspections shall be made, at least every three months under the direction and superintendence of said corporations, or the directors, managers or superintendents thereof, by persons

of suitable qualifications and attainments to perform the services required of inspectors of boilers, and who from their knowledge of the construction and use of boilers and the appurtenances therewith connected, are able to form a reliable opinion of the strength, form, workmanship and suitableness of boilers, to be employed without hazard of life, from imperfections in material, workmanship or arrangement of any part of such boiler and appurtenances. All such boilers so used shall comply with the following requirements: The boilers must be made of good and suitable materials; the openings for the passage of water and steam respectively, and all pipes and tubes exposed to heat shall be of proper dimensions; the safety valves, fusible plugs, low water glass indicator, gauge cocks and steam gauges, shall be of such construction, condition and arrangement that the same may be safely employed in the active service of the railroad corporation without peril to life; and each inspector shall satisfy himself by thorough examination that said requirements have been fully complied with. No boiler, nor any connection therewith shall be approved which is unsafe in its form, or dangerous from defects, workmanship or other cause. The person or persons who shall make the said inspections if he or they approve of the boiler or boilers and the appurtenances throughout, shall make and subscribe his or their name to a written or printed certificate which shall contain the number of each boiler inspected, the date of its inspection, the condition of the boiler inspected, and such details as may be required by the forms and regulations which shall be prescribed by the public service commission. Every certificate shall be verified by the oath of the inspector, and he shall cause such certificate or certificates to be filed in the office of the public service commission, within ten days after each inspection shall have been made, and also a copy thereof with the chief operating officer or employee of such railroad having charge of the operation of such locomotive boiler; a copy shall also be placed by such officer or employee in a conspicuous place in the cab connected with the locomotive boiler inspected, and there kept framed under glass. The public service commission shall have power, from time to time, to formulate rules and regulations for the inspection and testing of boilers as aforesaid, and may require the removal of incompetent inspectors of boilers under the provisions of this section. Copies of such rules and regulations shall be mailed to every corporation operating a railroad by steam in this

state. If it shall be ascertained by such inspection and test or otherwise, that any locomotive boiler is unsafe for use, the same shall not again be used until it shall be repaired, and made safe, so as to comply with the requirements of this section. Every corporation, director, manager or superintendent operating such railroad and violating any of the provisions of this section shall be liable to a penalty, to be paid to the people of the state of New York, of one hundred dollars for each offense, and the further penalty of one hundred dollars for each day it or he shall omit or neglect to comply with said provisions, and the making or filing of a false certificate shall be a misdemeanor, and every inspector who wilfully certifies falsely touching any steam boiler, or any appurtenance thereto belonging, or any matter or thing contained or required to be contained in any certificate, signed and sworn to by him, shall be guilty of a misdemeanor. Any person, upon application to the secretary of said commission and on the payment of such reasonable fee as said commission may by rule fix, shall be furnished with a copy of any such certificate. The public service commission shall enforce the provisions of this section as to penalties.

Formerly L. 1890, ch. 565 (Railroad Law), § 49-a, added by L. 1905, ch. 611, as am'd by L. 1907, ch. 208.

§ 73. State inspector of locomotive boilers. The office of state inspector of locomotive boilers is continued. Said inspector shall be appointed by the public service commissions and shall receive a compensation to be fixed by the commission, not exceeding three thousand dollars per year. He shall, under the direction of the commission, inspect boilers or locomotives used by railroad corporations operating steam railroads within the state, and may cause the same to be tested by hydrostatic test and shall perform such other duties in connection with the inspection and test of locomotive boilers as the commission shall direct. But this section shall not relieve any railroad corporation from the duties imposed by the preceding section.

Formerly L. 1890, ch. 565 (Railroad Law), § 49-b, added by L. 1905, ch. 611.

§ 74. Care of steam locomotives; steam and water cocks; penalty. It shall be the duty of every corporation operating a steam railroad, within this state, and of its directors, managers or superintendents, to cause the boiler of every locomotive used

on such railroad to be washed out as often as once every thirty days, and to equip each boiler with, and maintain thereon at all times, a water glass, showing the height of water in the boiler, having two valves or shut-off cocks, one at each end of such glass, which valves or shut-off cocks shall be so constructed that they can be easily opened and closed by hand; also to cause such valves or shut-off cocks and all gauge cocks or try-cocks attached to the boiler to be removed and cleaned whenever the boiler is washed out pursuant to the foregoing requirements of this section; also to keep all steam valves, cocks and joints, studs, bolts and seams in such repair that they will not at any time emit steam in front of the engineer, so as to obscure his vision. No locomotive shall hereafter be driven in this state unless the same is equipped and cared for in conformity with the provisions of this section; but nothing herein contained shall be construed to excuse the observance of any other requirement imposed by this chapter upon railroad corporations, their directors, officers, managers and superintendents. Every corporation, person or persons operating a steam railroad and violating any of the provisions of this section, shall be liable to a penalty of one hundred dollars for each offense, and the further penalty of ten dollars for each day that such violation shall continue. The public service commission shall enforce the provisions of this section.

Formerly L. 1890, ch. 565 (Railroad Law), § 49-e, as added by L. 1907, ch. 208.

§ 75. Public service commission may approve other safeguards. The public service commission may, on the application of any railroad corporation, authorize it to use any other safeguard or device approved by the commission, in place of any safeguard or device hereinbefore required by this article, which shall thereafter be used in lieu thereof, and the same penalties for neglect or refusal to use the same shall be incurred and imposed as for a failure to use the safeguard or device hereinbefore required, in lieu of which the same is to be used.

Formerly L. 1890, ch. 565 (Railroad Law), § 50.

Pub. Serv. Com. Law, § 50, relative to power of Commission to order repairs or changes.

The duty of a master to furnish his servants safe and proper appliances for their work cannot be evaded by delegating that duty to others. Redington v. N. Y. & O. W. Ry. Co., 84 Hun 231.

§ 76. Use of stoves or furnaces prohibited; exceptions. It shall not be lawful for any railroad corporation operating a steam railroad in this state of the length of fifty miles or more, excepting foreign railroad corporations incorporated without the jurisdiction of the United States running cars upon tracks in this state for a distance of less than thirty miles, to heat its passenger cars on other than mixed trains, excepting dining cars, by any stove or furnace kept inside the car or suspended therefrom, unless in case of accident or other emergency, when it may temporarily use such stove or furnace with necessary fuel; and in cars which have been equipped with apparatus to heat by steam, hot water or hot air from the locomotive or from a special car, the present stove may be retained to be used only when the car is standing still; and no stove or furnace shall be used in a dining car except for cooking purposes, and of pattern and kind to be approved by the public service commission; provided that passenger cars propelled by means of gasoline or oil engines may be heated in a manner to be approved by the public service commission. This section shall not be held to affect or interfere with the use by the commissioners of fisheries of this or other states, or of the United States, of stoves for heating or cooking or boilers for hatching operations in their fish car or cars. Any person or corporation violating any of the provisions of this section shall be liable to a penalty of one thousand dollars, and to the further penalty of one hundred dollars for each and every day during which such violation shall continue.

Formerly L. 1890, ch. 565 (Railroad Law), § 51, as am'd by L. 1896, ch. 299. Thus am'd by L. 1914, ch. 69.

Violation of the foregoing section is a misdemeanor. Penal Law, § 1987.

This provision is not in conflict with any Federal statute. Peo. v. N. Y., N. H. & H. R. R. Co., 55 Hun 409 (1890), affd., 123 N. Y. 635; see, also, Peo. v. Clark, 14 N. Y. Supp. 642, 8 N. Y. Crim. R. 169 (1891).

§ 77. Equipment of engines. It shall be unlawful for any railroad company to use within the state on its line or lines any locomotive engine not equipped with a power driving wheel brake and appliances for operating the train brake system.

Formerly L. 1893, ch. 543, § 1.

§ 78. Coal jimmies and caboose cars. The use of cars known and designated as "coal jimmies" in any form and the use of

any car as a caboose unless it shall have a suitable and safe platform at each end thereof, and the usual railing for the protection of persons using such platform, shall be unlawful within the state, except upon any railroad whose main line is less than fifteen miles in length and whose average grade exceeds two hundred feet to the mile. This section shall not be construed to authorize the interchange of such "coal jimmies" with, and the use thereof upon, railroads of more than fifteen miles in length or whose average grade is less than two hundred feet to the mile.

From and after the first day of July, nineteen hundred and twenty, it shall be unlawful for any corporation or individual to man, equip, or to use within the state on any railroad a caboose car, or car to serve the purpose of a caboose car, which shall be less than twenty-four feet in length exclusive of the platform, or which shall have a center constructive strength less than that of the fifty ton freight cars built according to master car builders' standards. Such caboose or other equivalent car shall be constructed with steel center sills with two four-wheel trucks; with each platform not less than twenty-four inches wide, with proper guard rails, grab irons and steps, which shall be equipped with a suitable rod, board or other guard designed to prevent slipping from the car step. Each such car shall have a door at each end and shall be equipped with four separate sleeping berths not less than six feet and two inches in length. Each such car shall contain a properly furnished toilet room, sink, ice box, water cooler, clothing lockers, and with a cupola of sufficient size to accommodate at least two men. Whenever any caboose or other car used for like purpose now in use by any such railroad company shall, after this act goes into effect, be brought into any shop for general repairs it shall be unlawful to again put the same into use within this state, as a caboose or other car used for like purpose unless it be equipped as provided in this act.

This section shall not apply to cabooses or other equivalent cars used in the switching service or on trains operated wholly within twenty-five miles of yard limits.

Any violation of the provisions of this section shall be a misdemeanor, punishable by a fine of not less than one hundred dollars nor more than five hundred dollars for each separate offense. This penalty is in addition to that provided for in section eighty-one of this chapter.

Formerly L. 1893, ch. 543, § 2, as am'd by L. 1896, ch. 486; L. 1900, ch. 549. Thus am'd by L. 1913, ch. 497.

§ 79. Air-brakes. It shall be unlawful for any railroad or other company to haul or permit to be hauled or used on its line or lines within this state any freight train that has not a sufficient number of cars in it so equipped with continuous power or air-brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

Formerly L. 1893, ch. 543, § 3, as am'd by L. 1900, ch. 549, § 2.

§ 80. Couplers. It shall be unlawful for any railroad or other company to haul, or permit to be hauled or used, on its line or lines within the state, any freight car not equipped with couplers of the master car builders' type, and coupling automatically by impact, and which can be uncoupled, except in cases of accident, without the necessity of men going between the ends of the cars.

Formerly L. 1893, ch. 544, § 3.

§ 81. Violation of four preceding sections. Any railroad or other company hauling or permitting to be hauled on its line or lines any train in violation of any of the provisions of the preceding four sections shall be liable to a penalty of one hundred dollars for each and every violation, to be recovered in an action to be brought by the public service commission in the name of the people and in the judicial district wherein the principal office of the company within the state is located.

Formerly L. 1893, ch. 543, § 5, as am'd by L. 1900, ch. 549.

§ 82. Canada thistles to be cut. Every railroad corporation doing business within this state, shall cause all Canada thistles, white and yellow daisies and other noxious weeds growing on any lands owned or occupied by it, to be cut down twice in each and every year, once between the fifteenth day of June and the twenty-fifth day of June, and once between the fifteenth day of August and the twenty-fifth day of August. If any such corporation shall neglect to cause the same to be so cut down, any person may cut the same between the twenty-fifth day of June and the fifth day of July inclusive, and between the twenty-fifth day of August and the fifth day of September inclusive in each year, at the expense of the corporation on whose lands the same shall be so cut, at the rate of three dollars per day for the time occupied in cutting.

Formerly L. 1890, ch. 565 (Railroad Law), § 52.

A railroad which has acquired a sixty-foot right of way by prescription does not obtain an easement over an adjoining strip by annually mowing weeds thereon. Scheer v. L. I. R. R. Co., 127 A. D. 267 (1908).

§ 83. Riding on platform; walking along track. No railroad corporation shall be liable for any injury to any passenger while on the platform of a car, or in any baggage, wood or freight car, in violation of the printed regulations of the corporation, posted up at the time in a conspicuous place inside of the passenger cars, then in the train, if there shall be at the time sufficient room for the proper accommodation of the passenger inside such passenger cars. No person other than those connected with or employed upon the railroad shall walk upon or along its track or tracks, except where the same shall be laid across or along streets or highways, in which case he shall not walk upon the track unless necessary to cross the same. Any person riding, leading or driving any horse or other animal upon any railroad, or within the fences and guards thereof, other than at a farm or street or forest crossing, without the consent of the corporation, shall forfeit to the people of the state the sum of ten dollars, and pay all damages sustained thereby to the party aggrieved.

Formerly L. 1890, ch. 565 (Railroad Law), § 53, as am'd by L. 1892, ch. 676.

Riding on freight or other cars without authority is a misdemeanor. Penal Law, § 1990.

When a passenger upon a trolley car is carried past his station through the fault of an employee of the railroad company he may make use of the right of way of the company in order to reach the station. Luther v. Fonda, Johnstown & G. R. R. Co., 160 A. D. 366 (1914).

It is not negligence, per se, for a passenger to stand on the platform of a moving car when a seat is provided within the car. Hastings v. Central Crosstown R. R. Co., 7 A. D. 312 (1896), distg. Bradley v. Second Av. R. R. Co., 90 Hun 419 (1895); Nolan v. Brooklyn City & N. R. R. Co., 87 N. Y. 63 (1881); see, also, Hayes v. 42d St. R. R. Co., 97 N. Y. 259; Werle v. L. I. R. R. Co., 98 N. Y. 650; Ginna v. 2d Av. R. R. Co., 67 N. Y. 596. The question whether the street railroad company is chargeable with negligence in permitting overcrowding of a car platform is one of fact for the jury. Graham v. Man. Ry. Co., 149 N. Y. 336 (1896); Lehr v. Steinway & H. P. R. R. Co., 118 N. Y. 556, and cases therein cited. A person stepping upon the track to save young children is not a trespasser. Costikyan v. R., W. & O. R. R. Co., 58 Hun 590, affd., 128 N. Y. 633 (1891).

When a passenger has, by invitation of the company, boarded an elevated railroad train, and been compelled to ride upon a car platform because of the crowded condition of the car, his relation of a passenger upon that train is not changed by his momentarily stepping off to permit another to alight at a station; and his return to the car platform to continue his journey, although he then knows his position upon the platform to be dangerous, does not, of itself, render him guilty of contributory negligence as matter of law. Graham v. Manhattan Ry. Co., 149 N. Y. 336 (1896), revsg. 8 Misc. 305.

The failure of an elevated railroad company to keep the gates of a car platform closed while the car is in motion is evidence of its negligence toward a passenger who is injured while trying to save himself from being pushed from the platform by a movement of a crowd occasioned by acts of the company's employee. Graham v. Manhattan Ry. Co., 149 N. Y. 336 (1896), revsg. 8 Misc. 305.

As any riding upon the front platform of a car, on proof that it was contrary to the general rules of the road, might, under the statute, relieve the railroad company from liability, it was proper for the plaintiff in an action to allege a rule of the company which permitted passengers who were smoking to stand upon the front platform, although it was not alleged that the plaintiff was smoking. Lynch v. Second Ave. R. R. Co., 7 A. D. 164 (1896).

A prescriptive right to cross the tracks of a railroad company at a point not a highway or street crossing cannot be acquired by the public even by long usage, where, in order to reach the point it is necessary to walk along the tracks of an intersecting railroad. Keller v. Erie R. R., 183 N. Y. 67 (1905), affg. 98 A. D. 550.

The fact that a person was riding as a passenger upon the front platform of a street car where he was directed to go by the driver because he was smoking does not constitute negligence in him as matter of law. Seelig v. Met. St. Ry. Co., 18 Misc. 383 (1896).

When a passenger, without any necessity for so doing, leaves an absolutely safe place in a car to go to a more hazardous one upon the front platform, upon a dark and stormy night, when the tracks are slippery and sudden stoppages of the car are likely to occur, he is not free from contributory negligence. Bradley v. Second Ave. R. R. Co., 90 Hun 419 (1895).

It has been held that section 46, chapter 140, Laws of 1850, now repealed and superseded by the foregoing section, relieving railroad companies from liability for injuries to a passenger while riding on a car platform, did not apply to a street railroad. Wood v. Brooklyn City R. R. Co., 5 A. D. 492 (1896); Vail v. Broadway R. R. Co. of Brooklyn, 147 N. Y. 377 (1895).

An unnecessarily sudden stoppage, by the use of air brakes of a train while entering a station, whereby persons standing in the aisles and upon the platforms of the cars preparatory to alighting are thrown down and one passenger is thrown under the car and injured, constitutes negligence on the part of the railway company. Schreiner v. N. Y. C. & H. R. R. R. Co., 12 A. D. 551 (1896).

It is the duty of a corporation to light clearly and distinctly the space between the car and the platform in order that passengers may know exactly what care is required of them at that point. Fox v. Mayor, etc., of New York, 5 A. D. 349 (1896); Boyce v. Manhattan Ry. Co., 118 N. Y. 314 (1890); Ryan v. Manhattan Ry. Co., 121 N. Y. 126 (1891).

§ 84. Corporations may establish ferries. Any steam railroad corporation, incorporated under the laws of this state, with a terminus in the harbor of New York, may purchase or lease boats propelled by steam or otherwise, and operate the same as a ferry or otherwise, over the waters of the harbor of New York, but this section shall not be construed to affect the rights of the city of New York.

Formerly L. 1890, ch. 565 (Railroad Law), § 54, as am'd by L. 1892, ch. 676.

This section does not authorize the leasing of a ferry distinct and independent from the terminus of the railroad. Starin v. Mayor, etc., 42 Hun 549 (1886), revsd. on other grounds, 112 N. Y. 206.

§ 85. Certain railroads may cease operation in winter. The directors of any railroad corporation operating a railroad, constructed and used principally for transporting lumber or ores, during the summer months, or for summer travel, may, by a resolution duly passed at a meeting thereof, apply to the public service commission for permission to cease the operation of their road during the winter season, for a period not exceeding seven months in any one year, specifying the date of such suspension, and the date of the reopening thereof; and such commission may, in its discretion, make an order granting the application wholly or in part, and thereupon such railroad corporation shall be relieved of the duty of operating its road during the period specified in the order. A copy of such order shall be posted in all depots and at the termini of such railroad, and published in every newspaper in each town in any part of which such road shall be constructed at least four weeks prior to the date of such suspension.

Formerly L. 1890, ch. 565 (Railroad Law), § 55.

§ 86. Certain railroads need not be operated beyond June, July, August and September. Subject to the permission and approval of the public service commission, any corporation, whose railroad is or shall be not longer than sixteen miles and is or shall be in large part intended for or used in summer travel or the convenience of summer sojourners need not operate its road beyond the months of June, July, August and September, inclusive. The motive power may be electricity. If the road be not longer than ten miles, such corporation may fix and collect fare for transporting each passenger, together with ordinary baggage, if any, not to exceed fifteen cents for each mile and fraction thereof.

Formerly L. 1890, ch. 565 (Railroad Law), § 21, as added by L. 1892, ch. 700.

§ 87. Mails. Any railroad corporation shall, when applied to by the postmaster-general, convey the mails of the United States on its road, and in case such corporation and the postmaster-general shall not agree as to the rate of transportation therefor, and as to the time, rate of speed, manner and condition of carrying the

same, the public service commissioner shall fix the prices, terms and conditions therefor, after giving the corporation reasonable opportunity to be heard. Such price shall not be less for carrying such mails in the regular passenger trains than the amount which such corporation would receive as freight on a like weight of merchandise transported in their merchandise trains, and a fair compensation for the post-office car. If the postmaster-general shall require the mail to be carried at other hours, or at higher speed than the passenger trains are run, the corporations shall furnish an extra train for the mail, and be allowed an extra compensation for the expenses and wear and tear thereof, and for the service to be fixed as herein provided.

Every railroad corporation refusing or neglecting to comply with any provision of this section shall forfeit to the people of the state one hundred dollars for every day such neglect or refusal continues.

Formerly L. 1890, ch. 565 (Railroad Law), § 56, as am'd by L. 1892, ch. 676.

Employees of a postal car are entitled to the same degree of care from a railroad company as passengers riding on the train. Seybolt v. N. Y., L. E. & W. R. R. Co., 95 N. Y. 562 (1884); Nolton v. Westn. Ry. Co., 15 N. Y. 444 (1867). A mail agent is a passenger. Id.

§ 88. When conductors and brakemen may be policemen. The governor may appoint any conductor or brakeman on any train conveying passengers on any steam railroad in this state, a policeman, with all the powers of a policeman in cities and villages, for the preservation of order and of the public peace, and the arrest of all persons committing offenses upon the land or property of the corporation owning or operating such railroad; and he may also appoint, on the application of any such corporation, or of any steamboat company, such additional policemen, designated by it, as he may deem proper, who shall have the same powers. Every such policeman shall within fifteen days after receiving his commission, and before entering upon the duties of his office, take and subscribe the constitutional oath of office, and file it with his commission in the office of the secretary of state. The post-office address of the person appointed shall appear in the commission, and whenever such address is changed the person appointed shall file with the governor a statement of the new address. Every such policeman shall when on duty wear a metallic shield with the words "railroad police" or "steamboat police," as the case may be, and the name of the corporation

for which appointed inscribed thereon, which shall always be worn in plain view, except when employed as a detective. The compensation of every such policeman shall be such as may be agreed upon between him and the corporation for which he is appointed, and shall be paid by the corporation. When any corporation shall no longer require the services of any such policeman it may file notice to that effect in the office in which notice of his appointment was originally filed, and thereupon such appointment shall cease and be at an end. The governor may also at pleasure revoke the appointment of any such policeman by filing a revocation thereof in the office of the secretary of state and mailing a notice of such filing to the corporation for which he was appointed, and also to the person whose appointment is revoked, at his last post-office address as the same appears in the commission or the latest statement thereof on file. If such person thereafter, knowing of such revocation or having in any manner received notice thereof, exercises or attempts to exercise any of the powers of a policeman, under this section, he shall be guilty of a misdemeanor; and the filing and mailing of such notice, as above provided, shall be presumptive evidence that such person knew of the revocation.

Thus am'd by L. 1911, ch. 817.

Formerly L. 1890, ch. 565 (Railroad Law), § 58, as am'd by L. 1899, ch. 539; L. 1906, ch. 380.

A railroad policeman appointed pursuant to section 58 of the Railroad Law is a public officer, and, therefore, prohibited from receiving for his own use and benefit a pass from any corporation. Dempsey v. N. Y. C. & H. R. R. R. Co., 146 N. Y. 290 (1895). But where a person made a contract with a railroad corporation whereby he agreed to render police services for it and to receive for such services a fixed salary and also an annual pass for transportation over its road and that of another corporation, which could be used by him when engaged in the business of the corporation or his own private affairs, it was held, that the pass under the contract was not a "free pass" within the meaning of the Constitution; and that action was maintainable to compel specific performance of the contract. Id.

A conductor or brakeman upon a passenger train has implied authority, incident to his position, to remove, in a lawful manner, a trespasser upon the platform of a car. Hoffman v. N. Y. C. & H. R. R. R. Co., 87 N. Y. 25 (1881). But the company is liable for an abuse of such authority. Id.

§ 89. New railroads across streets. All steam surface railroads built after the first day of July, eighteen hundred and ninety-seven, except additional switches and sidings, must be so constructed as to avoid all public crossings at grade, whenever practicable so to do. Whenever application is made to the public

service commission under section nine of this chapter there shall be filed with the commission a map showing the streets, avenues, highways and roads proposed to be crossed by the new construction, and the commission shall determine whether such crossings shall be under or over the proposed railroad, except where the commission shall determine such method of crossing to be impracticable. Whenever an application is made under this section to determine the manner of crossing, the commission shall designate a time and place when and where a hearing will be given to such railroad company, and shall notify the municipal corporation having jurisdiction over the streets, avenues, highways or roads proposed to be crossed by the new railroad. The commission shall also give public notice of such hearing in at least two newspapers, published in the locality affected by the application, and all persons owning land in the vicinity of the proposed crossing shall have the right to be heard. Upon such a notice and after a hearing, the public service commission may determine that alterations or changes may be made in any existing highway, at or in the vicinity of a proposed crossing for the purpose of avoiding a crossing at grade.

The decision of the commission rendered in any proceedings under this section shall be communicated, within twenty days after final hearing, to all parties to whom notice of the hearing in said proceedings was given, or who appeared at said hearing by counsel or in person.

Thus am'd by L. 1913, chs. 425 and 744; L. 1914, ch. 378.

Formerly L. 1890, ch. 565 (Railroad Law), § 60, as added by L. 1897, ch. 754.

The act of 1853, ch. 62, regulating the construction of streets across railroad tracks, was repealed by the act of 1897, ch. 754, relative to grade crossings; and the procedure provided by that act (§§ 60–69 of this law) must be resorted to in all attempts to take a street across the tracks of a steam railroad. Peo. ex rel. Niagara Falls v. N. Y. C. & H. R. R. R. Co., 158 N. Y. 410 (1899), affg. 31 A. D. 334.

None of the provisions of sections 60 to 69, both inclusive, apply to crossings in the city of Buffalo, under the jurisdiction of the grade crossing commissioners of that city, nor shall they apply to the University avenue or Brown street crossing, in the city of Rochester. L. 1897, ch. 754.

This section providing that all steam surface railroads hereafter built "except additional switches and sidings," must be so constructed as to avoid all public crossings at grade whenever practical to do so, empowers the board of railroad commissioners to eliminate grade crossings over sidings and switches on the application of a railroad. Matter of Terminal Ry., 122 A. D. 59 (1907), aff'd., 192 N. Y. 534.

§ 90. New streets across railroads. When a new street, avenue, highway or road or new portion or additional width of a street, avenue, highway or road, or a state or county highway or county road deviating from the line of an existing highway or road, shall hereafter be constructed across a steam surface railroad, other than pursuant to the provisions of section ninety-one of this chapter, such street, avenue, highway or road or portion of such street, avenue, highway or road, shall pass over or under such railroad or at grade, as the public service commission shall direct. Notice of intention to lay out such street, avenue, highway, or road, or new portion of a street, avenue, highway or road, across a steam surface railroad shall be given to such railroad company by the municipal corporation at least fifteen days prior to the making of the order laying out such street, avenue, highway or road by service personally on the president or vice-president of the railroad corporation, or any general officer thereof. In case of the construction of a state or county highway which deviates from the line of an existing highway across a steam surface railroad, a like notice shall be given to such railroad company by the state commission of highways at least fifteen days prior to the adoption of the maps, plans and specifications for such state or county highway by such commission. Such notice shall designate the time when and place where a hearing will be given to such railroad company, and such railroad company shall have the right to be heard before the authorities of such municipal corporation upon the question of the necessity of such street, avenue, highway or road or new portion or additional width of such street, avenue, highway or road, or before the state commission of highways in case of a state or county highway, on the question of the location of such highway. If the municipal corporation determines such street, avenue, highway or road or new portion or additional width of such street, avenue, highway or road to be necessary, or if the state commission of highways determines that such state or county highway which deviates from the line of an existing highway shall be constructed across such railroad at the place indicated in the maps, plans and specifications therefor, such municipal corporation or commission of highways shall then apply to the public service commission before any further proceedings are taken, to determine whether such street, avenue, highway or road or new portion or additional width of such street, avenue, highway or

road shall pass over or under such railroad or at grade. The public service commission shall thereupon appoint a time and place for hearing such application, and shall give such notice thereof as it shall judge reasonable, not however less than ten days, to the railroad company whose railroad is to be crossed by such new street, avenue, highway or road, or new portion or additional width of a street, avenue, highway or road, to the state commission of highways, or in the case of a state or county highway which deviates from the line of an existing highway, to the municipal corporation and to the owners of land adjoining the railroad and that part of the street, avenue, highway or road to be opened, extended or constructed. The public service commission shall determine whether such street, avenue, highway or road, or new portion or additional width of a street, avenue, highway or road, or state or county highway shall be constructed over or under such railroad or at grade. If said commission shall determine that such street, avenue, highway or road or new portion or additional width of such street, avenue, highway or road shall be carried across such railroad above grade, then said commission shall determine the height, the length and the material of the bridge or structure by means of which such street, avenue, highway or road or new portion or additional width of such street, avenue, highway or road shall be carried across such railroad, and the length, character and grades of the approaches thereto. If said commission shall determine that such street, avenue, highway or road shall be constructed or extended below the grade, said commission shall determine the manner and method in which the same shall be so carried under, and the grade or grades thereof, and if said commission shall determine that said street, avenue, highway or road or new portion or additional width of such street, avenue, highway or road shall be constructed or extended at grade, said commission shall determine the manner and method in which the same shall be carried over said railroad at grade and what safeguards shall be maintained. The decision of the commission as to the manner and method of carrying such new street, avenue, highway or road, or new portion or additional width of a street, avenue, highway or road, or state or county highway which deviates from the line of an existing highway, across such railroad shall be final, subject however to the right of appeal hereinafter given. The decision of said commission rendered in

any proceeding under this section shall be communicated within twenty days after final hearing to all parties to whom notice of the hearing of such proceeding was given, or who appeared at such hearing by counsel or in person.

Thus am'd by L. 1913, ch. 744; L. 1914, ch. 378.

Formerly L. 1890, ch. 565 (Railroad Law), § 61, as added by L. 1897, ch. 754, as am'd by L. 1898, ch. 520; L. 1909, ch. 153.

Necessity of Consent of Commission.

The change of the grade of a street so as to abolish a grade crossing, pursuant to an agreement between the railroad and a municipality, but without obtaining the consent of the Commission under this section, constitutes an illegal obstruction, entitling an abutting owner to an abatement of the alleged nuisance or to the payment of damages. Brush v. N. Y., N. H. & H. R. R. Co., 162 A. D. 731 (1914).

Appeal from Order of Commission.

Where an order of the Public Service Commission provided that a proposed highway shall cross tracks on an elevated viaduct an appeal does not lie if the Commission reserved its decision as to the character of the approaches to such viaduct. In re Town of Royalton, 138 A. D. 412 (1910).

Method of Constructing Crossing.

Where a municipality decides to open a street over land of which it derives a fee subject to an easement of a railroad, its construction across the railroad must conform to the determination of the Public Service Commission pursuant to Railroad Law, section 61. N. Y. C. & H. R. R. R. Co. v. Buffalo, 200 N. Y. 113 (1910), affg. on this point, 128 A. D. 373.

The Public Service Commissioners may require that a proposed highway be taken across railroad tracks on a viaduct, if a grade crossing would be dangerous, even though a town board duly laid out such highway to cross the tracks at grade in order to serve public convenience. In re Town Board of Royalton, 138 A. D. 412 (1910).

Hearing as to Nature of Grade Crossing.

The provisions of this section requiring a hearing before the commissioners does not make such hearing a prerequisite to a street opening proceeding by a municipality to acquire title, but merely requires a hearing as to the nature of the crossing before it is constructed. Matter of City of N. Y. (West 134th St.), 143 A. D. 258 (1911).

Granting Easement in Street.

Where landowners laid out and improved a street and as an inducement to a railroad company, to which they had given the right to operate its line over the property, to extend such line for the benefit of property owners in that section, granted to it an easement in said street, and also tendered to the city the fee of the street subject to the easement of the railroad company, the city will not be permitted to acquire the fee without such easement by paying to the railroad the value thereof. Matter of City of N. Y. (Neponsit Ave.), 77 Misc. 246 (1912).

Use of Land for Both Railroad and Highway Purposes Not Inconsistent.

The use of land for railroad purposes is not inconsistent with its use for highway purposes: therefore, the fact that part of a proposed street in a city consists of land used for railroad purposes does not prevent the city from opening the street or acquiring the necessary title. Matter of City of N. Y. (West 134th St.), 143 A. D. 258 (1911).

Application by Municipal Corporations.

Whenever a municipal corporation proposes to open a public street across the tracks and right of way of a steam railroad company, this section clearly requires that an application be made to the Public Service Commission for a determination as to whether the street should pass over or under such railroad, or at grade, before any application shall be made to the Supreme Court for the appointment of commissioners to appraise the lands and property of the railroad company required for the opening of the street. Matter of City of New York (West 134th St.), 204 N. Y. 465 (1912), revsg. 143 A. D. 258.

Village Law Provision.

The Village Law (L. 1909, ch. 64), § 146, subd. 5, added by L. 1912, ch. 224, provides: "If the street petitioned to be laid out, altered, widened, narrowed or discontinued shall cross a railroad such notice shall be served upon the railroad company as required by section ninety of the railroad law."

A municipality intending to extend a street across the tracks of a steam railroad at grade must comply with this section, even though it condemned the fee of the proposed street many years before the enactment of the section. N. Y. C. & H. R. R. R. v. City of Buffalo, 128 A. D. 373.

§ 91. Petition for alteration of existing crossing. The mayor and common council of any city, the president and trustees of any village, the town board of any town, the board of supervisors of any county within which a street, avenue, highway or road or new portion or additional width of a street, avenue, highway or road crosses or is crossed by a steam surface railroad at grade, below or above grade by structures heretofore constructed, or any steam surface railroad company, whose road crosses or is crossed by a street, avenue, highway or road or new portion or additional width of such street, avenue, highway or road at grade, below or above grade, may bring their petition in writing to the public service commission, therein alleging that public safety requires an alteration in the manner of such crossing, its approaches, the method of crossing, the location of the crossing, a change in the existing structure by which such crossing is made, the closing and discontinuance of a crossing and the diversion of the travel thereon to another street, avenue, highway, road or crossing, or if not practicable to change such crossing from grade, below or above grade or to close or discontinue the same, the opening of an additional

crossing for the partial diversion of travel from the grade below or above grade crossing, and praying that the same may be ordered. Where a street, avenue, highway or road or new portion or additional width of a street, avenue, highway or road in a city, village, town or county, which crosses or is crossed by a steam surface railroad at grade, below or above grade, is a part of a highway which the state commission of highways shall have determined to construct or improve as a state or county highway, as provided in article six of the highway law, such commission of highways may bring a petition containing any of the allegations above specified and praying for a like order. Upon any such petition being brought the public service commission shall appoint a time and place for hearing the petition, and shall give such personal notice thereof as it shall judge reasonable, of not less than ten days, however, to such petitioner, the railroad company, the municipality in which such crossing is situated, and if such crossing is in whole or part in an incorporated village having not to exceed twelve hundred inhabitants, also to the supervisor or supervisors of the town or towns in which such crossing is situated; and in all cases to the owners of the lands adjoining such crossing and adjoining that part of the street, avenue, highway or road or new portion or additional width of such street, avenue, highway or road to be changed in grade or location, or the land to be opened for a new crossing, and to the state commission of highways in case of a state or county highway. The public service commission shall cause notice of said hearing to be advertised in at least two newspapers published in the locality affected by the application. Upon such notice and after a hearing the public service commission shall determine what alterations or changes, if any, shall be made. If the application be made by the state commission of highways in respect to a street, avenue, highway or road or new portion or additional width of a street, avenue, highway or road proposed to be constructed or improved as a part of a state highway, the decision shall state whether such highway shall cross such railroad above or below the grade of the highway; in case of a county highway, such decision shall state whether such highway shall cross such railroad at grade, or above or below the grade of the highway. The decision of said public service commission rendered in any proceeding under this section shall be communicated within twenty days after

final hearing to all parties to whom notice of the hearing in said proceeding was given, or who appeared at said hearing by counsel or in person. Any person aggrieved by such decision, or by a decision made pursuant to sections eighty-nine and ninety hereof, and who was a party to said proceeding, may within sixty days appeal therefrom to the appellate division of the supreme court in the department in which such grade crossing is situated, and to the court of appeals, in the same manner and with like effect as is provided in the case of appeals from an order of the supreme court.

Thus am'd by L. 1911, ch. 141; L. 1913, chs. 354 and 744; L. 1914, ch. 378. Formerly L. 1890, ch. 565 (Railroad Law), § 62, as added by L. 1897, ch. 754, and am'd by L. 1898, ch. 520; L. 1899, ch. 359; L. 1909, ch. 153.

Section Does Not Apply to Private Streets.

It is only where a street, avenue or highway crosses or is crossed by a steam surface railroad at grade that statutory proceedings are authorized for the alteration or closing and discontinuance of such grade crossing and the diversion of travel therefrom. The words "street, avenue or highway" mean ways of a public character and no other ways whatsoever. The section has no application to private rights-of-way and does not authorize the elimination of such rights. Hence, no party can be chargeable thereunder with any portion of the expense of closing ways which are wholly private. Matter of N. Y. Central & H. R. R. R. Co., 200 N. Y. 121 (1910). Private crossings must be closed at the expense of the railroad company. Id.

Apportionment of Expense of Eliminating Grade Crossing.

It is for the Public Service Commission to determine when it is "practicable" to avoid a grade crossing, and a unanimous affirmance by the Appellate Division of the decision of the Commission is final. But when the construction to avoid a grade crossing necessarily involves the elimination of an existing grade crossing the expenses should be apportioned in accordance with the provisions of section 62 (now 91) and succeeding sections. Matter of Erie R. R. Co., 208 N. Y. 486 (1913), revsg. 151 A. D. 900.

In ordering the elimination of dangerous grade crossings the Public Service Commission has authority to change an existing route and to require the State and a municipality to pay their statutory proportion. Section 13 (now 24) applies only to a change of route made for the benefit of the railroad. In re N. Y. Central & H. R. R. Co. (Vil. White Plains), 136 A. D. 756 (1910); Danner v. N. Y. & Harlem R. R. Co., 152 A. D. 405 (1912).

The construction of a new track cannot be deemed the addition of a switch or siding and is subject to the above provision. Matter of Erie R. R. Co., 208 N. Y. 486 (1913).

Where the construction of a new track results in the elimination of an existing grade crossing it is equitable that the expense showed be apportioned between the railroad, the municipality and the State. Matter of Erie R. R. Co., 208 N. Y. 486 (1913), revsg. 151 A. D. 900.

The Public Service Commission cannot make directions for defraying the expense of altering old crossings and constructing new ones different from the provisions of this section. Matter of N. Y. Central & H. R. R. R. Co., 200 N. Y. 121 (1910), modifying 136 A. D. 760.

Elimination of Grade Crossings; Jurisdiction of Commission.

Under this section the defendant railroad company filed its petition with the Public Service Commission to eliminate two grade crossings and for leave to make a crossing of a turnpike road at a point where the plaintiff, a trolley railroad company, had long occupied space upon which previously there was a turnpike. Held, that the order of the Public Service Commission was the authority for the location of the crossing and for immunity from expense to the plaintiff for the carrying on of the work which contemplated in part the safety of the traveling public. New Paltz, Highland & P. Traction Co. v. Central N. E. Ry. Co., 84 Misc. 528 (1914).

Laches Bars Abutting Landowner's Right to Injunction.

Where an abutting landowner knows what changes are being made in a grade crossing and allows the work to proceed without objection for three years his right to an injunction is barred by laches. Danner v. N. Y. & Harlem R. R. Co., 152 A. D. 405 (1912).

When the grade crossing of a railroad is abolished pursuant to section 62 of the Railroad Law, an adjacent owner who has no rights or easements in the street which is lowered has no common-law right to compensation for the change of grade. Mellenbocker v. Village of Salamanca, 116 A. D. 691 (1907), affd., 188 N. Y. 370.

If, upon an application under this section, it appears that the highway, as changed, would be flooded at times, leaving no adequate provision for travel, the proposed change should be refused. Matter of D., L. & W. Ry., 116 A. D. 62 (1906).

§ 92. Acquisition of land, right or easement in crossing. The municipal corporation having jurisdiction over the street, avenue, highway or road and in which the crossing is located, or the state commission of highways in case of a street, avenue, highway or road to be constructed or improved as a part of a state or county highway, may with the approval of the railroad company acquire by purchase any lands, rights or easements necessary or required for the purpose of carrying out the provisions of sections eighty-nine, ninety and ninety-one of this chapter, but if unable to do so shall acquire such lands, rights or easements by condemnation either under the condemnation law or under the provisions of the charter of such municipal corporation. The railroad company shall have notice of any such proceedings and the right to be heard therein.

Thus am'd by L. 1913, ch. 744.

Formerly L. 1890, ch. 565 (Railroad Law), § 63, as added by L. 1897, ch. 754, and am'd by L. 1899, ch. 226; L. 1909, ch. 153.

Condemnation Proceedings; Counties Included in the Term Municipal Corporations.

The words "municipal corporation in which the highway crossing is located" are broad enough to include a county; therefore, the board of supervisors may apply for the appointment of commissioners to condemn lands necessary to a change in grade crossing. County of Nassau v. Luessen, 69 Misc. 184 (1910).

§ 93. Repair of bridges and subways at crossings. When a highway crosses a railroad by an overhead bridge, the frame-work of the bridge and its abutments shall be maintained and kept in repair by the railroad company, and the roadway thereover and the approaches thereto shall be maintained and kept in repair by the municipality having jurisdiction over and in which the same are situated; except that in the case of any overhead bridge constructed prior to the first day of July, eighteen hundred and ninety-seven, the roadway over and the approaches to which the railroad company was under obligation to maintain and repair, such obligation shall continue, provided the railroad company shall have at least ten days' notice of any defect in the roadway thereover and the approaches thereto, which notice must be given in writing by the town superintendent of highways or other duly constituted authority, and the railroad company shall not be liable by reason of any such defect unless it shall have failed to make repairs within ten days after the service of such notice upon it. When a highway passes under a railroad, the bridge and its abutments shall be maintained and kept in repair by the railroad company, and the subway and its approaches shall be maintained and kept in repair by the municipality having jurisdiction over and in which the same are situated. In case such highway is a part of a state or county highway constructed or improved as provided in article six of the highway law, the roadway over such railroad or the subway underneath the same, and the approaches thereto, shall be maintained and kept in repair under the supervision and control of the state commission of highways in the manner provided by the highway law for the maintenance and repair of state and county highways.

Thus am'd by L. 1913, ch. 744.

Formerly L. 1890, ch. 565 (Railroad Law), § 64, as added by L. 1897, ch. 754, and am'd by L. 1892, ch. 140; L. 1909, ch. 153.

Maintenance of Bridge Over Railroad.

This section requires a municipality to keep a walk on a highway bridge over a railroad, constructed prior to July 1, 1897, in repair, or to serve notice on the railroad company to make such repairs. Murphy v. Delaware & Hudson Co., 151 A. D. 351 (1912).

A bridge erected by a railroad within a village for the purpose of continuing a highway across the tracks must be maintained by the village in a reasonably safe condition, such bridge not being a public bridge under the Village Law, section 142. Murphy v. Vil. of Ft. Edward, 151 A. D. 342 (1913); Same v. Same, 158 A. D. 342.

As to change of grade of a city street by the raising of a bridge maintained by a railroad company across its tracks pursuant to a contract between the city and railroad company whereby a right of action was given to abutting owners for damages caused by the change of grade, see Rigney v. N. Y. Central & H. R. R. R. Co., 161 A. D. 187 (1914).

Liability to Assessment for Improvement of Streets.

A railroad company, whose right of way crosses village streets by means of bridges and abutments, is not liable to assessment for the improvement of such streets as no special benefits inure to it from such improvements, and a legislative act which authorizes the paving of streets in certain towns and provides that no abutting or adjoining property shall be exempt from assessment does not repeal this section. N. Y., N. H. & H. R. R. Co. v. Vil. of Port Chester, 149 A. D. 893 (1912), affd., 210 N. Y. 600 (1914).

This section applies to all bridges without regard to date of construction. City of Yonkers v. N. Y. C. & H. R. R. R. Co., 165 N. Y. 142 (1900), affg. 32 A. D. 474.

§ 94. Expense of constructing new crossings. Whenever under the provisions of section eighty-nine of this chapter, new railroads are constructed across existing highways, the expense of crossing above or below the grade of the highway including any expense incurred in altering or changing the highway under a determination of the public service commission shall be paid entirely by the railroad corporations. Whenever under the provisions of section ninety of this chapter a new street, avenue, highway or road or new portion or additional width of such street, avenue, highway or road is constructed across an existing railroad, the railroad corporation shall pay one-half and the municipal corporation having jurisdiction over such street, avenue, highway or road or new portion or additional width of such street, avenue, highway or road shall pay the remaining one-half of the expense of making such crossing above or below grade; and whenever a change is made as to an existing crossing or structure in accordance with the provisions of section ninety-one of this chapter, fifty per centum of the expense thereof shall be borne by the railroad corporation, twenty-five per centum by such municipal corporation and twenty-five per centum by the state; except that whenever an existing crossing, in which a change is made under the provisions of said section ninety-one, is located wholly or partly within an incorporated village having not to exceed twelve hundred inhabitants, the portion of expense herein required to be borne by the municipal corporation shall be borne by the town or towns in which such crossing is situated. Whenever under the

provisions of sections ninety and ninety-one of this chapter a highway is constructed across an existing railroad and is a part of a state or county highway constructed or improved as provided in the highway law, one-half of the expense of making such crossing above or below grade or changing or rebuilding the existing structure by which such crossing is made, shall be paid by the railroad corporation, and the remaining one-half of such expense shall be paid by the state in the case of a state highway, and jointly by the state, county and town in the case of a county highway, in the same proportion and in the same manner as the cost of the construction or improvement of such state or county highway is paid. Whenever in carrying out the provisions of sections ninety or ninety-one of this chapter two or more lines of steam surface railroad, owned and operated by different corporations, cross a highway at a point where a change in grade is made, each corporation shall pay such proportion of fifty per centum of the expense thereof as shall be determined by the public service commission. In carrying out the provisions of sections eighty-nine, ninety and ninety-one of this chapter the work shall be done by the railroad corporation or corporations affected thereby, subject to the supervision and approval of the public service commission, and in all cases, except where the entire expense is paid by the railroad corporation, the expense of construction shall be paid primarily by the railroad company, and the expense of acquiring additional lands, rights or easements shall be paid primarily by the municipal corporation having jurisdiction over the street, avenue, highway or road or new portion or additional width of such street, avenue, highway or road or, in case of a state or county highway, upon the order of the state commission of highways out of moneys available therefor. Plans and specifications of all changes proposed under sections ninety and ninety-one of this chapter, and an estimate of the expense thereof shall be submitted to the public service commission for its approval before the letting of any contract. If such changes are proposed in a highway which is to be constructed or improved as a state or county highway, such plans and specifications shall also be submitted to the state commission of highways for its approval before the letting of any contract. In case the work is done by contract the proposals of contractors shall be submitted to the public service commission, and if the commission shall determine that the bids are excessive it shall have the power to require the

submission of new proposals. The commission may employ temporarily such experts and engineers as may be necessary to properly supervise any work that may be undertaken under sections eighty-nine, ninety and ninety-one of this chapter, the expense thereof to be paid by the comptroller upon the requisition and certificate of the commission, said expense to be included in the cost of the particular change in grade or in the structure above or below grade on account of which it is incurred and finally apportioned in the manner provided in this section, upon the completion of the work and its approval by the public service commission an accounting shall be had between the railroad corporation and the municipal corporation, or the state commission of highways, of the amounts expended by each with interest, and if it shall appear that the railroad corporation or the municipal corporation, or the state commission of highways has expended more than its proportion of the expense of the crossing as herein provided, a settlement shall be forthwith made in accordance with the provisions of this section. All items of expenditures shall be verified under oath, and, in case of a dispute between the railroad corporation and the municipal corporation or the state commission of highways as to the amount expended, any judge of the supreme court in the judicial district in which the municipality, or the state or county highway, is situated may appoint a referee to take testimony as to the amount expended, and the confirmation of the report of the referee shall be final. In the event of the failure or refusal of the railroad corporation to pay its proportion of the expense, the same, with interest from the date of such accounting, may be levied and assessed upon the railroad corporation and collected in the same manner that taxes and assessments are now collected by the municipal corporation within which the work is done; and in the event of the failure or refusal of the municipal corporation to pay its proportion of the expense, suit may be instituted by the railroad corporation for the collection of the same with interest from the date of such accounting, or the railroad corporation may offset such amount with interest against any taxes levied or assessed against it or its property by such municipal corporation. The legislature shall annually appropriate out of any moneys not otherwise appropriated the sum of one hundred thousand dollars for the purpose of paying the state's proportion of the expense of a change in an existing grade crossing or of the structure of any existing crossing above or below grade

other than that required to be paid by the state from funds appropriated for the construction of state and county highways as above provided. If in any year any less sum than one hundred thousand dollars is expended by the state for the purpose aforesaid the balance remaining unexpended shall be applied to reduce the amount appropriated by the state in the next succeeding year, except that no such deduction shall be made in case there are outstanding and unadjusted obligations on account of a change in an existing grade crossing or the structure above or below grade for a proportion of which the state is liable under the provisions of this section. In the event of the appropriation made by the state in any one year being insufficient to pay the state's proportion of the expense of any change that may be ordered the first payment from the appropriation of the succeeding year shall be on account of said change, and no payment shall be made on account of any subsequent change that may be ordered, nor shall any subsequent change be ordered until the obligation of the state on account of the first named change in grade has been fully discharged, unless the same shall be provided for by an additional appropriation to be made by the legislature. The state's proportion of the expense of changing any existing grade crossing or the structure of any existing crossing above or below grade shall be paid by the state treasurer on the warrant of the comptroller, to which shall be appended the certificate of the public service commission to the effect that the work has been properly performed and a statement showing the situation of the crossing or structure that has been changed, the total cost and the proportionate expense thereof, and the money shall be paid in whole or in part to the railroad corporation or to the municipal corporation as the public service commission may direct, subject, however, to the rights of the respective parties as they appear from the accounting to be had as hereinbefore provided for. No claim for damages to property on account of the change or abolishment of any crossing or change in structure under the provisions of this article shall be allowed unless notice of such claim is filed with the public service commission within six months after completion of the work necessary for such change or abolishment.

Thus am'd by L. 1911, ch. 141; L. 1913, chs. 354, 425 and 744; L. 1914, ch. 378.

Formerly L. 1890, ch. 565 (Railroad Law), § 65, as added by L. 1897, ch. 754, and am'd by L. 1898, ch. 520; L. 1900, ch. 517; L. 1909, ch. 153.

§ 95. Proceedings by public service commission for alteration of grade crossings. The public service commission may, in the absence of any application therefor, when in its opinion public safety requires an alteration in an existing grade crossing or a change in any existing structure above or below grade, institute proceedings on its own motion for an alteration in such grade crossing or structure, upon such notice as it shall deem reasonable, of not less than ten days however, to the railroad company, the municipal corporation and the person or persons interested, and proceedings shall be conducted as provided in section ninety-one of this chapter. The changes in existing grade crossings or structures authorized or required by the commission in any one year shall be so distributed and apportioned over and among the railroads and the municipalities of the state as to produce such equality of burden upon them for their proportionate part of the expenses as herein provided for as the nature and circumstances of the cases before it will permit.

Thus am'd by L. 1913, ch. 354.

Formerly L. 1890, ch. 565 (Railroad Law), § 66, as added by L. 1897, ch. 754.

§ 96. Proceedings to enforce orders of commission. It shall be the duty of the corporation, municipality or person or persons to whom the decisions or orders of the public service commission are directed, as provided in sections eighty-nine, ninety, ninety-one and ninety-five of this chapter, to comply with such decisions and orders, and in case of their failure so to do the commission shall thereupon take proceedings to compel obedience to the decisions and orders of the commission. The supreme court at a special term shall have the power in all cases of such decisions and orders by the public service commission to compel compliance therewith by mandamus, or under the provisions of the public service commissions law, subject to appeal to the appellate division of the supreme court and the court of appeals in the same manner and with like effect as is provided in case of appeals from an order of the supreme court.

Formerly L. 1890, ch. 565 (Railroad Law), § 67, as added by L. 1897, ch. 754.

§ 97. Municipal corporation may borrow money. Whenever in carrying out any of the provisions of sections eighty-nine to

ninety-six inclusive of this chapter any municipality shall incur any expense or become liable for the payment of any moneys, it shall be lawful for such municipality temporarily to borrow such money on the notes or certificates of such municipality, and to include the amount of outstanding notes or certificates, or any part thereof, in its next annual tax levy for municipal purposes, or in the discretion of the common council in case of a city, the board of trustees in case of a village, the town board in case of a town, or the board of supervisors in the case of a county, to borrow the same, or any part thereof, on the credit of the municipality, and to issue bonds therefor, which bonds shall be signed by the mayor and clerk in case of a city, the president and clerk in case of a village, the town board in case of a town and the board of supervisors in the case of a county, and shall be in such form and for such sums and be payable at such times and places with interest not exceeding five per centum per annum, as the common council in case of a city, the board of trustees in case of a village, the town board in case of a town and the board of supervisors in the case of a county, shall direct.

Thus am'd by L. 1913, ch. 744; L. 1914, ch. 498.

Formerly L. 1890, ch. 565 (Railroad Law), § 67-a, as added by L. 1899, ch. 541, and am'd by L. 1902, ch. 198.

Chapter 20, Laws of 1910, which re-enacted former section 67-a, was specifically repealed by L. 1914, ch. 498, thereby repealing said former section 67-a.

§ 98. Intersections of railroads. All steam railroads hereafter constructed across the tracks of any other railroad and any street surface railroad hereafter constructed across a steam railroad shall be above, below, or at grade of such existing railroad as the public service commission shall determine, and such commission shall in such determination fix the proportion of expense of such crossing to be paid by each railroad.

Formerly L. 1890, ch. 565 (Railroad Law), § 68, as added by L. 1897, ch. 754, and am'd by L. 1900, ch. 739.

§ 99. Application of foregoing sections. The provisions of sections eighty-nine to ninety-eight inclusive of this chapter shall also apply to all steam surface railroads existing on the first day of July, eighteen hundred and ninety-seven, or thereafter on which, after said date, electricity or some other agency than steam shall be substituted as a motive power. None of the provisions of said

sections shall apply to crossings in the city of Buffalo under the jurisdiction of the grade crossing commissioners of that city, nor shall they apply to the University avenue or Brown street crossing in the city of Rochester. The terms "municipality" and "municipal corporation" as used in said sections shall include cities, villages, towns and counties.

Thus am'd by L. 1913, ch. 744.

Formerly L. 1890, ch. 565 (Railroad Law), § 69, as added by L. 1897, ch. 554.

Section 61, requiring notice of an intention to lay out a street, avenue or highway across a steam surface railroad to be given to the railroad company by the municipal corporation, and giving the railroad company the right to be heard before the authorities of the municipal corporation upon the question of the necessity of such street, avenue or highway, is not rendered inapplicable to a proceeding, begun under the charter of the city of Yonkers, Laws of 1895, ch. 635, before the act was passed, by section 31 of the Statutory Construction Law, relating to the effect of the repeal of a statute, as the act of 1897 only affects the procedure and is not retrospective. Matter of Ludlow Street, 59 A. D. 180. See, also, 47 A. D. 317.

The act of 1853, chapter 62, was repealed by the act of 1897, chapter 754, relating to grade crossings, and since July 1, 1897, the day on which the latter act took effect, the procedure provided by that act must be resorted to in all attempts to take a street across the tracks of a steam railroad, unless proceedings under the act of 1853 were commenced prior to July 1, 1897, in which case the right to prosecute the proceeding to the end in the courts is preserved by section 31 of the Statutory Construction Law. Peo. ex rel. City of Niagara Falls v. N. Y. C. & H. R. R. R. Co., 158 N. Y. 410.

By this section a railroad company is given an appeal to the Appellate Division from the determination of a municipal corporation to lay out a highway across its railroad. Matter of Mt. Vernon & N. Y., N. H. & H. R. R. Co., 32 A. D. 394, citing 30 A. D. 256.

The regularity of a proceeding by which a street railroad company seeks a right to cross the tracks of a steam railroad company at a point where the latter tracks intersect the highway on which the street railroad is constructed, must be determined by the Railroad Law as it stood when the application was made, and a subsequent amendatory act, prospective in its operation and precluded from retroactive effect by section 31 of the Statutory Construction Law, has no pertinency. Geneva & Waterloo Ry. Co. v. N. Y. C. & H. R. R. R. Co., 163 N. Y. 228, revsg. 24 A. D. 335, 24 A. D. 631.

In a review of the determination of the common council, in reference to an extension under section 61, a referee will not be appointed to take proof of the facts and circumstances under which the common council passed the ordinance. Matter of North Third Ave., 30 A. D. 256.

When grade crossing commissioners have determined that a change of grade pursuant to their plans may injure a single parcel of land, the commissioners of appraisal are not restricted by such determination, but may award damages for injury done to the land as an entirety. Matter of Grade Crossing Comrs., 59 A. D. 498.

Objection that proper notice of the hearing before the railroad commissioners, interposed by a party represented thereat, cannot be raised for the first time upon an appeal from the order granting the application. Town Board v. Fitchburg R. R. Co., 53 A. D. 16.

The act of 1853, chapter 62, which permits municipalities to lay out streets across railroad tracks without compensation, does not apply when the railroad property to be used for a street is held and used by the railroad corporation for storage, yard and depot purposes. Peo. ex rel. City of Buffalo v. N. Y. C. & H. R. R. R. Co., 156 N. Y. 570.

The railroad commissioners have power to determine what proportion of the expense of a crossing should be paid by a street railroad company over the tracks of a steam railroad, and where that power has been exercised, if the railroad crossed is entitled to further compensation, under section 12 of this law, the street surface railroad will be allowed to provide for that item by a bond. D., L. & W. R. R. Co. v. Syracuse, Lakeside & Baldwinsville R. R. Co., 28 Misc. 456.

It was intended that the railroad commissioners should be consulted and should determine the manner in which streets should cross steam surface railroads, and in the absence of such determination a mandamus will not be granted requiring a railroad company to cause a street to be taken across its tracks. Peo. ex rel. Niagara Falls v. N. Y. C. & H. R. R. R. Co., 31 A. D. 334.

A special act is not rendered unconstitutional because it authorizes the consolidation of two or more railroads, nor because it dissolves the original corporation and creates a new one with a new name. Bohmer v. Haffen, 161 N. Y. 390, affg. 35 A. D. 381.

Where a village began proceedings June 21, 1897, to have a highway taken across the tracks of a railroad, under chapter 62, Laws of 1853, the court refused to grant a mandamus compelling action by the railroad, under said act, and left the village to the remedy afforded by section 61 of the Railroad Law, which was passed May 22, 1897; took effect July 1, 1897. Matter of Village of Waverly, 35 A. D. 38.

A railroad cannot be compelled to take a street across land acquired by it for its railroad and terminal facilities. Rochester & Honeoye Valley R. R. Co. v. Rochester, 17 A. D. 257.

An incorporated village may extend a street at grade over lands of a railroad company used by it as a yard where the street will not interfere with any structure of the company. Matter of Folts St., 18 A. D. 568.

Where individuals owning and controlling certain railroads devised a fraudulent scheme of consolidation, and issued bonds of the consolidated company upon false representations as to lands to be furnished as added security to make the bonds secure, render them, as well as the corporation, liable for relief to the bondholders. O'Beirne v. Bullis, 158 N. Y. 466.

Where the subject-matter of a controversy is over the right of a city to compel a railroad corporation to carry a highway across land occupied by it, the cost of a grade crossing is a proper basis for an extra allowance. Rochester & Honeoye Valley R. R. Co. v. Rochester, 17 A. D. 257.

The stringers constitute part of the framework of a bridge, and are within the requirement, that when a highway crosses a railroad by an overhead bridge the framework is to be kept in repair by the railroad company. Bush v. D., L. & W. R. R. Co., 166 N. Y. 210, affg. 54 A. D. 616.

This section in providing that when a highway crosses a railroad by an overhead bridge, the framework of the bridge and its abutments shall be maintained and kept in repair by the railroad, is not limited in its applica-

tion to railroads constructed subsequent to its enactment or to bridges over crossings thereafter constructed before or after the law went into effect. Yonkers v. N. Y. C. & H. R. R. R. Co., 165 N. Y. 142 (1900), affg. 32 A. D. 474. See, also, 163 N. Y. 228.

§ 100. Temporary leave granted by court to a street surface railroad; bond. Whenever the railroad or route of any street surface railroad corporation shall intersect and cross, or shall cross the tracks and roadbed of any railroad, operated by locomotive, steam or other power, which are laid in, across or upon the surface of any street, avenue, road or highway in any city, town or village of the state, having less than five hundred thousand inhabitants and such street surface railroad corporation having been unable to agree with the corporation owning the tracks and roadbed so intersected or to be intersected and crossed, as to the line or lines, grade or grades, points or manner of such intersection and crossing, or upon the compensation to be made therefor, shall have applied to the court by petition to appoint commissioners to determine the same, the court shall upon application made by such street surface railroad corporation, at, or after, the time of the appointment of such commissioners, or if an answer to the petition of such street surface railroad corporation has been interposed, at any time thereafter, direct that such street surface railroad corporation be permitted to lay its tracks across, and to intersect, upon the surface of the street, avenue, road or highway, the tracks and roadbed of such railroad operated by locomotive steam or other power, provided such street surface railroad corporation shall at the time of obtaining such order, make and file with the clerk of said court, its bond or undertaking in writing, in an amount and with surety or sureties to be approved by the court, conditioned for the full and faithful performance by such street surface railroad corporation of any and all conditions and requirements which may be imposed by said commissioners and be affirmed by the court, in determining the line or lines, grade or grades, points or manner of such intersection and crossing and as to the amount of compensation to be paid therefor, and also conditioned to conform such crossing and intersection made by virtue of such order of the court to the requirements made by said commissioners as affirmed by the court.

Formerly L. 1893, ch. 239, § 1.

§ 101. Consent of public service commission in certain cases. No street surface railroad shall be allowed to lay its tracks at grade across the tracks or roadbed of any railroad operated by locomotive steam power at any point where there are three or more tracks of the steam road proposed to be crossed, which tracks have been constructed and in operation at least two years, unless the written consent of the public service commission be first obtained for such crossing at grade. But this section shall not affect the operation of the preceding section in any suit or proceeding pending on the twenty-ninth day of March, eighteen hundred and ninety-three, nor any renewals of said pending suit or proceeding brought for any cause.

Formerly L. 1893, ch. 239, § 2.

§ 102. Ventilation of tunnels. The public service commission is hereby authorized, empowered and given full and complete authority to require and compel all tunnels used or to be used by railroads operated by steam in this state to be properly ventilated, in such manner and by such means and mechanical appliances as said commission may direct.

Formerly L. 1891, ch. 360, § 1.

§ 103. Lighting of tunnels. The public service commission is also hereby authorized, empowered and given full and complete authority to require and compel all tunnels used or to be used by railroads operated by steam in this state, to be properly lighted by electricity or otherwise, or by such means or in such manner as said commission may direct.

Formerly L. 1891, ch. 360, § 2.

§ 104. Compliance with orders of commission. Whenever the public service commission shall cause to be personally served upon any railroad corporation controlling any tunnel or part of a tunnel in this state for the purpose of operating a railroad or moving, hauling or propelling cars therein by steam, by delivering a copy personally to the president, general manager or any director of said corporation of a notice or order of said commission, stating and specifying the structures to be erected, the manner, means, mechanical appliances and apparatus to be used in lighting or ventilating any tunnel or tunnels used by said corporation

for the purpose of moving, hauling or propelling cars by steam therein as aforesaid, said corporation shall, within thirty days from and after the service of said notice or order as aforesaid, cause said tunnel or tunnels so used by it as aforesaid to be lighted or ventilated, or both, in the manner and by the means and use of the mechanical apparatus and appliances specified and pointed out in said notice or order.

Formerly L. 1891, ch. 360, § 3.

§ 105. Mandamus. After the expiration of thirty days from the service of said order or notice specified in the preceding section, as therein directed, if said corporation shall not have fully complied with the provisions and requirements of said notice or order as aforesaid and as therein directed and required, the public service commission may apply hereunder, or under the provisions of the public service commissions law, to the supreme court of this state for a writ of mandamus to compel said corporation or corporations so neglecting or refusing to obey and comply with the provisions of said order or notice to comply with and obey the provisions and requirements of said notice or order, and said court shall have full power and authority to hear and determine said matter, and, after giving the corporation or corporations proceeded against an opportunity to be heard in its or their defense, to compel said corporation or corporations so proceeded against to obey said order or notice, and forthwith comply with and carry out the provisions and requirements therein contained.

Formerly L. 1891, ch. 360, § 4.

§ 106. Penalty for violation. Every corporation violating any of the provisions of the preceding four sections shall be guilty of a misdemeanor and may be indicted therefor, and may be compelled to appear and plead to an indictment therefor in the person of its president, secretary, treasurer or any director thereof, and a bench warrant may issue out of any competent court to compel such attendance and pleading, and, upon conviction thereof, such corporations shall be punished by a fine of one thousand dollars, and an additional fine of five hundred dollars a day for each and every day or part of a day after thirty days from the due service of said notice or order that said corporation shall refuse or neglect to obey and carry out the requirements and provisions of the same, and duly sentenced to pay the same.

Formerly L. 1891, ch. 360, § 5.

§ 107. Judgment-roll. It shall be the duty of the district attorney prosecuting any corporation for a violation of any of the provisions of sections one hundred and three, one hundred and four and one hundred and five, that shall be convicted thereof and sentenced to pay a fine therefor, to cause a judgment-roll to be made up, consisting of the indictment, orders and sentence of the court and a formal judgment, to be prepared by him, which judgment shall be duly signed by the clerk of the county in which said trial took place; said judgment-roll shall be filed by said county clerk and said judgment shall be duly recorded in the book of judgments in said county and duly entered and docketed by said county clerk in said county the same as if said judgment had been obtained in a civil action, and said judgments so duly entered and docketed shall become and be a lien upon all of the real estate of said corporation against which the same is obtained, and the collection thereof may be enforced by execution to be issued and signed by the district attorney of the county where the trial of said indictment took place, in the same manner and to the same extent as executions are collected in civil actions.

Formerly L. 1891, ch. 360, § 6.

§ 108. Approval of appliances in cities having a population of one million inhabitants or over. In cities in this state having a population of one million inhabitants or over, where tunnels are or may hereafter be operated or controlled by any railroad corporation, such portions of any mechanical or other devices or appliances as may be required under the provisions of the preceding six sections to be constructed on or above the surface of any streets, avenues or other places under which such tunnels may be built, shall be subject as to form, material and construction, to the approval of the local authorities of such cities, except that in the city of New York such approval shall be by a majority vote of the mayor, the comptroller, the president of the department of public parks of said city and the president of the borough of said city in which such mechanical or other device or appliance is to be constructed.

Formerly L. 1891, ch. 360, § 7.

ARTICLE 4

Consolidation, Lease, Sale and Reorganization

SECTION 140. Consolidation of corporations owning continuous lines; abandonment of parallel lines.
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154. Foreign railroads.
155. Consolidation of domestic and foreign railroads.

§ 140. Consolidation of corporations owning continuous lines; abandonment of parallel lines. 1. Subject to the permission and approval of the public service commission, any railroad or other corporation, organized under the laws of this state, or of this state and any other state, and owning or operating a railroad, bridge or tunnel, either wholly within or partly within and partly without the state, or whose lines or routes of road have been located but not constructed, may merge and consolidate its capital stock, franchises and property with the capital stock, franchises and property of any other railroad, tunnel or bridge corporation or corporations organized under the laws of this state or of this state and any other state, or under the laws of any other state or states, whenever the two or more railroads of the companies or corporations so to be consolidated, tunnels, bridges or branches or any part thereof, or the line or routes of their road, if not constructed, shall or may form a continuous or connected line of railroad with each other or by means of any intervening railroad bridge, tunnel or ferry, or by means of a right to operate cars over any intervening railroad subject to the jurisdiction of the public service commission, second district, and any such consoli-

dated corporation may thereupon construct or finish the construction of such continuous line of railroad, if not previously constructed, and operate the same, subject to all provisions of law applicable to such railroad corporations. Where the road to be operated is in whole or in part a tunnel or sub-surface road, authorized by section twenty-eight of this chapter, its consolidation with another road or roads under the provisions of this section shall not prevent any connecting railroad from having equal rights of transit for its passengers and freight through or over the tunnel or bridge of any such road, upon the same equitable terms, nor shall such consolidation be made where such tunnel or sub-surface road exceeds five miles in length.

Thus am'd by L. 1911, ch. 506.

2. Any railroad corporation, which by consolidation or merger under any provision of law, now owns, or shall hereafter own parallel or substantially parallel lines of railroad between any two points or stations, shall have the right, upon obtaining the consent of the public service commission of the proper district, to abandon such portion of its railroad and its franchise to own, maintain and operate the same on either of the said parallel lines, as shall, in the opinion of the said public service commission, be no longer necessary to furnish proper and adequate service to the public in the transportation of passengers and freight within the district in which such parallel lines may be operated. Such application for abandonment shall not be made until after it shall have been authorized by resolution of the board of directors of the corporation under its seal, and such resolution shall have been submitted to the stockholders thereof at a meeting called and conducted in the same manner as required by section one hundred and forty-eight of this chapter. If the stockholders shall at such meeting ratify such action of the directors, the secretary of the corporation shall so certify under the seal of the corporation, upon such resolution. If approved by the commission, such approval shall be indorsed upon such resolution and annexed thereto, and such resolution shall thereupon be filed and recorded in the office of the secretary of state and the date of such abandonment shall be as of the date of such filing. The property of any person, taken, affected or damaged by such abandonment shall be deemed to be required for a public purpose, and if such corporation, before making application to the pub-

lic service commission, shall have been unable to agree with any person damaged or claiming to be damaged as a result of such abandonment, as to the compensation, if any, which should justly be made therefor, such property, when paid for by such corporation as hereinafter provided, shall be deemed to have been taken by condemnation, and the proceeding thereon, as herein provided, shall be deemed to be a special proceeding, and subject to all the provisions of the code of civil procedure regulating special proceedings. Any such railroad corporation shall have the right within thirty days after filing such resolution and approval, to make application by verified petition to a special term of the supreme court in and for the county or one of the counties in which the portion of the route to be abandoned may be located, for the appointment of commissioners to ascertain and determine the compensation, if any, which shall justly be made for the property of any person so taken, affected or damaged and such abandonment shall not be deemed to be effective against such person unless and until said corporation shall have filed in the office of the clerk of the county in which said application shall have been made, an undertaking in an amount approved by the court that it will pay to the person or persons determined to be damaged by the abandonment the amounts, if any, finally awarded to him or them in the proceedings; notice of the appointment of such commissioners and of the time and place of their first meeting shall be published once a week for four successive weeks in two newspapers published in said county or counties, and affidavits of such publication and the filing of such undertaking shall be filed in the office of the public service commission. If such corporation shall fail to file such petition within said period of thirty days, any person or persons claiming to be damaged, may by separate petition to the court apply for the appointment of commissioners to ascertain and determine the said compensation with like effect as if such corporation had filed its petition. Nothing in this act shall be construed to impair or affect the rights of any lienor or mortgagee in and to the portion of the property of the said railroad or railroads affected by said abandonment, and no such abandonment shall be consented to as herein provided unless such liens or mortgages shall have first been discharged of record.

Formerly L. 1890, ch. 565 (Railroad Law), § 70, as am'd by L. 1892, ch. 676; L. 1909, ch. 564.

For forms in consolidation proceedings, see Forms Nos. 422–424.

Consolidation of foreign and domestic railroads, see § 155, post.

A corporation formed by consolidation is not subject to the payment of the tax of one-twentieth of one per cent. for the privilege of organization. See organization tax provisions of Tax Law, § 180, and cases cited thereunder, ante, pages 287–290, ante.

The Stock Corp. Law, § 7 (now § 14), and Laws 1899, ch. 690 (now General Business Law, §§ 340–346), designed to prevent corporations and monopolies in restraint of trade, do not forbid the merger of street railways, for the legislation of various enactments upheld by the courts has expressly upheld the merger of such corporations under certain conditions. Matter of Interborough-Metropolitan Co., 125 A. D. 804.

Companies may consolidate only under the permission and safeguards of the statute. Cole v. Millerton Iron Co., 133 N. Y. 164 (1892).

Proceedings for consolidation lawfully begun represent a right accruing, and may be lawfully completed, notwithstanding the enactment of a new statute. Cameron v. N. Y. & Mt. V. W. Co., 133 N. Y. 336 (1892).

The language "form a continuous line of railroad with each other" means a line or route extending and continuing in substantially the same general direction connecting two principal points. Peo. v. B. H. T. & West. Ry. Co., 12 Abb. N. C. 230 (1880). The provision also applies to lines located but not constructed. Id.

Upon the consolidation of domestic and foreign railroad corporations the result is a domestic corporation. In re Sage v. L. S. & M. S. R. R. Co., 70 N. Y. 220 (1877); Boardman v. Same, 84 N. Y. 157 (1883). But the sanction of the Legislatures of the other States is necessary. Peo. v. N. Y., C. & St. L. R. R. Co., 129 N. Y. 474 (1892); Peo. v. Fitchburg R. R. Co., 129 N. Y. 654 (1892). Whether the result would be a new cororation de jure is a mooted question. Id.

§ 141. Conditions. Such consolidation shall be made in the following manner:

1. Joint agreement; amount of capital stock. The directors of the corporations proposing to consolidate may enter into a joint agreement, under the corporate seal of each corporation, for the consolidation of such corporations, and prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation, the number and names of the directors and other officers thereof, and who shall be the first directors and officers and their places of residence, the number of shares of the capital stock, the amount of par value of each share, and the manner of converting the capital stock of each corporation into that of the new corporation, and how and when the directors and officers shall be chosen, with such other details as they shall deem necessary to perfect such new organization and the consolidation of such corporations. But in no case shall the capital stock of the corporation formed by such consolidation exceed the sum of the capital stock of the corporations so consolidated, at the par value thereof. Nor shall any bonds or other

evidences of debt be issued as a consideration for, or in connection with, such consolidation. If either of the corporations so to be consolidated is a corporation organized under the laws of any other state the joint agreement herein provided for may fix the location of the principal office of the new corporation in either state.

2. Agreement to be submitted to meeting of stockholders. If stockholders owning two-thirds of all the stock of each of such corporations shall by a consent in writing, acknowledged as are deeds entitled to be recorded and endorsed upon said lease or agreement, signify their assent thereto, it shall be deemed and taken as the adoption of such agreement by and on behalf of such corporation, and the original or certified copy thereof shall be filed as hereinafter provided. If such agreement shall not be consented to in writing by holders of two-thirds of the stock of either of such corporations as hereinbefore provided, such agreement shall be submitted to the stockholders of each of such corporations at a meeting thereof called separately for the purpose of taking the same into consideration. Due notice of the time and place of holding such meeting, and the object thereof, shall be given by each corporation to its stockholders by written or printed notices addressed to each of the persons in whose names the capital stock of such corporation stands on the books thereof, and delivered to such persons respectively, or sent to them by mail, when their post-office address is known to the corporation, at least thirty days before the time of holding such meeting, and also by a general notice published at least once a week for four weeks successively in some newspaper printed in the city, town or county where such corporation has its principal office or place of business. At such meeting of stockholders such agreement shall be considered, and a vote by ballot taken for the adoption or rejection of the same, and if the votes of the stockholders owning at least two-thirds of the stock of each corporation present and voting in person or by proxy shall be for the adoption of such agreement, then that fact shall be certified thereon by the secretaries of the respective corporations, under the seal thereof, and the agreement so adopted, or a certified copy thereof, shall be filed in the office of the secretary of state, and in the office of the clerk of the county where the new corporation is to have its principal place of business, and shall from thence be deemed and taken to be the agreement and act of consolidation of such corporations, and thereafter such corporations,

parties thereto, shall be one corporation by the name provided in such agreement, but such act of consolidation shall not release such new corporation from any of the restrictions, liabilities or duties of the several corporations so consolidated.

Formerly L. 1890, ch. 565 (Railroad Law), § 71, as am'd by L. 1892, ch. 676; L. 1904, ch. 228.

The provision permitting a consent in writing properly acknowledged was added to this section by the amendment of 1892. The same amendment also provided that the consolidation agreement may be approved at a meeting of the stockholders by "the votes of the stockholders owning at least two-thirds of the stock of each corporation present and voting in person or by proxy."

The provision limiting the capitalization of the new corporation to an amount not exceeding the aggregate capital stock of the constituent corporations must be strictly construed. Peo. v. B., H. T. & W. Ry. Co., 12 Abb. N. C. 230 (1880). As to illegal attempt to consolidate, see Latham v. Same, 38 Hun 265 (1885).

A contract made by the directors of one corporation with another corporation of which they are also directors is voidable by the corporation, but a contract entered into between two corporations, voidable because of their having common directors, cannot be disaffirmed by a minority of the stockholders of either corporation. Hart v. Ogdensburg & Lake Champlain R. R. Co., 89 Hun 316 (1895).

§ 142. New corporation. Upon the consummation of such act of consolidation all the rights, privileges, exemptions and franchises of each of the corporations, parties to the same, and all the property, real, personal and mixed, and all the debts due on whatever account to either of them, as well as all stock subscriptions and other things in action belonging to either of them, shall be taken and deemed to be transferred to and vested in such new corporation, without further act or deed; and all claims, demands, property, rights of way, and every other interest shall be as effectually the property of the new corporation as they were of the former corporations, parties to such agreement and act; and the title to all real estate, taken by deed or otherwise, under the laws of this state, vested in either of such corporations, parties to such agreement and act, shall not be deemed to revert or be in any way impaired by reason of this act, or anything done by virtue thereof, but shall be vested in the new corporation by virtue of such act of consolidation. And it shall be lawful for any railroad company or corporation, now or hereafter formed by the consolidation of one or more railroad companies or corporations organized under the laws of this state, or under the laws of this state and other states, with one or more railroad companies or corporations organized under the laws of any other state, or the laws of this state and other states,

to issue its bonds for the purpose of paying or retiring any bonds theretofore issued by either of said companies or corporations so consolidated, or for any purpose and to the amount authorized by the laws of the state under which either of said companies or corporations so consolidated was organized, and secure the same by a mortgage upon its real or personal property, franchises, rights and privileges, whether within or without this state, and subject to the remedies for the enforcement of the same under the laws of either of said states. Nothing in this article contained shall authorize the execution of any such mortgage without the consent of the stockholders as now required by the laws of this state, nor compel any bondholder to accept payment in whole or in part of any bond or bonds held by him or to surrender the same before they shall become due.

Formerly L. 1890, ch. 565 (Railroad Law), § 72, as am'd by L. 1891, ch. 362.

§ 143. Creditors' rights not to be impaired. The rights of all creditors of, and all liens upon the property of, either of such corporations, parties to such agreement and act, shall be preserved unimpaired, and the respective corporations shall be deemed to continue in existence to preserve the same, and all debts and liabilities incurred by either of such corporations shall thenceforth attach to such new corporation, and be enforced against it and its property to the same extent as if incurred or contracted by it. No actions or proceedings in which either of such corporations is a party shall abate or be discontinued by such agreement and act of consolidation, but may be conducted to final judgment in the names of such corporations, or such new corporation may be, by order of the court, on motion substituted as a party.

Formerly L. 1890, ch. 565 (Railroad Law), § 73.

Rights of creditors and bondholders of the constituent corporations are not disturbed by consolidation. Polhemus v. Fitchburg R. R. Co., 123 N. Y. 502 (1890); Janes v. Same, 50 Hun 310 (1888); Vilas v. Page, 106 N. Y. 439 (1887); Gale v. Troy & Boston R. R. Co., 51 Hun 470 (1889).

§ 144. Assessment of property of new corporation. The real estate of such new corporation, situate within this state, shall be assessed and taxed in the several towns and cities where the same shall be situated in like manner as the real estate of other railroad corporations is or may be taxed and assessed, and such proportion of the capital stock and personal property of such new corporation shall in like manner be assessed and taxed in this state, as the num-

ber of miles of its railroad situate in this state bears to the number of miles of its railroad situate in the other state or states.

Formerly L. 1890, ch. 565 (Railroad Law), § 74.

§ 145. Stocks of municipal corporations, how represented. At any meeting of the stockholders of any railroad corporation to consider any agreement or proposition to consolidate or lease, the commissioners or other officers of any municipal corporation holding or having charge of any of the capital stock of such railroad corporation shall represent such municipal corporation, and may act and vote in person or by proxy on all matters relating to such consolidation or lease in the same manner as individual stockholders.

Formerly L. 1890, ch. 565 (Railroad Law), § 75, as am'd by L. 1893, ch. 546.

§ 146. Foreclosure of mortgages made by consolidated railroads partly in the State. Whenever a railroad corporation of this or of any other state or states whose line of road lies partly in this state and partly in another state or states, shall have executed a mortgage upon its entire line of railroad, and a sale of the entire line of road under such mortgage shall have been or may hereafter be ordered, adjudged and decreed by a court of competent jurisdiction of the state or states, or by a court of the United States sitting within the state or states in which the greater part of such line of railroad may be situated, upon the confirmation of such judgment or decree, and of the sale made thereunder, by the supreme court of this state or by the circuit court of the United States in the judicial district in which some part of such line of road is situated, such sale shall operate to pass title to the purchaser, of that part of the line of railroad lying in this state, together with its appurtenances and franchises, with the same force and effect as if the judgment or decree under which such sale is had, had been made by a court of competent jurisdiction of this state. Such judgment or decree and sale may be so ordered, adjudged, decreed or confirmed in any action or proceeding heretofore or hereafter brought in the supreme court, or in a court of the United States sitting in this State, for the foreclosure of such mortgage, or in aid of an action for that purpose in such other state or states, if it shall appear that such confirmation is for the interest of the public and of the parties, due and lawful provision being made for and in respect of any liens upon that part of the line of

road or other property sold situate in this state, and for such costs, expenses and charges as may appear to be just and lawful. If a receiver of the entire line of such railroad shall have been, or may hereafter be appointed by such court of competent jurisdiction of the state in which the greater part of the line of railroad is situated, or by a court of the United States sitting in such other state, such receiver may perform, within this state, the duties of his office not inconsistent with the laws of this state, and may sue and be sued in the courts of this state.

Formerly L. 1890, ch. 565 (Railroad Law), § 76, as am'd by L. 1896, ch. 356.

§ 147. Powers of corporations organized to acquire and operate railroads partly in the state. A railroad corporation created under the laws of the state or states in which the greater part of the line of its railroad may be situated, or a railroad corporation created under this chapter or under article two of the stock corporation law in this state, for the purpose of taking title to, and operating, the line of road as so sold, under a judgment or decree of a court of this state, or of a court of the United States sitting in this state, for the foreclosure of a mortgage, with its franchises and appurtenances, may hold, possess and operate not only those parts of the railroad lying in other states, but also that part of the line of such railroad lying in this state, and shall be subject to the duties and liabilities to which such corporation was, by the laws of this state, subject, and to such further or other duties and liabilities as are now or may hereafter be imposed by law upon railroad corporations of this state, and the provisions of the stock corporation law concerning reorganization of corporations shall apply to, and in respect of, every such successor railroad corporation. An exemplified copy of the certificate or certificates of incorporation, under and by virtue of which any such corporation is created in any other state, and a certified copy of the judgment or decree of any court sitting in any other state, under which said railroad shall have been sold, and a certified copy of the order or judgment or decree of confirmation and approval required by the preceding section, or of the order, judgment or decree of the court of this state, or of the United States in this state, which decreed the sale, confirming the same, shall be filed in the office of the secretary of state for this state, and in the office of the county clerk of the county where its principal business office in this state is or shall be located.

This section and the preceding one shall apply in respect of decrees, foreclosure, sales, confirmations, reorganizations and incorporations, whether heretofore or hereafter made, provided, however, that nothing in either of said sections shall affect any action or proceeding pending in any court, on or before the first day of April, eighteen hundred and ninety-six, to establish the invalidity of any foreclosure or reorganization theretofore had, or to enforce any judgment or claim arising before such foreclosure or reorganization.

Formerly L. 1890, ch. 565 (Railroad Law), § 77, as am'd by L. 1895, ch. 454; L. 1896, ch. 356.

The last paragraph was formerly L. 1896, ch. 356, § 3.

§ 148. Lease of road. Subject to the permission and approval of the public service commission, any railroad corporation or any corporation owning or operating any railroad or railroad route within this state may contract with any other such corporation for the use of their respective roads or routes, or any part thereof, and thereafter use the same in such manner and for such time as may be prescribed in such contract. Such contract may provide for the exchange or guaranty of the stock and bonds of either of such corporations by the other and shall be executed by the contracting corporations under the corporate seal of each corporation, and if such contract shall be a lease of any such road and for a longer period than one year, such contract shall not be binding or valid unless approved by the votes of stockholders owning at least two-thirds of the stock of each corporation which is represented and voted upon in person or by proxy at an annual meeting of the stockholders for the purpose of electing directors, called in the manner prescribed by law, provided that the notice of such meeting shall state that one of the purposes thereof will be the approval of such lease, or at a meeting, called separately for that purpose upon a notice stating the time, place and object of the meeting, served at least thirty days previously upon each stockholder personally, or mailed to him at his post-office address and also published at least once a week, for four weeks successively, in some newspaper printed in the city, town or county where such corporation has its principal office, and there shall be indorsed upon the contract the certificate of the secretaries of the respective corporations under the seals thereof, to the effect that the same has been approved by such votes of the stockholders, and the contract

shall be executed in duplicate and filed in the offices where the certificates of incorporation of the contracting corporations are filed. The road of a corporation cannot be used under any such contract in a manner inconsistent with the provisions of law applicable to its use by the corporation owning the same at the time of the execution of the contract. Such contracts shall be executed by the corporations, parties thereto, and proved and acknowledged in such manner as to entitle the same to be recorded in the office of the clerk or register of each county through or into which the road so to be used shall run. If any contract so recorded shall be or has been terminated by the contracting corporations in pursuance of resolutions of their respective boards of directors prior to the time specified in such contract for the termination thereof, then the contracting corporations shall execute, acknowledge and procure to be recorded in each office where such contract is recorded a certificate to the effect that such contract has been terminated, stating the date of the termination thereof, and said certificates so recorded shall be presumptive evidence of the termination of such contract accordingly. Nothing in this section shall apply to any lease in existence prior to May first, eighteen hundred and ninety-one.

Formerly L. 1890, ch. 565 (Railroad Law), § 78, as am'd by L. 1892, ch. 676; L. 1893, ch. 433; L. 1905, ch. 695.

For forms of notice of meeting and certificate of adoption of lease, see post, Forms Nos. 425–427.

Suit to Set Aside Lease.

A contract for the lease of a road will not be set aside as illegal and void at the suit of a stockholder who has acquired and accepted pecuniary benefits thereunder with knowledge of the character of the transactions. Wormser v. Met. St. Ry. Co., 184 N. Y. 83 (1906).

General Power to Lease.

Where a railroad corporation is authorized to lease the roads of other similar corporations, it may, in the absence of any statutory limitation, lease a road operated in and under the laws of another State unless the law of that other State forbids it. Day v. O. & L. C. R. R. Co., 107 N. Y. 129 (1887). See, also, 89 N. Y. 75; 86 N. Y. 117 (1881); 35 Hun 227 (1885); 34 Hun 435; 93 N. Y. 616, revsg. 25 Hun 246; 77 N. Y. 234; 46 N. Y. 653; 16 Abb. Pr. N. S. 262.

A lease of a street railroad to an individual to be operated as private property will not be sustained. Fanning v. Osborne, 102 N. Y. 441 (1886).

As the statutes permit a railroad corporation to lease itself to another corporation, a court may not consider any reasons which public policy may seem to suggest against it. O'Connor v. L. I. Traction Co., 15 Misc. 501

(1896). No relief will be granted in an equitable action when the main object of the action is to coerce the defendants, or others interested, into yielding to demands which are not embraced in the relief prayed for. Id.

The fact that a railroad company has leased and transferred for the term of its corporate existence its road and business to a foreign railroad corporation, and that the latter has taken the management and possession thereof does not deprive the former of the right to acquire title to lands necessary in carrying on the business. In re N. Y., Lacka. & W. Ry. Co., 99 N. Y. 12 (1885). See, also, Kip v. N. Y. & H. R. R. Co., 67 N. Y. 227 (1876).

Distinction Between Lease and Traffic Agreement.

An agreement between two street railroads by which one grants the other the right to use for the passage of its cars the tracks of the grantor in order that the grantee may connect one of its tracks with another part of its system, not naming any definite period for such use, is not, within section 78 of the Railroad Law, a lease for a longer period than one year requiring approval by the stockholders of the contracting corporations; the same is to be deemed only a traffic contract, as the grantee corporation might, under section 102, have secured the same rights as those which the contract gave it. Chapman v. Syracuse Rapid Transit Ry. Co., 25 Misc. 626 (1898). See, also, Roosa v. Brooklyn Heights R. R. Co., 28 Misc. 387 (1899).

Leases by Roads with Common Directors.

When the lessor and lessee companies have directors in common the lease is voidable, and not void. Barr v. N. Y., L. E. & W. R. R. Co., 125 N. Y. 263 (1891).

A contract made by the directors of one corporation with another corporation, of which they are also directors, is voidable by the corporation, but a contract entered into between two corporations, voidable because of their having common directors, cannot be disaffirmed by a minority of the stockholders of either corporation. Hart v. Ogdensburg & Lake Champlain R. R. Co., 89 Hun, 316 (1895).

Rights of Minority Stockholders.

Where a plaintiff, suing as a stockholder of a street railroad corporation, claims that he has been defrauded of a portion of his interest in the corporate assets by means of a lease made by the directors and seeks to set aside the lease, the action is not for the benefit of the plaintiff alone, but is representative in character, and for the benefit of the plaintiff and all other stockholders similarly situated. Flynn v. Brooklyn City R. R. Co., 158 N. Y. 493, affg. 9 A. D. 269. In such an action, an averment of a demand upon the corporation to sue, and its refusal or unreasonable neglect so to do, is essential to enable the stockholder to sue in his own name. Id. See, also, Sage v. Culver, 147 N. Y. 241.

When the officers of a corporation lease the property of another corporation, control a majority of the latter's stock, and conspire to compel the minority to sell its stock by refusing to pay the rent due, a court of equity, on the application of the minority, will compel the payment of the rent. Barr v. N. Y., L. E. & W. R. R. Co., 96 N. Y. 444. See, also, cases cited in Farmers' Loan & Trust Co. v. N. Y. & Northern Ry. Co., 150 N. Y. 410.

Consents of Property Owners.

It has never been the intention of the general railroad legislation to require consents of local authorities or property owners to the operation by one railroad company of its cars over the tracks of another by virtue of a traffic contract. Ingersoll v. Nassau Electric R. R. Co., 157 N. Y. 453 (1899), affg. 89 Hun, 213.

A railroad corporation which has made a traffic contract with two other roads, for operation over their tracks, may operate under such contract without first obtaining the consents of the property owners and of the municipal authorities. Kunz v. Brooklyn Heights R. R. Co., 25 Misc. 334 (1898).

When a railroad company has acquired the right and has constructed and operated its railroad in the streets of a city, its railroad in such streets may be used under contract by another corporation without the latter obtaining the prescribed consents. The Constitution, art. 3, § 18, does not forbid such contract. Peo. v. Brooklyn, F. & C. I. R. R. Co., 89 N. Y. 75 (1882).

Rights and Liabilities of Lessor and Lessee.

The lessor cannot be held liable for injuries to a passenger caused by the negligence or wrongful acts of the lessee's servants. Fisher v. Met. El. R. R. Co., 34 Hun 433 (1885). See, also, Mayor of N. Y. v. 23d St. Ry. Co., 113 N. Y. 311 (1889); Miller v. N. Y., L. & W. R. R. Co., 125 N. Y. 118 (1890). The lessor is liable, however, if the lease is unauthorized. Abbott v. Johnstown, G. & K. Horse R. R. Co., 80 N. Y. 27 (1880).

An action for damages for injuries sustained at a highway crossing, through the negligence of a foreign railroad corporation running its trains over a railroad under contract made by it with a domestic railroad corporation owning the road, is not maintainable against the latter corporation, the contract allowing such use of the road being authorized by this section. Cain v. Syracuse, Binghamton & N. Y. R. R. Co., 27 A. D. 376 (1898), distgd. in Decker v. Erie R. R., 85 A. D. 16 (1903).

Where two railroad companies, by agreement, construct a road for joint use, either company is entitled to operate cars of the railroad company leased by it over the tracks so constructed. Coney Isl. & Gravesend Ry. Co. v. C. I. & B. R. R. Co., 38 A. D. 494 (1899).

A railroad corporation which, while not actively operating its road, because of leases made thereof, still maintains its organization, may, by its board of directors, lawfully agree to compensate its president for services rendered on behalf of the corporation. Bagley v. Carthage, W. & S. H. R. R. Co., 25 A. D. 475, affd., 165 N. Y. 179 (1900).

A lease of a railroad for 999 years or during the existence of the lessee company does not terminate by appointment of receivers of the lessee's property under the Code of Civ Pro. § 1788, pending an action for dissolution of the lessee company upon the ground of insolvency. N. Y. El. R. R. Co. v. Man. Ry. Co., 63 How. 14 (1881).

Miscellaneous Cases.

Where two corporations are co-tenants of railroad tracks, one co-tenant cannot, without the consent of the other, make a traffic contract with a third railroad company, giving it a permanent easement over the tracks. Chapman v. Syracuse Rapid Transit Ry. Co., 25 Misc. 626 (1898).

A lease which imposes no obligation upon the lessee to use the road, but

which contemplates an abandonment of its use, is not a contract for "use," and is void. Troy & Boston R. R. Co. v. Boston H. T. & W. Ry. Co., 86 N. Y. 107 (1881).

An individual, to whom a road has been leased, is estopped from questioning the validity of the lease in an action to recover the stipulated rent. 80 N. Y. 27, above; Woodruff v. E. Ry. Co., 93 N. Y. 609 (1883).

The provision of chapter 218 of Laws of 1839, that it shall be lawful for any railroad corporation to contract with any other railroad corporation for the use of their respective roads, has been in full force and effect from the time of its enactment to the present time, and applies to street surface railroad corporations. Ingersoll v. Nassau Electric R. R. Co., 157 N. Y. 453, affg. 89 Hun 213.

§ 149. **Lessees of railroad may acquire stock therein.** Subject to the permission and approval of the public service commission, any railroad corporation created by the laws of this state, or its successors, being the lessee of the road of any other railroad corporation, may take a surrender or transfer of the capital stock of the stockholders, or any of them, in the corporation whose road is held under lease, and issue in exchange therefor the like additional amount of its own capital stock at par, or on such other terms and conditions as may be agreed upon between the two corporations; and whenever the greater part of the capital stock of any such corporation shall have been so surrendered or transferred, the directors of the corporation taking such surrender or transfer shall thereafter, on a resolution electing so to do, to be entered on their minutes, become ex-officio the directors of the corporation whose road is so held under lease, and shall manage and conduct the affairs thereof, as provided by law; and whenever the whole of such capital stock shall have been so surrendered or transferred, and a certificate thereof filed in the office of the secretary of state, under the common seal of the corporation to whom such surrender or transfer shall have been made, the estate, property, rights, privileges and franchises of the corporation whose stock shall have been so surrendered or transferred, shall thereupon vest in and be held and enjoyed by the corporation, to whom such surrender or transfer shall have been made, as fully and entirely, and without change or diminution, as the same were before held and enjoyed, and be managed and controlled by the board of directors of the corporation, to whom such surrender or transfer of such stock shall have been made, and in the corporate name of such corporation. Where stock shall have been so surrendered or trans-

ferred, the existing liabilities of the corporation, and the rights of the creditors and of any stockholder not surrendering or transferring his stock, shall not be affected thereby.

Formerly L. 1890, ch. 565 (Railroad Law), § 79.

See Pub. Serv. Com. Law, § 54. See, also, Stock Corpn. Law, § 52, containing provision for acquiring stock of other corporations.

The transfer of stock does not abate condemnation proceedings instituted before the transfer. In re Met. El. Ry. Co., 12 N. Y. Supp. 506 (1891). The transferring company neither loses its corporate existence, nor its right to continue or to authorize continuance of condemnation proceedings. In re N. Y. El. R. R. Co., 43 St. Rep. 651, aff'd., 133 N. Y. 690 (1892).

§ 150. Consolidation and lease of parallel lines prohibited. No railroad corporation or corporations owning or operating railroads whose roads run on parallel or competing lines, except street surface railroad corporations, shall merge or consolidate, or enter into any contract for the use of their respective roads, or lease the same, the one to the other, unless the public service commission shall consent thereto.

Formerly L. 1890, ch. 565 (Railroad Law), § 80, as am'd by L. 1892, ch. 676.

By this section the leasing of parallel or competing steam railroads, the one to the other, heretofore allowed by ch. 218, Laws of 1839, is forbidden.

This section does not prohibit traffic contracts beyond the line of parallelism between companies whose lines are parallel for only a portion of their respective routes. Peo. v. O'Brien, 111 N. Y. 1 (1888). Competing lines are those which are rivals for traffic. The prohibition may include lines not mathematically parallel and roads not constructed. Peo. v. Boston, H. T. & W. R. R. Co., 12 Abb. N. C. 230 (1880).

§ 151. Mortgagee may purchase at foreclosure sale. Any mortgagee of the property and franchises of any railroad corporation may become the purchaser of the same at any sale thereof under the mortgage, upon foreclosure by advertisement, or under a judgment, or decree, or otherwise, and hold and use the same, with all the rights and privileges belonging thereto or connected therewith, for the period of six months, and convey the same to any railroad corporation.

Formerly L. 1890, ch. 565 (Railroad Law), § 81.

See the Stock Corp. Law, § 9.

§ 152. Certificates of stock may be issued after foreclosure in certain cases. If any person or corporation shall be entitled to certificates of stock subscribed to and paid for in any railroad corporation whose property and franchises have been sold under mortgage foreclosure, and such certificates have not been issued

before foreclosure, the officers of the corporation shall, at any time within six months after the foreclosure sale issue and deliver to the person or corporation entitled thereto, upon demand, such certificates of stock, which shall have all the force and effect and confer upon the holder all the rights which he would have had if such certificates of stock had been issued at the time of the payment of the subscription thereto.

Formerly L. 1890, ch. 565 (Railroad Law), § 82.

§ 153. Liabilities of reorganized railroad corporations. A railroad corporation, reorganized under the provisions of law, relating to the formation of new or reorganized corporations upon the sale of their property or franchise, shall not be compelled or required to extend its road beyond the portion thereof constructed, at the time the new or reorganized corporation acquired title to such railroad property and franchise, provided the public service commission shall certify that in its opinion the public interests under all the circumstances do not require such extension. If such commission shall so certify and shall file in its office such certificate, which certificate shall be irreversible by such commission, such corporation shall not be deemed to have incurred any obligation so to extend its road and such certificate shall be a bar to any proceedings to compel it to make such extension or to annul its existence for failure so to do, and shall be final and conclusive in all courts and proceedings whatever. This section shall not authorize the abandonment of any portion of a railroad which had been constructed and operated prior to May first, eighteen hundred and ninety-one, nor apply to Kings county.

Formerly L. 1890, ch. 565 (Railroad Law), § 83.

See provisions for reorganization, Stock Corpn. Law, §§ 9–12.

The certificate of the railroad commissioners, duly filed, to the effect that no public interest required the extension of the road of a reorganized corporation, is a bar to an action brought by the Attorney-General under the Code of Civil Procedure, section 1798, to annul the existence of the corporation. Peo. v. Ulster & Del. R. R. Co., 128 N. Y. 240 (1891), affg. 58 Hun 266, and 8 N. Y. Supp. 149. This provision is constitutional. Id.

§ 154. Foreign railroads. All the provisions contained in the several sections of this chapter shall extend, apply to and cover the consolidation, lease, sale or reorganization of any railroad or other corporation heretofore or hereafter organized, under the laws of this state, and any other state or country, to build, lease, buy, sell, maintain or operate any of the lines or routes of rail-

roads, tunnels, bridges, ferries or branches or any part thereof mentioned in this article, and any similar lines or routes of railroad, tunnels, bridges, ferries or any part thereof, constructed or to be located and constructed in any foreign country.

Formerly L. 1890, ch. 565 (Railroad Law), § 84, as added by L. 1895, ch. 921.

§ 155. Consolidation of domestic and foreign railroads. The consolidation of a domestic railroad corporation with a foreign railroad corporation, effected prior to March tenth, nineteen hundred and three, shall not be deemed invalid because such roads at the time of the consolidation did not form a connected and continuous line, if, when the consolidation was effected, or thereafter, an intermediate line, by purchase or by a lease of not less than ninety-nine years, became, with the consolidated roads, a continuous and connecting line of railroad.

Formerly L. 1903, ch. 30, § 1; L. 1897, ch. 193.

ARTICLE 5

Street Surface Railroads

SECTION 170. Street surface railroads; general provisions.
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§ 170. Street surface railroads; general provisions. The provisions of this article shall apply to every corporation which, under the provisions thereof, or of any other law, has constructed or shall construct or operate, or has been or shall be organized to construct or operate, a street surface railroad, or any extension or extensions, branch or branches thereof, for public use in the conveyance of persons and property for compensation, upon and along any street, avenue, road, highway, or private property, in any city, town or village, or in any two or more civil divisions of the State, and every such corporation must comply with the provisions of this article. Any street surface railroad corporation, at any time proposing to extend its road or to construct branches thereof, may, from time to time, make and file in each of the offices in which its certificate of incorporation is filed, a statement of the names and description of the streets, roads, avenues, highways and private property in or upon which it is proposed to construct, maintain or operate such extensions or branches. Upon filing any such statement and upon complying with the conditions set forth in section one hundred and seventy-one of this chapter, every such corporation shall have the power and privilege to construct, extend,

operate and maintain such road, extensions or branches, upon and along the streets, avenues, roads, highways and private property named and described in its certificate of incorporation or in such statement. Every such corporation, before constructing any part of its road upon or through any private property described in its articles of association or certificate of incorporation or statement, and before instituting any proceeding for the condemnation of any real property, shall make a map and profile of the route adopted by it upon or through any private property, which map and profile shall be certified by the president and engineer of the company, or a majority of its directors, and shall be filed in the office of the clerk of the county in which the road is to be constructed, and all provisions of section sixteen of this chapter so far as applicable shall apply to the route so located. If any such street surface railroad company is unable to agree for the purchase of any such real property, or of any right or easement therein required for the purpose of its railroad, or if the owner thereof shall be incapable of selling the same, or if, after diligent search and inquiry, the name and residence of such owner can not be ascertained, it shall have the right to acquire title thereto by condemnation in the manner and by the proceedings provided by the condemnation law. Nothing in this section shall be deemed to authorize a street railroad corporation whose railroad is mainly, upon, along, above or below streets and highways to acquire real property within a city by condemnation, but nothing in this section shall apply to or affect rapid transit railways constructed, maintained or operated under any rapid transit act.

Thus am'd by L. 1911, ch. 418.

Formerly L. 1890, ch. 565 (Railroad Law), § 90, as am'd by L. 1892, ch. 676; L. 1893, ch. 434; L. 1895, ch. 933.

For forms of statement of extensions, see post, Forms Nos. 433, 434.

Street Railroad Franchise Does Not Authorize Maintenance of Side Tracks for Private Purposes.

A franchise to operate a street surface railroad granted pursuant to sections 170–173 of this act does not carry with it the right to maintain a siding in a street and a private freight station for the use and convenience of a company owning a factory. Bklyn. Heights R. R. Co. v. Steers, 213 N. Y. 76 (1914), affg. 158 A. D. 948.

Application.

The amendment of 1892, chapter 676, that a street surface railroad corporation, "organized since May 6, 1884," must comply with the provisions of this article, must be deemed equivalent to a provision that such a corpo-

ration, if organized prior to May 6, 1884, need not comply with the provisions of the article. Weed v. Common Council of Binghamton, 26 Misc. 208 (1899).

Rights of street surface railroad companies organized prior to May 6, 1884, considered in N. Y. Cable Co. v. Mayor, etc., 104 N. Y. 1 (1887).

The railroad commissioners have power, under section 68 of this law, to determine what proportion of the expense of a crossing should be paid by a street railroad company over the tracks of a steam railroad, and where that power has been exercised, if the railroad crossed is entitled to further compensation under section 12, the street surface railroad will be allowed to provide for that item by a bond. D., L. & W. R. R. Co. v. S., L. & B. R. R. Co., 28 Misc. 456, affd., 43 A. D. 621 (1899).

Where a street railway company files a map and profile of land which it desires to acquire for an extension of its road, and a landowner affected thereby, having fifteen days after the service upon him of notice of such filing, fails to institute proceedings to review such location, he cannot oppose the location in a proceeding by the railroad for condemnation of the property, the only question before the referee, to whom the issues raised by the landowner's answer are referred, being whether it is necessary for the public use that the corporation should take the land. Stillwater & Mechanicville St. Ry. Co. v. Slade, 36 A. D. 587 (1899).

The requirement that a railroad, before constructing any part of its road upon or through any private property, shall file a map or profile of its proposed route, applies to a proposed crossing of the right of way of another railroad. D., L. & W. R. R. Co. v. S., L. & B. R. R. Co., 28 Misc. 456, affd., 43 A. D. 621 (1899).

The word "extend" was not intended to be used in its restricted sense of prolongation in a given direction, but was intended to enable railroad companies to acquire a right of construction of additional routes which might be operated in connection with existing lines. Bohmer v. Haffen, 35 A. D. 381, affd., 161 N. Y. 390 (1900).

The last sentence of the section applies only to private property located outside of the streets in which the railroad is to be operated. Adee v. Nassau Elec. R. R., 72 A. D. 404 (1902), affd., 173 N. Y. 580.

A street railway company may condemn private property for the purpose of its organization. In re Rochester Elec. Ry. Co., 123 N. Y. 351 (1890); see, also, the earlier case on this subject, to wit: In re South Beach R. R. Co., 119 N. Y. 141 (1890).

Where an adult owns an undivided three-fourths of land sought to be condemned, but claims to own it all, and there are five infants claiming an interest in the land, in support of whose claims judgment has been rendered, and there are liens thereon, the railroad company may institute proceedings for condemnation upon the ground that it is unable to agree with the owners for the purchase of the land. Stillwater & Mechanicville St. Ry. Co. v. Slade, 36 A. D. 587 (1899).

A city ordinance requiring all railroads operating lines of cars in the streets of the city to run their cars during certain hours of the day not less than twenty minutes apart is operative. Mayor, etc. v. N. Y. & Harlem R. R. Co., 10 Misc. 417 (1894); see, also, Mayor v. Dry Dock, etc., R. Co., 133 N. Y. 104 (1892).

Street surface railroad corporations may operate cars designed and used exclusively for carrying express matter, freight or property. The use of the word "fare," in section 101 of the Railroad Law, does not indicate that the carriage of passengers alone is within the contemplation of the act. De Grauw v. Long Island Elec. Ry. Co., 43 A. D. 502 (1899), affd., 163 N. Y. 597.

The cars of a street railroad corporation have a paramount right to the use of that portion of the street occupied by their tracks, which lies between intersecting streets. Rosenblatt v. Brooklyn Heights R. R. Co., 26 A. D. 600 (1898).

A passenger who has signaled to stop at a point which is at that moment rendered dangerous is entitled to a reasonable time in which to alight. Norton v. Third Ave. R. R. Co., 26 A. D. 60 (1898).

The Legislature may grant the right to build an elevated road directly over a street surface railroad. Ninth Ave. R. R. Co. v. N. Y. El. R. R. Co., 3 Abb. N. C. 347 (1877).

Prior to the amendment of section 59a by L. 1902 street railroads could extend their lines under the provisions of section 90 so as to parallel existing lines without obtaining the consent of the board of railroad commissioners. N. Y. C. & H. R. R. R. Co. v. A. I. E. R. Co., 178 N. Y. 75 (1904), affg. 79 A. D. 645.

§ 171. Consent of property owners and local authorities. A street surface railroad, or extensions or branches thereof, shall not be built, extended or operated unless the consent in writing acknowledged or proved as are deeds entitled to be recorded, of the owners in cities and villages of one-half in value, and in towns, not within the corporate limits of a city or village, of the owners of two-thirds in value, of the property bounded on and also the consent of the local authorities having control of that portion of a street or highway upon which it is proposed to build or operate such railroad, extension or branch shall have been first obtained. Such consents of property owners in the county of Kings which shall be hereafter executed, may be forfeited unless within sixty days after the execution thereof, the same shall be recorded in the office of the register of such county. Such register is hereby directed upon the payment of the proper fees to record all consents left with him for that purpose in books to be provided by him and paid for out of the funds provided to meet the expenses of said office. Such books shall be indexed according to the names of the consenting property owners and also according to the names of the streets, roads or other highways upon which the property to which the consent relates shall be bounded. In case the recording of such consents shall be hindered, delayed or prevented by legal proceedings in any court or from any other or different cause not within the control of the corporation upon which such requirement is imposed, the time for the performance of such act is hereby and shall be deemed to be extended for the period covered by such hindrance, delay or prevention. The consents of property owners in one city, village or town, or in any other civil divi-

sion of the state, shall not be of any effect in any other city, village or town or other civil divisions of the state. Consents of property owners heretofore obtained to the building, extending, operating or change of motive power shall be effectual for the purposes herein mentioned and may be deemed to be sufficiently proved and shall be entitled to be recorded, wherever such consents shall have been signed, executed or acknowledged before an officer authorized by law to take acknowledgments of deeds, or before or in the presence of a subscribing witness, and without regard to whether or not the subscribing witness shall have affixed his signature in the presence of the subscriber, provided that the proof of such signing, execution or acknowledgment shall have been made by such subscribing witness in the manner prescribed by section three hundred and four of the real property law. In cities the common council, acting subject to the power now possessed by the mayor to veto ordinances; in villages the board of trustees; and in towns the superintendent of highways and the town board shall be the local authorities referred to; except that in villages where the control of the streets is vested in any other board or authorities, such other board or authorities shall be the local authorities referred to, and the consent of such other board or authorities hereafter or heretofore obtained shall be sufficient; if in any city or county the exclusive control of any street, avenue or other property which is to be used or occupied by any such railroad, extension or branch, is vested in any other authority, the consent of such authority shall also be first obtained. The value of the property above specified shall be ascertained and determined by the assessment roll of the city, village or town in which it is situated, completed last before the local authorities shall have given their consent, except property owned by such city, village or town, or by the state of New York, or the United States of America, the value of which shall be ascertained and determined by making the value thereof to be the same as is shown by such assessment roll to be the value of the equivalent in size and frontage of the adjacent property on the same street or highway; and the consent of the local authorities shall operate as consent of such city, village or town as the owners of such property. Whenever heretofore or hereafter a railroad has been or shall be constructed and put in operation for one year or the motive power thereon has been or shall be changed and put in operation for a

similar length of time, such facts shall be presumptive evidence that the requisite consents of local authorities, property owners and other authority to the construction, maintenance and operation of such railroad or change of motive power have been duly obtained. No consent of local authorities given prior to May second, nineteen hundred and one, shall be deemed invalid because of any portion of the road or route consented to not being connected with an existing road or route of the corporation obtaining or acquiring such consent and all statements of extension filed under section one hundred and seventy of this article in reference to the route or part thereof described in any consent of local authorities are hereby ratified and confirmed, whether the same were filed before or after the obtaining or acquiring of such consents, provided, however, that nothing herein contained shall be construed to affect any portion of a street surface railroad which is now in or upon any portion of a street which is under the jurisdiction of a park department in any city containing a population of over twelve hundred thousand inhabitants.

Formerly L. 1890, ch. 565 (Railroad Law), § 91, as am'd by L. 1892, ch. 676; L. 1893, ch. 434; L. 1894, ch. 723; L. 1895, ch. 545; L. 1896, ch. 855; L. 1901, ch. 638; L. 1903, ch. 537; L. 1905, ch. 650; L. 1907, ch. 156.

For forms of consent of property owners, see post, Forms Nos. 428, 429.

The second, third and fourth sentences of this section were inserted in 1905.

As enacted in 1890 (chapter 565), the foregoing section contained the following in relation to street surface railroads, to-wit: "But where such railroad runs through a street or avenue bounded on one side by a public square or park, the consent of one-half of the property owners on the opposite side of such square or park shall also be first obtained." The section as above amended in 1894, chapter 723, omitted the provision quoted and it was thereby repealed. McDermott v. Nassau Electric R. R. Co., 85 Hun 422 (1895).

Definition of General Franchise and Special Franchise.

The right to exist as a corporation is frequently called a franchise, as it is in one sense, but not in the sense that the grant of a right to build a railroad in a public street is a franchise. The right to be a corporation is a general franchise, which is subject to suspension, alteration or repeal, at the will of the Legislature. The right to be a corporation, or the corporate right of life, is inseparable from the corporation itself. It is a part of it and cannot be sold or assigned. That franchise is general and dies with the corporation, for it cannot survive dissolution or repeal. A special franchise is the grant of a right to use public property for a public use, but with private profit. When the right of way over a public street is granted, with leave to construct and operate a railroad thereon, the privilege is known as a special franchise. When acted upon such a franchise becomes property and cannot be repealed, unless power to do so is reserved in the grant although it may be condemned upon making compensation. Special franchises may

be made to an individual with the same legal force and effect as to a corporation, and unless there is some restriction in the grant they may be mortgaged and sold. Lord v. Equitable Life Assur. Soc., 194 N. Y. 212 (1909).

Individual May Acquire Franchise and Operate Railroad.

The Railroad Law contemplates that railroads are generally to be constructed and operated through the medium of corporations, organized for that express purpose, and to which are given the right of eminent domain and many other rights and privileges not possessed by natural persons, yet a municipality may grant a franchise to an individual for the construction and operation of a street railroad. Village of Phœnix v. Gannon, 195 N. Y. 471 (1909), and cases therein cited; Trojan Ry. Co. v. City of Troy, 125 A. D. 362 (1908), affd., 195 N. Y. 614; Geneva & W. Ry. Co. v. N. Y. C. & H. R. R. R. Co., 163 N. Y. 228 (1900); Woodruff v. Erie Ry. Co., 93 N. Y. 609, 617 (1883); Lord v. Equitable Life Assur. Soc., 194 N. Y. 212 (1909); City of New York v. Bryan, 196 N. Y. 158 (1909).

Delegated Power to Grant Franchises.

Not only the franchise to be a corporation, but also the power to grant franchises to a corporation, when formed, for use of the public streets, spring from the State, although granted through its agencies. The consent of the municipal authorities is but a step in the grant of a single indivisible franchise, to construct and operate the railroad. It is the elementary definition of a franchise that it is a grant from the sovereign power. Municipalities have only such power in this regard as has been delegated to them by the Legislature. City of New York v. Bryan, 196 N. Y. 158, 165 (1909), revsg. 130 A. D. 658; Village of Phœnix v. Gannon, 195 N. Y. 471, 474 (1909).

Franchise Granted Without Time Limit.

In the grant of a franchise to construct a railroad where no limit of time has been prescribed within which the road should be constructed, there is impliedly a covenant on the part of the grantees to execute the conditions and duties contained in the grant, and, therefore, if no time is prescribed, the franchise must be exercised within a reasonable time. City of New York v. Bryan, 196 N. Y. 158 (1909).

Failure to Procure Consents on One Street; Tracks Across Another Railway.

A street railway company, if otherwise authorized, may, upon obtaining a majority of consents on one street, enter thereon and construct its road; hence, if authorized to construct a road over certain streets it may maintain proceedings to ascertain what compensation shall be made for carrying its tracks over those of another company, although it has been unable to procure the necessary consents on other streets of the chartered route. Matter of Manhattan Bridge Three Cent Line v. Bklyn. Heights R. R. Co., 159 A. D. 567 (1913).

Requisites for Consent to Construct Over a Public Highway.

Before a street railway company will be permitted to construct and operate its road over a public highway it must obtain, first, the certificate of convenience and necessity from the public service commission provided by

the Railroad Law, section 9, or the consent of said Commission pursuant to the Public Service Commissions Law, section 53, or both, as the case may be; second, the consent of the local authorities pursuant to section 18 of article 3 of the Constitution and section 171 of the Railroad Law; and, third, the consent of the abutting property owners, or in lieu thereof the determination of commissioners in favor of the construction of the road, pursuant to said constitutional provision, and sections 171 and 174 of the Railroad Law. Manhattan Bridge Three Cent Line v. Bklyn. Heights R. R. Co., 78 Misc. 220 (1912). The consent of existing railroads on other parallel streets is not necessary. Id.

Upon Dissolution Secondary Franchises Become Vested in Trustees.

A judgment in an action under the Code, § 1798 (now Gen. Corp. Law, § 131), which results in vacating the charter or annulling the existence of a corporation does not work a confiscation of its rights and property, for, even if the life of the corporation be taken away, its rights and property become vested in its trustees in office at the time of its death. Peo. v. Westchester Traction Co., 123 A. D. 689 (1908); Peo. v. Bleecker St. & Fulton Ferry R. R. Co., 140 A. D. 611 (1910), affd., 201 N. Y. 594; Peo. v. O'Brien, 111 N. Y. 1 (1888).

Consents of Property Owners.

The consent of the owners of one-half of the property bounded on that portion of each street upon which the proposed railroad is to be built is necessary. Hilton v. 34th St. R. R. Co., 1 How. N. S. 453 (1885).

Where the issue was whether a street railroad had procured the consent of one-half in value of the property bounded on that portion of a street upon which it was proposed to operate the road, and the proposed line extended only 125 feet along a piece of property having a frontage of 273 feet, the railroad company could not avail itself of the consent as to the whole value of the premises, but only in the proportion of 125 to 273. Merriman v. Utica Belt Line St. R. R. Co., 18 Misc. 269 (1896).

In determining whether the requisite consents to the construction of a street railroad have been obtained, property bounded on the route, but fronting on adjoining streets, is to be considered. Tiedemann v. Staten Island M. R. R. Co., 18 A. D. 368 (1897).

The value of an entire tract abutting on the street, with buildings thereon, is to be considered, though it extends back to another street; it having no interior boundaries, natural or artificial, and being used as an entirety for a single purpose. Fox v. N. Y. C. I. Ry. Co., 113 A. D. 832 (1906).

Sections 91 and 102, relating to the obtaining of the consents of the local authorities and abutting property-owners, are not in conflict with section 78. Ingersoll v. Nassau Electric R. R. Co., 157 N. Y. 453 (1899), affg. 89 Hun 213.

The statute requires consents of owners of one-half of the property, measured in lineal feet, bounded upon the route where the change in motive power is proposed to be made. St. Michael's P. E. Church v. Forty-second St., Manhattanville & St. Nicholas Ave. Ry. Co., 26 Misc. 601 (1899).

In estimating whether a street railroad corporation has obtained the requisite consents of property-owners along its route, a corner lot situated opposite the outer curve of the proposed route must be counted. Sea Beach Ry. Co. v. Coney Island & Gravesend Elec. Ry. Co., 22 A. D. 477 (1897).

Consents to the construction of a street railroad given by abutting owners to its promoters, running to their legal representatives and assigns, and by

the promoters assigned to the street railroad company after its incorporation, are valid consents in the hands of the latter and cannot be attacked by a steam railroad company in order to prevent the crossing. Geneva & Waterloo Ry. Co. v. N. Y. C. & H. R. R. R. Co., 163 N. Y. 228 (1900), revsg. 24 A. D. 335, 24 A. D. 631.

Consents given by property owners to the construction and operation of a street railroad do not include the use of its tracks by another company. Colonial City Trac. Co. v. Kingston City R. R. Co., 153 N. Y. 540 (1897), affg. 15 A. D. 195.

As to the effect of a voluntary temporary change in a part of a route upon consents previously granted, see Trelford v. Coney Island & Brooklyn R. R. Co., 5 A. D. 464 (1896).

Where an owner of premises on a highway signed the following instrument "For value received, I hereby grant to the Rochester Railway Company the right to construct, maintain and operate a double-track railroad upon Plymouth avenue, from the bridge over the abandoned Genesee Valley canal to the southerly end of Plymouth avenue, such railroad to consist of a single track upon each side of the roadway, and to be operated by electricity as motive power," held, that such instrument gave no right to the railroad company to lay and operate a railroad beyond the limits of the street therein named. Curvin v. Rochester Ry. Co., 78 Hun 555 (1894). Such instrument must have such practical operation as the case permits, and, if two tracks could not be laid in front of the premises of the owner consenting, the company must be content with one, and that one should be laid on the traveled track of the highway, if necessary. Id. Such instrument was the grant of an easement in addition to that involved in its use as a highway. Id.

The use of a street, not named in its articles of association, by a railroad company, merely for hauling cars to and from a car storehouse, is impliedly, if not expressly, sanctioned by the law when a majority of abutting owners consent and the storehouse is located upon the only vacant land available, which was not within the restrictions imposed by the city authorizing the company to make necessary connections in the street named in the articles and "in such parts of those adjacent thereto as may be necessary." Bklyn. Heights R. R. Co. v. City of Brooklyn, 152 N. Y. 244 (1897).

As to whether the Legislature has power to authorize construction of a railroad upon a street or highway, where the fee of the street remains in the original owner without granting compensation to the abutting lot owner. See Fanning v. Osborne, 102 N. Y. 441 (1886).

Property-owners' consents need not be under seal nor need they include a release from damages. Matter of Cortland & H. Horse R. R., 98 N. Y. 336 (1883), affg. 31 Hun 72.

Consents of Local Authorities.

When a street railroad corporation has not, either by its certificate of incorporation or by valid extension proceedings, located a route upon an avenue, it has no capacity to receive the consent of the local authorities as to such avenue. McClean v. Westchester Electric Ry. Co., 25 Misc. 383 (1898).

Where a street railroad company running for seven miles through two separately constituted villages and a town where a crossing is located, obtains the consent of the highway commissioners of the town to the construction of the street railroad on the town highway, the consent is sufficient and the failure to obtain the consents of the village authority is immaterial since they could have no force. Geneva & Waterloo Ry. Co. v. N. Y. C. & H. R. R. R. Co., 163 N. Y. 228 (1900), revsg. 24 A. D. 631, 24 A. D. 335.

It is not the intention of the general railroad legislation to require consents of local authorities or property-owners to the operation by one railroad company of its cars over the tracks of another by virtue of a traffic contract, but the intention has been to require such consents only to the construction, maintenance or operation of new railroad tracks. Ingersoll v. Nassau Electric R. R. Co., 157 N. Y. 453 (1899), affg. 89 Hun 213.

In the absence of facts showing that the consent of the municipal authorities was procured by fraud and corruption, an action will not lie to set aside a consent granted for the construction of a street surface railroad. Kittinger v. Buffalo Trac. Co., 160 N. Y. 377 (1899), affg. 25 A. D. 329.

A street surface railroad company operating upon its own right of way through a town is forbidden by section 18, article 3, of the State Constitution, from building its line across the highway of the town without obtaining the consent of the local authorities. Matter of Syracuse & South Bay Ry. Co., 33 Misc. 510 (1901). The corporation cannot and need not obtain the consent of the Supreme Court as provided in section 11 of the Railroad Law, for that section has no application to such case. Id.

A condition imposed by highway commissioners of a town, on granting consent to the construction of a railroad, which requires passengers to be transported for a prescribed fare, is not void as conflicting with the rights of the highway authorities in the other towns or villages to prescribe conditions. Gaedeke v. Staten Island Midland R. R. Co., 46 A. D. 219 (1899).

The interest in the street obtained from municipal authorities is in perpetuity to the extent required for a street railroad. Peo. v. O'Brien, 111 N. Y. 1 (1888).

The foregoing section, compelling a street surface railroad company to obtain the consents of the local authorities and abutting owners before it can apply to acquire the right to use the connecting track of another company by a proceeding in invitum, under section 102 of the Railroad Law, is absolute and does not depend upon what the defendant company might have power to agree to voluntarily. Colonial City Trac. Co. v. Kingston City R. R. Co., 154 N. Y. 493 (1897).

An attempt to build a street railroad on a public highway without authority is a public nuisance. Fanning v. Osborne, 102 N. Y. 441 (1886).

The highway commissioners are, under the Railroad Law, section 91, the legal authorities who must consent to the use of a bridge by a street railroad corporation, and, where the company has obtained only the consent of the village trustees, a motion to vacate a temporary injunction restraining the use of the bridge must be denied. Town of Lysander v. Syracuse, Lakeside & B. Ry. Co., 31 Misc. 330, affd., 51 A. D. 617 (1900).

A street railroad must obtain the consent of both the lawful authorities and the property-owners before it can apply to the courts to condemn the right to use the tracks of another company. Colonial City Trac. Co. v. Kingston City R. R. Co., 153 N. Y. 540 (1897), affg. 15 A. D. 195.

Conditions imposed by municipal authorities which were void when imposed may be ratified and confirmed by act of the Legislature. City of N. Y. v. Eighth Ave. R. R. Co., 118 N. Y. 389 (1890).

A railroad corporation which has made a traffic contract with two other roads, for operation over their tracks, may operate under such contract without first obtaining the consents of the property-owners and of the municipal authorities. Kunz v. Brooklyn Heights R. R. Co., 25 Misc. 334 (1898).

Commissioners of highways of a town, whose consent to the construction of a road is necessary, may, as a condition, require the railroad company to execute an agreement to carry passengers for one fare between certain points

and to issue transfers to connecting lines, and where the railroad disregards such agreement, a passenger, who is charged two fares, may maintain an action to recover the additional fare. The consent of highway commissioners was not made unnecessary by the Highway Law, ch. 568, L. 1890. Gaedeke v. Staten Island Midland R. R. Co., 43 A. D. 515 (1899).

The provision in a contract entered into by a street railroad corporation and the trustees of a village, to the effect that, in consideration of a franchise granted to the railroad corporation, the latter would construct a railroad within a year, and that upon its failure so to do, the sum of $10,000 would be paid "as liquidated damages for said failure and not by way of penalty," will not be regarded as a penalty. Peekskill State Camp & Mohegan R. R. Co. v. Peekskill, 21 A. D. 94, affd., 165 N. Y. 628.

Chapter 649, Laws of 1896, validating and confirming certain consents theretofore given by the local authorities of cities of the first and second class, in the construction, operation and maintenance of street surface railroads therein, is a general bill within the meaning of that term as used in the Constitution, and therefore a valid act. Kittinger v. Buffalo Traction Co., 160 N. Y. 377 (1899), affg. 25 A. D. 329.

The consent of local authorities may be procured either before or after that of the property-owners. In re Broadway Surface R. R. Co., 34 Hun 414 (1884).

A grant of a street railroad franchise providing that the cars shall be licensed by the mayor and that the grantee shall pay an annual fee per car for such license requires the holder of the franchise to pay for each car run over the line, not merely for the greatest number in daily use during the year. City of New York v. N. Y. City Ry. Co., 126 A. D. 36 (1908), affd., 193 N. Y. 680.

Where the consent of highway commissioners to the construction of a street surface railroad provides that the grant shall lapse unless one track shall be constructed and operated within two years, except in the case of delay by injunction, legal proceedings or causes beyond the control of the railroad, the latter exception should be construed as applying only to conditions for delay not then known to the parties, such as interference by the courts or other acts of interference over which the railroad had no control. Hence when such railroad, having power to enforce its right of way, fails to construct and operate the track within two years, the grant of the highway commissioners terminates and cannot be continued by a subsequent board of commissioners under the guise of a resolution extending the time over which the railroad was required to file a bond. Manton v. South Shore Traction Co., 121 A. D. 410 (1907).

Taxpayer's Action.

An action to prevent the construction of the road does not lie in favor of a resident and taxpayer not owning real property on the street where the road is to be laid, and to whom it will not be specially injurious. Davis v. Mayor, etc., 14 N. Y. 506 (1856).

An abutting property-owner may maintain an action to restrain a railroad corporation from unlawfully maintaining and operating a railroad along the street. McClean v. Westchester Electric Ry. Co., 25 Misc. 383 (1898).

Although the unauthorized maintenance of a railroad in a city street constitutes it a public nuisance, an owner of property bounded by the exterior line of the street, not owning the fee thereof, is not entitled to enjoin such maintenance and operation of the railroad, in the absence of proof that he has suffered special damages therefrom, and, even where it appears that special damage has resulted to the owner, and that the railroad was constructed with-

out the necessary consents, it rests within the discretion of the court to grant an injunction or to give the railroad company a reasonable time within which to obtain such consents. Black v. Brooklyn Heights R. R. Co., 32 A. D. 468 (1898).

An abutting owner, who has no rights in the fee of a street, has sufficient interest to restrain by injunction the construction, in the street, of a railroad upon the trolley system, where the company is attempting to construct the road without having procured the consent of half of the property in value bounded on the proposed line. Merriman v. Utica Belt Line St. R. R. Co., 18 Misc. 269 (1896).

In a taxpayer's action to restrain the building of a street railroad, a complaint setting forth that a resolution of the common council was corruptly passed to the injury of the property of the city, and confirmed by an act of the Legislature, does not state a cause of action. Kittinger v. Buffalo Traction Co., 25 A. D. 329, affd., 160 N. Y. 377 (1899).

New York City.

From the date of passage of the charter of Greater New York, chapter 378, Laws of 1897, the granting of a franchise to operate a street railroad within the new city for a longer term than twenty-five years, is forbidden. Norris v. Wurster, 23 A. D. 124 (1897).

The provision of section 73 of the Greater New York charter (L. 1897, ch. 378), that after the approval of the act no franchise or right to use the streets of the city shall be granted for a longer period than twenty-five years, operated to restrict the power of the city authorities within the territory of the new city thereby created, from the date of the approval of the act May 4, 1897, and from that date, deprived the local authorities of Brooklyn of power to grant a consent to operate a railroad in the streets for a period beyond twenty-five years. Blaschko v. Wurster, 156 N. Y. 437 (1898), affg. 23 A. D. 625.

A resolution of the New York city dock department, granting a license to a street railway company to lay tracks over property reclaimed from the river, cannot be attacked by a taxpayer on the ground that it constitutes a grant of a franchise. Hart v. New York, 16 A. D. 227 (1897). See, also, Central Crosstown R. R. Co. v. Met. St. Ry. Co., 16 A. D. 229.

The department of public parks of the city of New York did not have that exclusive control of the streets contemplated by sections 91 and 92 of the Railroad Law, which made the consent of the commissioner of street improvements necessary to the construction of a railroad. Bohmer v. Haffen, 35 A. D. 381; affd., 161 N. Y. 390 (1900).

The commissioner of street improvements of certain wards of the city of New York has not such exclusive control of the streets as to require his consent in addition to that of the common council for the construction of street railroads therein. Bohmer v. Haffen. 161 N. Y. 390 (1900), affg. 35 A. D. 381.

The board of estimate and apportionment of the city of New York has no authority to grant to a property-owner a permit to lay private railroad tracks in front of his premises and operate express cars thereon for the conveyance of goods between his property and a street railroad, pursuant to section 242 of the city charter, and an adjoining owner whose property will be damaged thereby is entitled to an injunction restraining the taking of any steps under such permit. Hatfield v. Straus, 189 N. Y. 208 (1897).

§ 172. Consent of local authorities; how procured. The application for the consent of the local authorities shall be in writing

and before acting thereon such authorities shall give public notice thereof and of the time and place when it will first be considered, which notice shall be published daily in any city for at least fourteen days in two of its daily newspapers if there be two, if not, in one, to be designated by the mayor, and in any village or town for at least fourteen days in a newspaper published therein, if any there shall be, and if none, then daily in two daily newspapers if there be two, if not, one published in the city nearest such village or town. Such consent must be upon the expressed* condition that the provisions of this article pertinent thereto shall be complied with, and shall be filed in the office of the clerk of the county in which such railroad is located. Whenever the consent of the common council of a city is applied for, the first consideration, of which notice is hereby required, may be by committee of such common council. Any such notice, publication or consideration heretofore or hereafter given, made or had in substantial conformity with the requirements of this section, is and shall be sufficient notice, publication and consideration for all the purposes hereof notwithstanding any conflicting provision of any local or special act or charter.

Formerly L. 1890, ch. 565 (Railroad Law), § 92, as am'd by L. 1892, ch. 676; L. 1893, ch. 434.

For form of notice of application, petition to authorities and consent of latter, see post, Forms Nos. 430–432.

In granting a franchise for the use of the public streets in New York city, the procedure is governed by section 74 of the city charter rather than by this section, as the charter provision is later in date and covers the whole subject-matter. Schieffelin v. McClellan, 135 A. D. 665 (1909), dis. on other grounds, 197 N. Y. 610.

The method of procedure upon the hearing of an application by a railroad corporation for consent of the local authorities of a village to the laying of tracks is not defined in the statute, but rests largely in the discretion of the village board, and while the courts would not tolerate an abuse of discretion which arbitrarily excluded a fair and reasonable hearing of interested parties, yet when it appears that parties have had a hearing and that a reasonable opportunity has been given for the hearing of all, the court will not interfere and restrain action by the board unless it be clearly shown that this right has been unnecessarily denied and that actual prejudice and damage has resulted or will result to the party seeking redress. Secor v. Village of Pelham Manor, 6 A. D. 236, 39 N. Y. Supp. 993 (1896). The statute does not provide that the board should continue to adjourn for the purpose of hearing interested parties, or that such parties acquired the right to be heard because the board adjourned without taking formal action upon the application. Id.

When a railroad company becomes incorporated it holds a charter from the State and is responsible only to it for the fulfillment of the duty to operate its franchise during the term specified; it is not to be supposed that the

* So in the original.

Legislature conferred a franchise which could, at some time, at the option of the municipal corporation, be surrendered to it. Potter v. Collis, 156 N. Y. 16 (1898).

Where a railroad corporation has applied to the board of trustees of a village for permission to lay tracks the requirement as to public notice was satisfied by a publication of such notice once a week for four consecutive weeks in a newspaper, which, although not printed in the village, is circulated and given to the public at the village, and whose publishers have their place of business and mailing list there. Secor v. Village of Pelham Manor, 6 A. D. 236, 39 N. Y. Supp. 993 (1896).

Where a street railroad company is authorized by a municipality to locate and erect trolley poles such poles are not a nuisance per se, but they must be erected so as not unduly and unnecessarily to interfere with the use of streets by the public or with the rights of abutting property-owners. Lambert v. Westchester Electric Railroad Co., 191 N. Y. 248 (1908), affg. 115 A. D. 78.

The prohibition in section 59 against the exercise of the powers of a railroad corporation until a certificate under said section has been obtained has reference solely to the additional powers specially conferred relating to the survey, acquisition of land, construction, etc., and does not apply to the initial proceedings peculiar to street railroads, such as the obtaining of the consents of property-owners and the local authorities. McWilliams v. Jewett, 14 Misc. 491 (1895).

A consent of local authorities of a city to the construction of a railroad upon its streets, obtained in proceedings in compliance with the city charter, is valid. Matter of Buffalo Traction Co., 25 A. D. 447 (1898), affd., 155 N. Y. 700.

The terms of a license to lay tracks do not attach to a subsequent license to extend the railroad, not stating any terms. Mayor, etc., of New York v. Eighth Ave. R. R. Co., 7 A. D. 84 (1896).

The procurement of a certificate of necessity from the railroad commissioners under section 59 is not a condition precedent to an application by a street surface railroad corporation for municipal consent to use the streets and the publication of notice of a public hearing in relation to such application. McWilliams v. Jewett, 14 Misc. 491 (1895).

The municipal authorities may impose any condition which seems to them to be proper, as the terms for their consent. Peo. ex rel. West Side St. Ry. Co. v. Barnard, 110 N. Y. 548 (1888).

When a street railroad seeks to cross a bridge, one-half of which lies in a village in one town and the other half in a village in an adjoining town, the bridge having been built by the two towns, both of which are chargeable with its repair and maintenance, the consent of the highway commissioners of the two towns is a prerequisite, under section 18 of article 3 of the Constitution, to the construction and operation of the railroad. Town of Wheatfield v. Tonawanda Street R. R. Co., 92 Hun 460 (1895). A consent obtained from the trustees of the two villages will not, in such a case, satisfy the constitutional requirement. Id.

From the date of the passage of the Greater New York charter, L. 1897, ch. 378, the granting of a franchise to operate a railroad within the territory of the new city for a longer term than twenty-five years, with certain privileges of renewal, is forbidden. Norris v. Wurster, 23 A. D. 124 (1897).

The provision of the Greater New York charter, Laws of 1897, chapter 378, section 73, that "after the approval of this act no franchise or right to use the streets, avenues, parkways or highways of the city shall be granted by the municipal assembly to any person or corporation for a longer period than

twenty-five years," restricted the power of the aldermen or city authorities within the limits of the new city thereby created, from the date of the approval of the act, and from that date deprived the local authorities of Brooklyn of power to grant a consent to operate a railroad in the streets for a period beyond twenty-five years. Blaschko v. Wurster, 156 N. Y. 437 (1898), affg. 23 A. D. 625.

Where a turnpike company, maintaining a highway as a turnpike road, has acquired from adjoining landowners the right to a strip of land on each side of the highway for a bridle-path and has given consent to a railroad company to use a portion of said bridle-path for its railroad, such consent is not sufficient under the statute; the consent, so given, has no effect save as it regarded the rights and interests of the turnpike company; the highway had not ceased to be such because used as a turnpike, and the administrative duty of the town highway commissioners remained unimpaired, so far as its exercise was required for the preservation of the rights and interests of the public; therefore, their consent was requisite. In re Rochester Elec. Ry. Co., 123 N. Y. 351 (1890), distg. 77 N. Y. 248.

A special act exempting a consolidated company from the provisions of sections 93, 95 and 98 of this law did not confer upon it any exclusive immunity or privilege, but simply operated to relieve the corporation from conditions which had been imposed by the Legislature. Bohmer v. Haffen, 35 A. D. 381, affd., 161 N. Y. 390 (1900).

§ 173. Condition upon which consent shall be given; sale of franchise at public auction. The consent of the local authorities in any city of the first class must contain the condition that the right, franchise and privilege of using any street, road, highway, avenue, park or public place shall be sold at public auction to the bidder who will agree to give the city the largest percentage per annum of the gross receipts of such corporation, with a bond or undertaking in such form and amount and with such conditions and sureties as may be required and approved by the comptroller or other chief fiscal officer of the city, for the fulfillment of such agreement and for the commencement and completion of its railroad within the time designated by law and for the performance of such additional conditions as the local authorities in their discretion may prescribe. Whenever such consent shall provide for the sale at public auction of the right to construct and operate a branch or extension of an existing railroad, such consent shall provide that but one fare shall be exacted for passage over such branch or extension and over the line of road which shall have applied therefor; and further, that if such right shall be purchased by any corporation other than the applicant, that the gross receipts from joint business shall be divided in the proportion that the length of such extension or branch so sold shall bear to the entire length of the road whether owned or leased which shall

have applied therefor and of such branch or extension, and that if such right shall be purchased by the applicant, the percentage to be paid shall be calculated on such portion of its gross receipts as shall bear the same proportion to the whole value thereof as the length of such extension or branch shall bear to the entire length of its road, whether owned or leased. The bidder to which such right, franchise and privilege may be sold must be a duly incorporated railroad corporation of this state, organized to construct, maintain and operate a street railroad in the city for which such consent may be given; but no such corporation shall be entitled to bid at such sale unless at least five days prior to the day fixed for such sale, or five days prior to the day to which such sale shall have been duly adjourned, the corporation shall have filed with the comptroller or other chief fiscal officer of the city, a bond in writing and under seal, with sufficient sureties, to be approved by such comptroller or officer, conditioned that if such right, franchise and privilege shall be sold to such corporation, to pay to the city where such railroad is situated the sum of fifty thousand dollars as liquidated damages and not by way of penalty in the event of the failure of such bidder to fulfill the terms of sale, comply with the provisions of this article pertinent thereto, and complete and operate its railroad according to the plan or plans and upon the route or routes fixed for its construction within the time hereinafter designated for the construction and completion of its railroad, and also conditioned to pay to the corporation first applying for the consent, if it shall not be the successful bidder, the necessary expenses incurred by such corporation prior to the sale pursuant to the requirements and direction of the local authorities, within twenty days after such sale and upon the certificate of the comptroller or other officer conducting the same as to the sum or amount to be paid. Notice of the time, place and terms of sale, and of the route or routes to be sold, and of the conditions upon which the consent of the local authorities to the construction, operation and extension of such street railroad will be given, must be published by such local authorities for at least three successive weeks, at least three times a week in two daily newspapers of the city to be designated by the mayor. The comptroller or other chief fiscal officer of the city shall attend and conduct such sale and may adjourn the same from time to time, but not more than four weeks in all, unless further adjournments should, in his discretion, be necessary by reason of the pendency

of legal proceedings, and shall cancel any bid if in excess of the gross receipts, leaving in force the highest bid not in excess, or if the bidder shall not have furnished adequate security entitling such bidder to bid, or shall otherwise fail to comply with the terms and conditions of sale, and shall resell the consent and license in the same manner as hereinbefore provided for the first sale. The bidder who may build and operate such railroad shall at all times keep accurate books of account of the business and earnings of such railroad, which books shall at all times be subject to the inspection of the local authorities. In the event of the failure or refusal of the corporation operating or using such railroad to pay the rental or percentages of gross earnings agreed upon, and after notice of not less than sixty days to pay the same, the local authorities interested therein may apply to any court having jurisdiction upon at least twenty days notice to such corporation, and after it shall have had an opportunity to be heard in its defense, for judgment declaring the consent and right to operate and use such railroad forfeited and authorizing the sale again of the same in the manner hereinbefore prescribed, provided, however, that no such resale of any such consent and right heretofore granted shall be authorized except upon the condition that the same shall be subject to all liens and incumbrances existing on said railroads at the time such forfeiture may have been declared. All consents hereafter given by the local authorities, unless it be otherwise provided in such consent or in some renewal thereof may be forfeited at the expiration of two years thereafter. The board of sinking fund commissioners of any city shall have power to reduce, compromise or release any obligation or liability to the mayor, aldermen and commonalty of such city under the provisions of chapter six hundred and forty-two of the laws of eighteen hundred and eighty-six, or of this chapter, whenever, in the opinion of such board, such release or compromise shall be just or equitable, or for the public interest, the reason for any such release or compromise to be stated in the recorded proceedings of such board. No lease by any company organized under section five of this chapter and owning a right, privilege or franchise of using any street, avenue, highway or public place for railroad purposes, which was sold prior to May nineteenth, nineteen hundred and eight, under the provisions of this section, made after said date to any street surface railroad company which is not subject to the payment of any percentage pursuant to this section, and

which is not organized for the purpose of operating a railroad in a city of the first class, shall be valid until the lessee company shall have filed in the office of the secretary of state and in the office of the clerk of the county where its certificate of incorporation is filed, its acceptance in writing and under its corporate seal of the provisions of this section as now amended; and upon such acceptance being filed, the total percentage amount thereafter to be paid annually under this section and under section one hundred and seventy-five of this chapter, shall be at the rate of five per centum of the gross receipts derived from the operation of the roads of the lessor and lessee companies considered as one system. The lessee company, at the time of filing its acceptance aforesaid, shall also file in the same offices a bond to the people of the state, executed in duplicate by it and a surety company authorized by law to act as surety on bonds and undertakings, in the penal sum of fifty thousand dollars, and conditioned for the faithful payment annually of the total percentage aforesaid, and such bond shall be deemed to be a full compliance with the condition for a bond or undertaking required by this section to be provided for in the conditions of the consent of the local authorities and shall supersede any such bond or undertaking theretofore given. Whenever it shall be desired to unite two street surface railroad routes at some point not over one-half mile from such respective lines or routes, and establish by the construction of such connection a new route for public travel, and the corporation or corporations owning or using such railroads shall consent to operate such connection as a part of a continuous route for one fare, and it shall appear to the local authorities that such connection cannot be operated as an independent railroad without inconvenience to the public but that it is to the public advantage that the same should be operated as a continuous line or route with existing railroads, or whenever for the purpose of connecting with any ferry or railroad depot, it shall be desired to construct an extension or branch not more than one-half mile in length, of any street surface railroad corporation, no sale of such franchise shall be made as provided in this section, but any consent of the local authorities for the construction and operation of such connection, extension or branch shall provide that the corporation or corporations operating such connection, extension or branch shall pay into the treasury of said city annually the percentage provided for extensions or branches in section one hundred and seventy-five of this chapter, for the pur-

poses, at the times, in the manner and upon the conditions set forth in such section. Nothing herein contained shall be construed as superseding, repealing or modifying any provision of the charter of any city, village or town, nor as modifying or affecting the terms of a certain contract bearing date January first, eighteen hundred and ninety-two, entered into by and between the city of Buffalo and the various street surface railroad corporations therein named in said contract, nor as modifying or affecting the terms of a certain contract bearing date the twenty-fifth day of February, eighteen hundred and ninety, entered into by and between the city of Rochester and the street surface railroad corporation therein named nor as modifying or affecting any contract heretofore entered into between a street surface railroad corporation and any city of the third class, town or village regulating the payment of percentages or paving of streets, and any city of the third class, town or village, is hereby authorized to enter into any such form of contract with any street surface railroad corporation, and any such contract entered into before said date is hereby ratified and confirmed. The local authorities may, in their discretion, make their consent to depend upon any further conditions respecting other or further security, or deposit, suitable to secure the construction, completion and operation of the railroad within any time not exceeding the period prescribed in this article and respecting the character, quality or motive power of the road to be completed and respecting the grouping of streets, avenues and highways into one route, or into several routes, for the purpose of a single sale of the franchise, right or privilege for all the routes collectively, or of the separate sale for each route or street, as said local authorities may think expedient and respecting the payment of the percentage agreed to be paid at the sale upon all the lines operated by the successful bidder within the city and respecting any matter involved in or affecting the computation of percentage payments and respecting the use of the railroads to be constructed under the consent by any other company and respecting the interchange of traffic and division of fares between the company operating such railroads and any other company, and respecting the application of any provision herein contained as to carriage of passengers for single fare and the division of gross receipts and the payment of percentages to the line leased or operated under contract by the applicant for an extension, and also respecting any other matter concerning which, in their judgment, further conditions would be

for the public interest. Nothing herein contained shall apply to, or affect any grant hereafter made under the provisions of title one, chapter three of chapter three hundred and seventy-eight of the laws of eighteen hundred and ninety-seven and the amendments thereto known as the Greater New York charter.

Formerly L. 1890, ch. 565 (Railroad Law), § 93, as am'd by L. 1892, ch. 306, and ch. 676; L. 1893, ch. 434; L. 1901, ch. 494; L. 1908, ch. 475.

As to constitutionality of this section and the confirmation of pending contracts. Davidge v. Binghamton, 62 A. D. 525 (1901).

Under this section and three years after consents have been obtained, a commissioner of highways of a town may, as a condition of granting on May 12, 1896, a consent to the construction of a railroad, provide that if the road is not completed by January 1, 1897, "then this franchise shall be forfeited, and the rights and privileges granted by it shall cease and determine without any action or proceeding in law or otherwise." Dusenberry v. N. Y., W. & C. Traction Co., 46 A. D. 267 (1900). The consent, although broad enough to work a forfeiture without legal proceedings, will not be given that effect, and, in an action to establish the forfeiture, because of a non-compliance with such condition, the corporation may show facts constituting a legal excuse for its non-compliance or a waiver thereof or an estoppel. Id. Where affidavits, used upon a motion for an injunction restraining operation of a railroad, specify details wherein the company has failed to obtain consent of the owners of two-thirds in value of the property bounded upon the street in which it is constructing its road, the burden is upon the railroad company to make clear proof that it has the necessary consents. Id. Where the Legislature has regulated the subject-matter, it is not competent for persons charged with the duty of giving their consent to the performance of a particular act to impose different conditions. Id.

An act exempting a railroad company from the provisions of sections 93, 95 and 98 does not confer upon it any exclusive immunity or privilege, but simply operates to relieve the corporation from the conditions which had been imposed by the Legislature. Bohmer v. Haffen, 35 A. D. 381, affd., 161 N. Y. 390 (1900).

Two extensions of an existing street surface railroad are not one extension and franchise, because they are to be connected by an intermediate section of the main line of the applicant. Beekman v. Third Ave. R. R. Co., 153 N. Y. 144 (1897), affg. 13 A. D. 279.

A city cannot make a valid sale of more than one extension of an existing street surface railroad at the same sale when the extensions are separated from each other in such a way that they can only be operated together over the line of the existing railroad. Beekman v. Third Ave. R. R. Co., 153 N. Y. 144 (1897), affg. 13 A. D. 279.

The common council has no power to impose as a condition of the sale of an extension or extensions of an existing street surface railroad, that such railroad, if a purchaser, shall pay into the city treasury a sum of money in cash, within a certain time after the right to build the extension has been struck off to it, in addition to the percentage of gross receipts bid by it upon such sale. Beekman v. Third Ave. R. R. Co., 153 N. Y. 144 (1897), affg. 13 A. D. 279.

The State has no power to interpose as a party in suits in which it is not interested to prevent multiplicity of suits between adverse claimants. Chapter 310, Laws of 1886, is not retroactive. Said chapter is unconstitutional. Peo. v. O'Brien, 111 N. Y. 1 (1888), revsg. 45 Hun 519.

In a case under section 59 of the Railroad Law, in which the railroad commissioners refused to issue a certificate of public convenience and necessity, but without prejudice to a renewal of the application, on the ground that the company should have first obtained the consent of the local authorities as required by section 93, it was held that the fact that the railroad commissioners had refused such certificate does not prevent the railroad company from becoming a bidder at a sale in the city of New York. Matter of Empire City Traction Co., 4 A. D. 103 (1896).

The court will not entertain an action by a municipal corporation to have it adjudged, in respect to an auction sale of a street railroad franchise, whether bidding has passed beyond reasonable and valid bids; which is the highest legal and valid bid, and to have the municipality directed to award the franchise accordingly, or whether biddings should be canceled and a resale ordered, and that the court protect the city's interest in the franchise, and instruct its comptroller as to his official duty in the premises. City of New York v. Fitch; North N. Y. City Trac. Co. et al., 9 A. D. 452 (1896).

The local authorities may impose a shorter term for the construction of the road than that provided by the general law and may require the giving of a bond. South Shore T. Co. v. Town of Brookhaven, 116 A. D. 749 (1907).

The requirement of the first sentence of this section, for the sale of franchises at public auction, cannot be construed to apply to the city of Buffalo, because of the subsequent provision of such section that "the provisions of this section as now amended shall apply to all cities of the first class," for, although the city of Buffalo is a city of the first class, it has not the population prescribed in the first sentence referred to. An effect should be given to above provisions of the statute by construing the subsequent declaration as rendering all cities of the first class liable to the rules and regulations prescribed by the amended section, save those provisions which by the express language of the first sentence are confined to cities of the first class having a prescribed population. Kuhn v. Knight, 190 N. Y. 339 (1907).

Individual May Purchase Franchise.

An individual can lawfully bid in a franchise to operate a surface railway. Such individual bidder, if successful, becomes obligated to form a corporation with powers extending over the streets, or to assign his bid to some one who will carry out its terms. The franchise must be sold to the highest bidder and the acceptance of any other bid is illegal. Trojan Ry. Co. v. City of Troy, 125 A. D. 362 (1908), affd., 195 N. Y. 614 (1909), on authority of Village of Phoenix v. Gannon, 195 N. Y. 471 (1909).

Although the Railroad Law contemplates that railroads are generally to be constructed and operated through the medium of corporations organized for that express purpose, a municipality can grant a franchise to an individual to construct and operate a street railroad, and a bond given to secure performance of a duty which is coupled with the right granted, is valid. Village of Phoenix v. Gannon, 195 N. Y. 471 (1909), revsg. 123 A. D. 93.

§ 174. Proceedings if property owners do not consent. If the consent of property owners required by any provision of this article can not be obtained, the corporation failing to obtain such consents may apply to appellate division of the supreme court held in the department in which it is proposed to construct its road for the appointment of three commissioners to determine whether

such railroad ought to be constructed and operated. Notice of such application must, at least ten days prior thereto, be served, personally, upon each non-consenting property owner by delivering the same to the person to whom such property is assessed upon such assessment-roll or by duly mailing the same, properly folded and directed, to such property owner at his post-office address with the postage prepaid thereon. If the person upon whom service is to be made is unknown, or his residence and post-office address are unknown and cannot by reasonable diligence be ascertained, service of such notice may be made by publishing the same in such newspaper of the county as the court may direct, at least once a week for two successive weeks. Upon due proof of service of such notice the court to which the application is made shall appoint three disinterested persons, who shall act as commissioners, and who shall, within ten days after their appointment, cause public notice to be given of their first meeting in the manner directed by the court, and may adjourn from time to time, until all their business is completed. Vacancies may be filled by the court after such notice to parties interested as it may deem proper to be given; and the evidence taken before as well as after the happening of the vacancy shall be deemed to be properly before such commissioners. After a public hearing of all parties interested, the commissioners shall determine whether such railroad ought to be constructed and operated, and shall make a report thereon, together with the evidence taken, to the appellate division, within sixty days after appointment, unless the court, or a judge thereof, for good cause shown, shall extend such time; and their determination that such road ought to be constructed and operated, confirmed by such court, shall be taken in lieu of the consent of the property owners hereinbefore required. The commissioners shall each receive ten dollars for each day spent in the performance of their duties and their necessary expenses and disbursements, which shall be paid by the corporation applying for their appointment.

Formerly L. 1890, ch. 565 (Railroad Law), § 94, as am'd by L. 1892, ch. 676.

Appointment of Commissioners.

The court is not vested with discretion to grant or deny the motion upon a consideration of the utility or necessity of the proposed road, nor has it power to deny the application because of failure of the applicant to procure the requisite consent of another company. Inability to obtain consent of property holders is the only prerequisite to the application. In re Thirty-fourth St.

R. R. Co., 102 N. Y. 343 (1886). The court primarily possesses mere naked power of appointment, and cannot pass upon the merits of the application until the commissioners have reported. Id.

The only prerequisite to the appointment of commissioners to determine whether such railroad ought to be constructed and operated is the fact that consent of property owners cannot be obtained. The consent of municipal authorities is a prerequisite to the construction, extension or operation of the railroad, but, as such consent is not necessary to the appointment of commissioners, the question whether it has been given does not necessarily arise upon motion to confirm their report. Matter of Auburn City Ry. Co., 88 Hun 603 (1895).

A petition showing the total valuation of property on the portion of each street upon which the road is to be built, is sufficient when it appears therefrom that refusals to consent represented more than one-half of the total valuation. In re People's R. R. Co., 112 N. Y. 584. The reasons for the refusals of property owners to consent need not be given. In re B'way Surface R. R. Co., 34 Hun 414 (1885).

Where it is sought to take property of an individual under powers granted to a corporation to be formed in a particular manner, the constitutional protection of the rights of private property requires that the powers granted be strictly construed, and all prescribed conditions performed. N. Y. Cable Co. v. Mayor, etc., of N. Y., 104 N. Y. 3. It must be a corporation de jure. Id. When the power is conferred upon a corporation duly formed, it will not be defeated simply because the corporation has done or omitted some act which may cause a forfeiture of its rights and franchises, as it rests with the State to determine whether such forfeiture will be enforced. Id.

Only owners whose names appear on the assessment-roll are entitled to notice. 34 Hun 414 (1885), above. Notice enables property owners to appear and oppose the application. 102 N. Y. 343, above.

Power of Supreme Court.

The determination of commissioners is not operative until their report is confirmed by the General Term. Such order is discretionary and not reviewable. In re Kings Co. El. R. R. Co., 82 N. Y. 95 (1880). When commissioners report that the road should not be built, the court, in the absence of proof of fraud or manifest irregularity, has no power to order a further hearing nor to appoint new commissioners. In re Nassau Cable Co., 36 Hun 272 (1885).

A proceeding by a street surface railroad corporation to obtain the consent of the Appellate Division in lieu of that of property owners is entirely independent of proceedings to procure the consent of local authorities or of the board of railroad commissioners; therefore, it is no defense to a motion to confirm the report of commissioners, that the other consents will have to be obtained before the road can be constructed. Matter of Buffalo Trac. Co., 25 A. D. 447, affd., 155 N. Y. 700 (1898).

The provision of article 3, section 18 of the State Constitution, that the determination of commissioners, confirmed by the court, may be taken in lieu of consent of property owners, does not give to the Appellate Division power in the matter where the report of the commissioners is unfavorable to the construction of the road. Matter of Nassau Elec. R. R. Co., 6 A. D. 141 (1896); Matter of East River Bridge Co., 143 N. Y. 249. It is only a favorable report, confirmed by the court, which can be taken in lieu of the consent of property owners. Id.

The Appellate Division may confirm a report made by a majority of the commissioners appointed under this section to determine whether the proposed railroad shall be built, as the Constitution, article III, section 18, contemplates that the determination to be reached in the matter shall be that of the court as well as that of the commissioners. The commissioners may properly consider whether there are other routes equally available and calculated to accommodate the public. Matter of Port Chester St. Ry. Co., 43 A. D. 536 (1899).

Ch. 649, L. 1896 (now section 188 of this law), validating and confirming consents given since December 1, 1895, and prior to February 1, 1896, by local authorities of cities of the first or second class to any construction, operation and maintenance of a street surface railroad by a corporation, which has not complied with the provisions of section 59 of the Railroad Law, and authorizing such corporation to construct its road, upon obtaining the consent of abutting owners, "as provided by law," is available to a corporation, which, being unable to secure consents of abutting owners, under section 91 of the Railroad Law, obtains the confirmation by the Appellate Division of a report of commissioners, favoring the construction of the railroad, pursuant to section 94 of said law. Matter of Buffalo Trac. Co., 25 A. D. 447 (1898), affd., 155 N. Y. 700.

§ 175. Percentage of gross receipts to be paid in cities or villages; report of officers. Every corporation building or operating a railroad or branch or extension thereof, under the provisions of this article, or of chapter two hundred and fifty-two of the laws of eighteen hundred and eighty-four, within any city of the state having a population of twelve hundred thousand or more, shall, for and during the first five years after the commencement of the operation of any portion of its railroad annually, on November first, pay into the treasury of the city in which its road is located, to the credit of the sinking fund thereof, three per centum of its gross receipts for and during the year ending September thirtieth next preceding; and after the expiration of such five years, make a like annual payment into the treasury of the city to the credit of the same fund, of five per centum of its gross receipts. If a street surface railroad corporation existing and operating any such railroad in any such city on May sixth, eighteen hundred and eighty-four, shall have thereafter extended its tracks or constructed branches therefrom, and shall operate such branches or extensions under the provisions of chapter two hundred and fifty-two of the laws of eighteen hundred and eighty-four, or of this article, such corporation shall pay such percentages only upon such portions of its gross receipts as shall bear the same proportion to its whole gross receipts as the length of such extension or branches shall bear to the entire length of its line. In any other incorporated city or village the local authorities shall have

the right to require, as a condition to their consent to the construction, operation or extension of a railroad under the provisions of this article, the payment annually of such percentage of gross receipts, not exceeding three per centum, into the treasury of the city or village as they may deem proper. In case of extension the amount to be paid shall be ascertained in the manner heretofore provided. The corporation failing to pay such percentage of its gross earnings shall, after November first, pay in addition thereto five per centum a month on such percentage until paid. The president and treasurer of any corporation required by the provisions of this article to make a payment annually upon its gross receipts shall, on or before November first in each year, make a verified report to the comptroller or chief fiscal officer of the city of the gross amount of its receipts for the year ending September thirtieth, next preceding, and the books of such corporation shall be open to inspection and examination by such comptroller or officer, or his duly appointed agent, for the purpose of ascertaining the correctness of its report as to its gross receipts. The corporate rights, privileges and franchises acquired under this article or such chapter by any corporation, which shall fail to comply with all the provisions of this section, shall be forfeited to the people of the state, and upon judgment of forfeiture rendered in an action brought in the name of the people by the attorney-general, shall cease and determine.

Formerly L. 1890, ch. 565 (Railroad Law), § 95, as am'd by L. 1892, ch. 676.

Increase of Population by Annexation.

Where by annexation a city whose population is less than 250,000 becomes part of a city having a greater population, a street railway therein becomes liable to pay a percentage of its gross receipts to the city. City of N. Y. v. Pelham Pk. R. R. Co., 68 Misc. 205 (1910).

"Gross Receipts" and "Gross Earnings" Are Synonymous.

The words "gross receipts" and "gross earnings," as used in this section, are synonymous, and mean the receipts from fares. Hence, a railroad which, having leased its line, ran no cars, has no gross receipts. Only the corporation having gross receipts from the operation of the road is liable to pay a percentage to the city. City of N. Y. v. Thirty-fourth St. Crosstown Ry. Co., 137 A. D. 645 (1910).

Discretion of Local Authorities.

Under the present law it is discretionary with the local authorities, except in New York city whether they will require, as a condition precedent to the granting of consent, the payment of any portion of the gross receipts of the railroad to be constructed and operated. Adamson v. Nassau Electric R. R. Co., 89 Hun 261. See Southern Boulevard R. R. Co. v. People's Trac. Co., 5 A. D. 330 (1896); Same v. North N. Y. City Trac. Co., 16 Misc. 263 (1896).

§ 176. Extension of route over rivers; terminus in other counties; when property owners withhold consent; supreme court may appoint commissioners. Any street railroad in operation in this state, which shall, by a two-thirds vote of its directors, decide to extend the route of its road, so as to cross a river over and by any bridge now or hereafter constructed under the provisions of any law of this state, may so extend its route over and across such bridge upon such terms as may be mutually agreed upon between it and such bridge company, and may locate the terminus of its road in the county adjoining the one in which its road is now located and in operation, upon first obtaining the consent of such bridge company or its lessees, and the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of that portion of a street or highway upon which it is proposed to construct or operate such railroad, or in case the consent of such property owners cannot be obtained the appellate division of the supreme court in the district in which it is proposed to be constructed may, upon application, appoint three commissioners, who shall determine after a hearing of all parties interested, whether such railroad ought to be constructed, or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners. Whenever a terminus of any public viaduct, bridge or bridges, or public viaduct connected with any bridge or bridges, heretofore or hereafter constructed in and owned and maintained by any city of the first class, or town adjoining the same, is or shall be located at or adjacent to or within one-half mile of the route of any existing street surface railroad, the corporation owning or operating such railroad may, irrespective of any provisions otherwise applicable thereto contained in any general or local act, upon obtaining the consent of the local authorities and property owners as above provided, and upon complying with the provisions of this chapter applicable thereto, extend its road or route and construct and operate its railroad, to, upon and across such viaduct, bridge or bridges and approaches thereto for the purpose of connecting with another railroad route not more than one-half mile distant from such bridge or viaduct so as to afford a continuous ride for one fare, subject to the provisions of this chapter, or for the purpose of reaching the depot, station or terminus of another railroad

not more than one-half mile distant from such bridge or viaduct. This section shall not apply to any bridge over the Hudson or East rivers in the counties of New York and Kings, nor to any bridge or viaduct constructed under the provisions of any so-called grade crossing law.

Formerly L. 1890, ch. 565 (Railroad Law), § 96, as am'd by L. 1898, ch. 590, and L. 1901, ch. 419.

§ 177. Use of tracks of other roads. Any railroad corporation in this state, whose cars are run and operated by horses or other motive power, authorized by this article, upon the surface of the street, excepting in the county of New York, may, for the purpose of enabling it to connect with and run and operate its cars between its tracks, and a depot or car-house owned by it, run upon, intersect, and use, for not exceeding five hundred feet, the tracks of any other railroad corporation, the cars of which are run and operated in like manner with the necessary connections and switches for the proper working and accommodation of the cars upon such tracks, and in connection with such depot or car-house, upon paying therefor such compensation as it may agree upon with the corporation owning the tracks to be so run upon, intersected, and used; and in case such corporations can not agree upon the amount of such compensation, the same shall be ascertained and determined in the manner prescribed in the condemnation law.

Formerly L. 1890, ch. 565 (Railroad Law), § 97.
For text of the Condemnation Law, see post.

§ 178. Repair of streets; rate of speed; removal of ice and snow. Every street surface railroad corporation, so long as it shall continue to use or maintain any of its tracks in any street, avenue or public place in any city or village, shall have and keep in permanent repair that portion of such street, avenue or public place between its tracks, the rails of its tracks, and two feet in width outside of its tracks, under the supervision of the proper local authorities, and whenever required by them to do so, and in such manner as they may prescribe. In case of the neglect of any corporation to make pavements or repairs after the expiration of twenty days' notice to do so, the local authorities may make the same at the expense of such corporation, and such authorities may make such reasonable regulations and ordinances as to the rate of

speed, mode and use of tracks, and removal of ice and snow, as the interest or convenience of the public may require. A corporation whose agents or servants willfully or negligently violate such an ordinance or regulation shall be liable to such city or village for a penalty not exceeding five hundred dollars, to be specified in such ordinance or regulation.

Thus am'd by L. 1912, ch. 368.

Formerly L. 1890, ch. 565 (Railroad Law), § 98, as am'd by L. 1892, ch. 676.

Duty of Railroad to Keep Bridge in Repair.

The obligation of a street railroad to repair a bridge upon which its tracks are laid is not determined by section 11 of this law, which is confined to intersections of the highway for short distances, but by section 98 (now 178) and the obligations imposed upon the railroad in its franchise. Town of Queensbury v. Hudson Valley Ry. Co., 75 Misc. 197 (1912).

Municipality May Require Repaving.

The receiver of a railroad appointed in foreclosure proceedings is liable under this section for expense of repaving city streets between and adjacent to the tracks of the railroad, and the city may require the railroad to repave with any kind of material necessary to conform to the remainder of the street. City of N. Y. v. Linch, 161 A. D. 292 (1914).

Remedy in This Section Not Exclusive.

The remedy provided in this section is not exclusive. If an insolvent railroad, for the purpose of preserving its franchise, maintains its tracks in the street and the pavement between the same in such a dangerous condition and so out of repair as to constitute a nuisance, a city may bring an action to have the nuisance abated. City of New York v. Montague, 145 A. D. 172 (1911). See, also, 149 A. D. 476.

Decisions Generally.

Cases involving paving, repairs and assessments therefor. Gilmore v. City of Utica, 131 N. Y. 26; id., 121 N. Y. 561 (1890); Peo. ex rel. Davidson v. Gilon, 126 N. Y. 147 (1891); Mayor, etc., of N. Y. v. Second Ave. R. R. Co., 102 N. Y. 572 (1886); Same v. N. Y. & H. R. R. Co., 46 St. Rep. 349, 19 N. Y. Supp. 67; Snell v. Roch. Ry. Co., 64 Hun 476 (1892).

The case of Gilmore v. City of Utica, 131 N. Y. 26, arose under Laws of 1884, chapter 252, section 9, the language of which is very different from that of section 98 of the present Railroad Law, which now makes it the duty of railroad companies to keep that portion of the street described in the statute in permanent repair, and commands that it shall make such repairs whenever required by the local authorities, and in such manner as they shall prescribe. Conway v. Rochester, 157 N. Y. 33 (1898), revsg. 24 A. D. 489.

When the city authorities have determined that a street occupied by a railway company shall be entirely repaved, this section imposes upon the city the mandatory duty of notifying the company to repave, in the manner determined, that portion of the street which the statute requires it to keep in permanent repair. If, after such notice, the company neglects to repave, as directed, beyond the time prescribed by statute, the city can proceed with the work, at the expense of the company. Conway v. Rochester, 157 N. Y. 33 (1898), revsg. 24 A. D. 489.

The obligation upon a street railroad corporation to pave certain portions of the street applies to all such railroads, whether incorporated before or after the passage of the act, and a city common council has no power to exempt a company from the full statutory liability imposed. Weed v. Common Council of Binghamton, 26 Misc. 208 (1899).

When a railroad corporation refuses to pave, the municipality may do so at expense of the railroad. Mechanicville v. S. & M. St. Ry. Co., 35 Misc. 513 (1901).

Removal of snow and ice from tracks. Silberstein v. Houston, W. St. & P. F. R. R. Co., 117 N. Y. 293 (1889); Dixon v. B'klyn City & N. R. R. Co., 100 N. Y. 170 (1885); Mayor of Troy v. Troy & Lansgbgh. R. R. Co., 49 N. Y. 657 (1872); Somerville v. City R. Co. of Po'keepsie, 43 St. Rep. 425 (1892).

Where there is no law regulating rate of speed of electric cars on a city street, the mere fact that a car was running twelve or fifteen miles an hour does not constitute negligence. Bittner v. Crosstown St. Ry. Co., 153 N. Y. 76 (1897), revsg. 12 Misc. 514.

A street car has no paramount right of way at a street crossing. Huber v. Nassau Elec. R. R. Co., 22 A. D. 426 (1897); Dise v. Metropolitan St. Ry. Co., 22 Misc. 97, affg. 21 Misc. 790.

It is error to exclude evidence showing that a city ordinance requiring cars to be run at stated intervals during the night was unreasonable. Mayor, etc., of N. Y. v. Dry Dock, East B'dway & B. R. R. Co., 133 N. Y. 104 (1892).

This section must be construed to mean that the railroad must repair a space of two feet outside of each rail, not merely two strips one foot in width measured from the rail. City of Amsterdam v. Fonda, J. & G. R. R. Co., 119 A. D. 680 (1907).

This section is a legitimate exercise of the taxing power of the Legislature. City of Rochester v. Rochester Ry. Co., 182 N. Y. 99 (1905).

Where a statute under which a street surface railway company was incorporated contains a provision requiring the company to "keep the surface of the street inside the rails and for one foot outside thereof, in good and proper order and repair," the question of what shall constitute keeping the pavement in such condition shall be determined somewhat at least by existing conditions, and where a municipality has for sufficient reason decided to pave a street with a new and better pavement, it is its duty to co-operate with the city and put its part of the street in the same condition as the remainder, even though that necessitates the laying of a new pavement instead of repairing an old one. Mayor of New York v. Harlem Bridge, Morrisania & Fordham Ry. Co., 186 N. Y. 304 (1906).

This section applies to corporations existing at the time of its passage as well as to those subsequently formed. Doyle v. City of New York, 58 A. D. 588 (1901).

The requirement that repairs are to be made "under the supervision of the proper local authorities and whenever required by them" does not relieve the company from the duty of making repairs until ordered so to do by the local authorities. Doyle v. City of New York, 58 A. D. 588 (1901).

§ 179. Within what time road to be built. In case any street surface railroad corporation shall not commence the construction of its road, or of any extension or branch thereof, within one year after the consent of the local authorities and property owners or the determination of the appellate division of the su-

preme court as herein required, shall have been given or renewed, and shall not complete the same within three years after such consents or determination shall have been obtained, its rights, privileges and franchises in respect of such railroad or extension or branch, as the case may be, may be forfeited. If the performance of any act required by this chapter or any prior acts within the times therein prescribed, is hindered, delayed or prevented by legal proceedings in any court, such court may also extend such time for such period as the court shall deem proper or if the performance of any act required by said statutes within the times therein prescribed is hindered, delayed or prevented by works of public improvement, or from any other or different cause, not within the control of the corporation upon which such requirement is imposed, the time for the performance of such act is hereby and shall be deemed to be extended for the period covered by such hindrance, delay or prevention. The time for compliance with any requirement in this or any former act, by a street surface railroad corporation incorporated for the purpose of constructing a street surface railroad and which has prior to March twenty-fifth, nineteen hundred and two, obtained or shall prior to June thirtieth, nineteen hundred and three, obtain such consents or determination is hereby extended until June thirtieth, nineteen hundred and four.

Formerly L. 1890, ch. 565 (Railroad Law), § 99, as am'd by L. 1892, ch. 676; L. 1893, ch. 434; L. 1902, ch. 209.

See section 12 of this law, and cases cited thereunder, and section 173. See, also, §§ 187, 188.

The objection that a franchise had become extinct because of failure to construct within three years is not tenable, in a collateral attack upon the company, as, under the amendment of 1893, non-compliance is a ground of forfeiture which can only be urged in a direct proceeding instituted by the State. Coney Island, Ft. Hamilton & Bklyn. R. R. Co. v. Kennedy, 15 A. D. 588 (1897); Dusenberry v. N. Y., W. & C. Trac. Co., 46 A. D. 267 (1899); Matter of Brooklyn, Q. Co. & S. R. R. Co., 106 A. D. 240 (1905).

§ 180. Motive power. Any street surface railroad may operate any portion of its road by animal or horse power, or by cable, electricity, or any power than locomotive steam power, which said locomotive steam power is primarily generated by the locomotive propelling the cars, and in the use of which either escaping steam or smoke is visible, which may be approved by the public service commission and consented to by the owners of one-half of the property bounded on that portion of the railroad, with respect to which a change of motive power is proposed; and if the

consent of such property owners can not be obtained, the determination of three disinterested commissioners, appointed by the appellate division of the supreme court of the department in which such railroad is located, in favor of such motive power, confirmed by the court, shall be taken in lieu of the consent of the property owners. The consent of the property owners shall be obtained and the proceedings for the appointment and the determination of the commissioners and the confirmation of their report shall be conducted in the manner prescribed in sections one hundred and seventy-one and one hundred and seventy-four of this article, so far as the same can properly be made applicable thereto. Any railroad corporation making a change in its motive power under this section, may make any changes in the construction of its road or roadbed or other property rendered necessary by the change in its motive power. Where a street surface railroad in the counties of Herkimer and Hamilton is located wholly outside the limits of an incorporated city or village, such railroad may, with the approval of the public service commission, be operated by locomotive steam power, provided that such steam power is generated by oil from and including April fifteenth to and including November thirtieth, and by either oil or coal from and including December first to and including April fourteenth.

Formerly L. 1890, ch. 565 (Railroad Law), § 100, as am'd by L. 1892, ch. 676; L. 1899, ch. 584; L. 1900, ch. 679; L. 1901, ch. 553.

The amendment of 1901 added the last sentence, which appears to be intended to meet a special case.

In an action brought by a telephone company to restrain a street railroad company from operating its road by the single-trolley system of electric propulsion, held, that as the plaintiff had accepted its franchise, which authorizes it to construct and operate its lines upon streets and highways upon the express condition that they shall not be so constructed as to incommode the public use, and as the railroad company was occupying the streets in such a manner as to expedite public travel and promote the public use to which they were originally devoted, the telephone company's franchise was of a subordinate character, and it could not complain that the single-trolley system interfered with the operation of its lines. Hudson River Tel. Co. v. Watervliet Turnpike & Ry. Co., 135 N. Y. 393 (1892), revsg. 61 Hun 140, and distg. Story v. N. Y. & E. R. R. Co., 90 N. Y. 122 (1882); Lahr v. M. E. R. Co., 104 N. Y. 268 (1887), and Peo. ex rel. v. Newton, 112 N. Y. 396 (1889). See, also, Hudson R. T. Co. v. W. T. & Ry. Co., 121 N. Y. 397 (1891).

A street railroad corporation cannot use electricity to operate its road without the consent of the board of railroad commissioners. Trelford v. Coney Island & Bklyn. R. R. Co., 6 A. D. 204 (1896).

On application to the railroad commissioners by a street surface railroad company for permission to change its motive power from horses to kinetic stored steam power, it is not a valid objection that such last-mentioned power is a locomotive steam power, the use of which is prohibited by section 100, nor

is the board required to withhold its approval because the motor to be used is in its experimental stages, or because the corporation applying to use it is controlled by persons interested in such motor system. Peo. ex rel. Babylon R. R. Co. v. Railroad Commissioners, 32 A. D. 179, affd., 158 N. Y. 421 (1899).

A corporation which has adopted horse power cannot change to electric power, except upon compliance with this section, requiring the consents of abutting owners, and, failing such necessary consents, will be enjoined from proceeding with the work. St. Michael's P. E. Church v. Forty-second St., M. & St. Nicholas Ave. Ry. Co., 26 Misc. 601 (1899).

A railroad company, in the city of New York, having obtained the consent of a majority of owners of property upon the road for a change of its motive power, and, having obtained the authority of the railroad commissioners, as provided by this section, is entitled to a permit from the commissioner of public works to open the streets for the purpose of making the change in construction of its road, rendered necessary by the change in motive power. Potter v. Collis, 19 A. D. 392, affd., 156 N. Y. 16 (1898).

The Legislature, in revising the railroad laws, did not, by the omission of the words "in value" after the word "property," provide for the consent of the owners of one-half of the property bounded on that portion of the railroad with respect to which a change of motive power is proposed, intend to alter the law as it then existed so as to require the consent of the owners of one-half the lineal foot frontage of the property. Matter of Rochester & Lake Ontario Ry. Co., 51 A. D. 65 (1900).

The fact that an applicant to a city commissioner of public works for a permit to excave streets to change motive power also needs a permit from the board of electrical control does not make illegal the act of the commissioner of public works in granting the permit. Potter v. Collis, 19 A. D. 392, affd., 156 N. Y. 16 (1898).

The power vested in the State board of railroad commissioners to authorize a change of motive power was intended to be used in a way which could not contravene the established policy of the State as to overhead electrical wires. Potter v. Collis, 19 A. D. 392, affd., 156 N. Y. 16 (1898).

A street surface railroad company lawfully using a cable for motive power in the city of New York may construct upon its roadbed and use an iron pipe containing electrical wires for use in signaling its power-house in cases of accident. Empire City Subway Co., Ltd., v. Broadway & Seventh Ave. R. R. Co., 87 Hun 279 (1895).

Consents of abutting owners, executed by attorneys in fact or by executors or by holders of a naked power of sale, cannot be declared valid, unless the instruments, which conferred authority, are produced and examined. St. Michael's P. E. Church v. Forty-second St., M. & St. Nicholas Ave. Ry. Co., 26 Misc. 601 (1899).

When the board of railroad commissioners has, upon due notice, granted an application for a change of motive power, the privilege thereby required by the corporation is in the nature of a franchise, and, in the absence of statutory authority conferring it, the board has no power to subsequently reconsider or review its action. Peo. ex rel. Luckings v. Board of R. R. Comrs., 30 A. D. 69 (1898), affd., 156 N. Y. 693 (1898).

§ 181. Rate of fare. No corporation constructing and operating a railroad under the provisions of this article, or of chapter two hundred and fifty-two of the laws of eighteen hundred and

eighty-four, shall charge any passenger more than five cents for one continuous ride from any point on its road, or on any road, line or branch operated by it, or under its control, to any other point thereof, or any connecting branch thereof, within the limits of any incorporated city or village. Not more than one fare shall be charged within the limits of any such city or village, for passage over the main line of road and any branch or extension thereof if the right to construct such branch or extension shall have been acquired under the provisions of such chapter or of this article; except that in any city of the third class, or incorporated village, it shall be lawful for such corporation to charge and collect as a maximum rate of fare for each passenger, ten cents, where such passenger is carried in a car which overcomes an elevation of at least four hundred and fifty feet within a distance of one and a half miles. This section shall not apply to any part of any road constructed prior to May six, eighteen hundred and eighty-four, and then in operation, unless the corporation owning the same shall have acquired the right to extend such road, or to construct branches thereof under such chapter, or shall acquire such right under the provisions of this article, in which event its rate of fare shall not exceed its authorized rate prior to such extension. The legislature expressly reserves the right to regulate and reduce the rate of fare on any railroad constructed and operated wholly or in part under such chapter or under the provisions of this article; and the public service commission shall possess the same power, to be exercised as prescribed in the public service commissions law.

Formerly L. 1890, ch. 565 (Railroad Law), § 101, as am'd by L. 1892, ch. 676; L. 1897, ch. 688.

Application of Former Sections 101 (now 181) and 104 (now repealed).

History of the section discussed and the words "such corporation entering into such contract" held to embrace all corporations which by any form of contract acquire the right to use the road of another corporation. If sections 101 and 104 are read together, it is clear that they did not interfere with the fares which existing street railroad companies were entitled to charge. They do require, as a condition for the privilege of expansion, not only that newly-acquired property but also existing property shall be subject to the provisions of the statute relative to single fares and transfers. Corporations formed by merger or consolidation are not exempt from the provisions of the statute. Braffett v. Brooklyn, Queens Co. & S. R. R. Co., 204 N. Y. 440 (1912), affg. 137 A. D. 899.

Right to Collect Excess Fare.

In the earlier decisions it was held that section 101 (now 181) applied only to through cars, if there were any, and that the company was not re-

quired to transfer from one car to another over the remainder of the route; but this proposition was overruled in Bull v. N. Y. City Ry. Co., 192 N. Y. 361 (1908). This section does not apply to roads in operation before May 6, 1884, where it does not appear that they have acquired the right to extend their road or to construct branches under the General Railroad Act or its predecessors, the former Street Surface Railroad Acts. Braffett v. Brooklyn, Queens Co. & S. R. R. Co., 204 N. Y. 440 (1912), affg. 137 A. D. 899.

Following the case of Braffett v. Brooklyn, Queens Co. & S. R. R. Co., 204 N. Y. 440 (1912), the Court of Appeals has decided that the right to collect excess fare remains when two districts are consolidated into one city, as in the case of Brooklyn and Jamaica. Hogan v. Long Island R. R. Co., 206 N. Y. 440 (1912), revsg. 142 A. D. 29.

Review and Analysis of Legislation.

Legislation on the subject of transfers and excessive fares reviewed, analyzed and distinguished. O'Connor v. Bklyn. Heights R. R. Co., 123 A. D. 784 (1908); Griffin v. Interurban St. Ry. Co., 179 N. Y. 438 (1904); O'Reilly v. Bklyn. Heights R. R. Co., 179 N. Y. 450 (1904); Bull v. N. Y. City Ry. Co., 192 N. Y. 361 (1908); Braffett v. Brooklyn, Queens Co. & S. R. R. Co., 204 N. Y. 440 (1912), affg. 137 A. D. 899.

Legislative Control over Fares.

The Legislature retains control over fares to be charged by public service corporations, but has conferred upon the Public Service Commission authority to fix and regulate such fares, and it may do so, notwithstanding a contract made by a municipality authorizing a corporation to operate its cars over a bridge and to charge a certain fare between terminals, because such a contract constitutes a mere license to operate cars. Peo. ex rel. Bridge Operating Co. v. Public Service Com., 153 A. D. 129 (1912).

Repeal of Section 104.

By the Consolidated Railroad Law of 1910, chapter 481, former section 104 of the Railroad Law has been repealed without re-enactment. By the provisions of that section corporations operating other roads under lease or contracts pursuant to section 78 (now 148) were required to issue transfers. This subject is thus placed in charge of the Public Service Commissions under the provisions of sections 26 and 49 of the Public Service Commissions Law, the provisions of which are different from those of the section repealed. Under said section 49 the Public Service Commission is required to act only after complaint has been made. Numerous cases respecting the rights of railroads and the public under former section 104 may be found cited in the seventh edition of "White on Corporations," pages 704, 705.

Effect of Additional Franchise Granted on Condition of Reduced Fare.

Where a municipality had granted a franchise to a trolley company under which it was entitled to charge a ten-cent fare and thereafter granted it an additional franchise on condition of a reduced fare over that portion of the road covered by the first franchise, and the additional franchise was accepted by the company, this constituted a valid contract and the old franchise was superseded by the new contract so far as the municipality was interested therein. Pub. Service Com. v. Westchester St. R. R. Co., 206 N. Y. 209 (1912). Where such latter franchise was granted after the execution of a

mortgage on the property of the trolley company, which mortgage by its terms covered property to be thereafter acquired, and the trustee under such mortgage elected to enforce such lien against such subsequently acquired property and secured a judgment directing the sale thereof, the mortgagee thereby affirmed the act of the mortgagor in obtaining the additional franchise and the terms on which it was secured, and a purchaser of the property is chargeable with notice of these facts and takes the property subject to the terms of the second franchise for a reduced fare, although he did not buy the later acquired property. Id.

Miscellaneous Cases.

This section has no reference to a steam railroad constructed prior to the passage of the Railroad Law of 1884, nor was section 104 of this law applicable to such case. Barnett v. Brooklyn Heights R. R. Co., 53 A. D. 432 (1900).

When a passenger who has paid his fare is ejected by a conductor who acted in good faith, only compensatory damages will be awarded. Hamilton v. Third Ave. R. R. Co., 53 N. Y. 25. Other cases involving payment of fare: Rown v. Christopher & Tenth St. R. R. Co., 34 Hun 471 (1885); Corbett v. Twenty-third St. Ry. Co., 114 N. Y. 579 (1889), 42 Hun 587. See, also, cases cited under section 40 of the Railroad Law, ante, several of which are applicable to the foregoing section.

An agreement between two connecting railroads that one of them shall make no discrimination in the rate of fare over its road in favor of any other railroad and against the other party of the contract, there being no requirement that the rate of fare, in the absence of any discrimination, should not be as low as the former company may choose to make it, is not in violation of public policy. Brooklyn Elevated R. R. Co. v. Brooklyn, Bath & West End R. R. Co., 23 A. D. 29 (1897).

The provisions of sections 101, 103, 104, in substance enacting that, in cities having a population of 800,000 or more, street surface railroad corporations may make an intertraffic contract to carry a passenger for a continuous trip and for a single fare not exceeding five cents, nor exceeding the lawful fare, does not apply to such a contract made in 1895, in a city not shown to have then had such a population, by a corporation organized in 1885, operating as a street surface railroad prior to April, 1889, a considerable portion of which was not, in 1895, in the city, being the successor of a similar railroad which had been operated for twenty years; and it or its lessee may charge, for a continuous trip, a fare in excess of five cents. Brooklyn Elevated R. R. Co. v. Brooklyn, Bath & W. E. R. R. Co., 23 A. D. 29 (1897).

The fact that a street railroad company owns a controlling proportion of the stock of a company operating a connecting road does not make the former liable to the penalty prescribed by section 39 of this law upon refusal to issue a transfer to the connecting line. Senior v. N. Y. C. Ry., 97 N. Y. Supp. 645 (1906), 111 A. D. 39.

An individual cannot maintain an action to restrain a street surface railroad corporation from charging fare in excess of the legal rate, and the proper remedy is for the Attorney-General to vacate or annul the charter of the corporation. McNulty v. Brooklyn Heights R. R. Co., 31 Misc. 674 (1900).

The fact than one street surface railroad corporation owns the majority of the stock of another does not constitute a control of the owned corporation within the meaning of section 101 of the Railroad Law. Senior v. N. Y. City Ry. Co., 111 A. D. 39, affd., 187 N. Y. 559 (1906).

§ 182. Collection of fare. It shall be unlawful for any corporation, or an employee thereof, operating a street surface railroad, or a branch thereof, on which the motive power is electricity, which road or branch is operated wholly or in part in a city having at least one million inhabitants and which crosses the boundaries of a city of the first class, to collect fare of a passenger more than once for and during one continuous ride on a single car or train; excepting that fare may be once collected separately outside the city limits for passenger service to or from such limits, and once separately within the city for the service therein. A person or corporation violating the provisions of this section shall be liable to a penalty of twenty-five dollars for each violation, recoverable by the passenger aggrieved thereby.

Formerly L. 1890, ch. 565 (Railroad Law), § 101-a, as added by L. 1907, ch. 229.

§ 183. Construction of road in street where other road is built. No street surface railroad corporation shall construct, extend or operate its road or tracks in that portion of any street, avenue, road or highway, in which a street surface railroad is or shall be lawfully constructed, except for necessary crossings, or, in cities, villages and towns of less than one million two hundred and fifty thousand inhabitants over any bridges, without first obtaining the consent of the corporation owning and maintaining the same, except that any street surface railroad company may use the tracks of another street surface railroad company for a distance not exceeding one thousand feet, and if in a city having a population of less than thirty-five thousand inhabitants, for a distance not exceeding fifteen hundred feet, and in cities, villages and towns of less than one million two hundred and fifty thousand inhabitants, shall have the right to lay its tracks upon, and run over and use any bridges used wholly or in part as a foot-bridge, whenever the court upon an application for commissioners shall be satisfied that such use is actually necessary to connect main portions of a line to be constructed or operated as an independent railroad, or to connect said railroad with a ferry, or with another existing railroad, and that the public convenience requires the same, in which event the right to use shall only be given for a compensation to an extent and in a manner to be ascertained and determined by commissioners to be appointed by the courts as is provided in the condemnation law, or by the public

service commission in cases where the corporations interested shall unite in a request for such commission to act. Such commissioners in determining the compensation to be paid for the use by one corporation of the tracks of another shall consider and allow for the use of the tracks for all injury and damage to the corporation whose tracks may be so used. Any street surface railroad corporation may, in pursuance of a unanimous vote of the stockholders voting at a special meeting called for that purpose by notice in writing, signed by a majority of the directors of such corporation, stating the time, place and object of the meeting, and serving upon each stockholder appearing as such upon the books of the corporation, personally or by mail, at his last known post-office address, at least sixty days prior to such meeting, guarantee the bonds of any other street surface railroad corporation whose road is fully or partly in the same city or town or adjacent cities or towns.

Formerly L. 1890, ch. 565 (Railroad Law), § 102, as am'd by L. 1892, ch. 306 and ch. 676; L. 1893, ch. 434; L. 1894, ch. 693.

For forms of guarantee of bonds, see Forms Nos. 346–348.

The effect of the foregoing section, and of section 91 (now section 171), is that before a street surface railroad may operate its road through any street in a city it must procure the consent of the local authorities, although another company is already operating its road through such street, and that it must procure the right to the use of such street as a part of its route before it can commence proceedings to secure the right to use the property of another company upon and as a part of such route. Colonial City Trac. Co. v. Kingston City R. R. Co., 15 A. D. 195, affd., 153 N. Y. 540 (1897).

The consents of the local authorities and of the abutting owners to the use or operation of the intervening track of another company are, by force of the Constitution and of section 91 of the Railroad Law, conditions precedent to a proceeding to acquire such use under section 102 of the Railroad Law. Colonial City Trac. Co. v. Kingston City R. R. Co., 153 N. Y. 540, affg. 15 A. D. 195 (1896).

The provision that any street surface railroad company may acquire the right to use the tracks of another company, without its consent, to connect main portions of a line to be operated as an independent railroad, by condemnation proceedings, does not provide an alternative right, but constitutes an addition to the provision of section 91, requiring the prior consent of the local authorities and abutting owners. Colonial City Trac. Co. v. Kingston City R. R. Co., 153 N. Y. 540 (1897), affg. 15 A. D. 195.

The use by a street surface railroad company of a few hundred feet of the intervening tracks of another company, to form a connection between the main portions of its own track over which to run its own cars and transport its own passengers, is an "operation" of its road, within the meaning of the provisions of the Constitution, article 3, section 18, and of the Railroad Law, section 91, which forbid the operation of a street railroad without the prior consent of the local authorities and abutting owners. Colonial City Trac. Co. v. Kingston City R. R. Co., 153 N. Y. 540 (1897), affg. 15 A. D. 195.

The fact that one street surface railroad company has the consent of both local authorities and abutting property owners to build and operate a railroad through a street does not relieve a second company from the necessity of obtaining further consents from both of those sources to enable it to use the tracks of the first company. Colonial City Trac. Co. v. Kingston City R. R. Co., 153 N. Y. 540 (1897), affg. 15 A. D. 195.

A railroad company, accepting a franchise to construct and operate its railroad in a city street upon the condition that any other street surface railroad operating outside the district should have the right to use its tracks, cannot deny another railroad company the right to use its tracks, on the ground that the last-mentioned corporation has not obtained the requisite consent from the municipal authorities, particularly when the latter has begun proceedings under section 102 of the Railroad Law to have commissioners appointed to determine what it should pay to the first-mentioned company for the use of the tracks in question and has given a bond to secure the payment of whatever compensation should be awarded. Staten Island Midland R. R. Co. v. Staten Island Elec. R. R. Co., 34 A. D. 181 (1898).

A street railroad company, which has constructed its railroad in a street, has a right, under the foregoing section, to exclude another company from constructing a road there, and, upon showing any special damage to it, may restrain, as a public nuisance, the proposed construction of such other road. Central Crosstown R. R. Co. v. Metropolitan St. Ry. Co., 16 A. D. 229 (1897).

The provision in this section imposing as a condition to the construction or operation of a street railroad in a street in which another street railway has been lawfully constructed, that the consent of the company owning and maintaining such other road shall be obtained, is not a delegation of legislative power to the company whose consent is required, and is constitutional and valid. Matter of Thirty-fourth Street R. R. Co., 102 N. Y. 343 (1886). See, also, Forty-second & Grand St. R. R. Co. v. Same, 102 N. Y. 691 (1886); N. Y. Cable Ry. Co. v. Chambers St. & Grand St. F. R. R. Co., 40 Hun 29 (1886).

A street railroad company may operate its road in any legal manner consonant with the purposes for which it was organized; it may hire out its line, or it may permit other railroad companies to run their cars over its tracks, by authority of the foregoing section. Ingersoll v. Nassau Electric R. R. Co., 89 Hun 213 (1895).

A resolution of the New York city dock department, granting permission to a street railroad company to construct tracks over property under its charge, by its terms, a mere revocable license, cannot authorize the construction of a street railroad over the premises, as against the rights of another corporation affected thereby. Central Crosstown R. R. Co. v. Metropolitan St. Ry. Co., 16 A. D. 229 (1897).

A prolongation and divergence of a railroad company's line into another street so as to run for 250 feet parallel to the road of another corporation is a violation of section 102 of the Railroad Law, and may be restrained by injunction. Central Crosstown R. R. Co. v. Metropolitan St. Ry. Co., 17 Misc. 716 (1896).

Where a horse railroad company's track is crossed by the track of another company, the former cannot complain unless it is impeded in running cars. Brooklyn Cent. & J. R. R. Co. v. Brooklyn City R. R. Co., 33 Barb. 420 (1861).

It is not necessary to obtain the consent of company already in street before applying for consent of local authorities. Electric City Ry. Co. v. City of Niagara Falls, 95 N. Y. Supp. 73 (1905).

§ 184. Abandonment of part of route. Any street surface railroad corporation may declare any portion of its route which

it may deem no longer necessary for the successful operation of its road and convenience of the public to be relinquished or abandoned. Such declaration of abandonment must be adopted by the board of directors of the corporation under its seal, which shall be submitted to the stockholders thereof at a meeting called and conducted in the same manner as required by law for meetings of stockholders for the approval of leases by railroad corporations for the use of their respective roads. If the stockholders shall, at such meeting, ratify and adopt such declaration of abandonment, the secretary of the company shall so certify under the seal of the corporation, upon such declaration. Such declaration shall then be submitted to the public service commission for its approval, and if approved by such commission, such approval shall be indorsed therein or annexed thereto and the declaration so certified and indorsed shall be filed and recorded in the office of the secretary of state, and from the time of such filing, such portion of the route designated in the declaration shall be deemed to be abandoned.

Formerly L. 1890, ch. 565 (Railroad Law), § 103, as am'd by L. 1892, ch. 676; L. 1900, ch. 478.

This section was originally revised from L. 1885, ch. 305, § 3, relative to leases. The amendment of 1892 substituted the above provisions in lieu of provisions respecting leases then covered by section 78 (now section 148).

The provisions of sections 101, 103, 104, enacting in substance that, in cities having a population of 800,000 or more, street surface railroad corporations may make an intertraffic contract to carry a passenger for a continuous trip and for a single fare, not exceeding five cents, nor exceeding the lawful fare, does not apply to such a contract made in 1895, in a city not shown to have then had such a population, by a corporation organized in 1885, operating as a street surface railroad prior to April, 1889. Brooklyn Elevated R. R. Co. v. Brooklyn, Bath & West End R. R. Co., 23 A. D. 29 (1897).

A railroad company is authorized to contract with another for the use of its road, although the effect of such contract is to cause the abandonment of a portion of the road of one company. Prospect Pk. & C. I. R. R. Co. v. Bklyn., Bath & West End. R. R. Co., 84 Hun 516 (1895).

§ 185. Effect of dissolution of charter as to consents. Whenever any street surface railroad corporation shall have been dissolved or annulled, or its charter repealed by an act of the legislature, the consent of owners of property bounded on, and the consent of the local authorities having the control of that portion of a street or highway upon which the railroad of such corporation shall have been theretofore constructed and operated, and the order of the appellate division confirming the report of any commis-

sioner that such railroad ought to be constructed or operated, shall not, nor shall either thereof, be deemed to be in any way impaired, revoked, terminated or otherwise affected by such act of dissolution, annulment or repeal, but the same and each thereof shall continue in full force, efficacy and being. The right to the further enjoyment and to the use thereof, subsequent to such act of dissolution, annulment or repeal, and of all the powers, privileges and benefits therein or thereby created, shall be sold at public auction by the local authorities within whose jurisdiction such railroads shall be, in the same manner as is provided in section one hundred and seventy-three of this article. When such sale shall have been so made, the purchaser thereat shall have the right to the further enjoyment and use of such consents and orders, and of each thereof, and of all the powers, privileges and benefits therein or thereby created, in like manner as if such purchaser had been originally named in such consents, reports and orders; if such purchaser shall be otherwise authorized by law to construct, maintain and operate a street surface railroad within the municipality within which such railroad shall be.

Formerly L. 1890, ch. 565 (Railroad Law), § 106, section number changed to 105, and am'd by L. 1892, ch. 676.

See Peo. v. O'Brien, 111 N. Y. 1.

Valid consents given by the owners of the fee in a public street to the construction and operation of a street railway cannot be withdrawn at will. The public has an interest which cannot be destroyed or abandoned without the consent of the State. Paige v. Schenectady St. Ry. Co., 178 N. Y. 102 (1904).

§ 186. Corporate rights saved in case of failure to complete road; right to operate branches; conditions; former consents ratified; limitations. The corporate existence and powers of every street surface railroad corporation, which has completed a railroad upon a substantial portion of the route designated in its certificate of incorporation, or of extension, within ten years from the date of filing such certificate in the office of the secretary of state, and which was operating such completed portion of its railroad on the twenty-third day of March, nineteen hundred twelve, and had operated a portion of the same continuously for a period of five years immediately preceding said date, shall continue as to the completed portion of said road only with like force and effect, as though it had in all respects complied with the provisions of law with reference to the time when it should have fully completed its road, or such extension. Every such corporation shall have the

right to operate any extensions and branches of its railroad, now constructed and operated by it, which had been so constructed and operated by it, for a period of ten years immediately preceding said twenty-third day of March, nineteen hundred and twelve, with like force and effect, as though the route of such extensions and branches were designated in its certificate of incorporation.

But every such street railroad corporation is authorized to operate such railroad and any extensions or branches thereof, upon condition that it has heretofore obtained, or shall hereafter obtain, the consent of the local authorities having the control of that portion of the streets, avenues or highways included in such railroad, or any extension or branch thereof, to the construction and operation of the same, and also upon the condition that it has heretofore obtained or shall hereafter first obtain the consent of the owners of one-half in value of the property bounded on the portion of the streets, avenues or highways included in the route of such railroad, or any extensions or branches thereof, to the construction and operation of the same, or in case the consent of such property owners can not be obtained, the appellate division of the supreme court of the department in which such railroad or any extension or branch thereof is located, may, upon application, appoint three commissioners who shall determine, after a hearing of all the parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners. If any street surface railroad corporation shall have made and filed a statement or statements of proposed extensions or branches embracing a line from the boundary of a city or village to the boundary of another city or village generally parallel with the route specified in its certificate of incorporation and generally distant not more than one-half mile therefrom, and shall have made and filed an agreement of consolidation with some other street surface railroad corporation formed to build a street railroad upon a route continuous or connecting with one or more of the routes described in such statement or statements of proposed extensions or branches, and thereafter there shall have been constructed and operated for a period of four years a street surface railroad from such city or village to such other city or village upon a line embraced in any such proposed extensions or branches, such consolidated corporation may relinquish and abandon any unconstructed route or unconstructed portions of route specified in the

certificate of incorporation or in any statements or proposed extensions or branches of such first-mentioned corporation by filing in the office of the secretary of state a copy of a resolution of the board of directors of such consolidated corporation certified by its president and secretary, declaring such unconstructed route or unconstructed portions of route relinquished and abandoned, and thereupon the corporate rights, powers and franchises of such consolidated corporation shall be and continue the same as though the certificate of incorporation of such constituent corporation had specified the constructed and not the unconstructed portions of such route and proposed extensions and branches. All consents given, or grants made by local authorities having the control of the portion of any street, avenue, or highway included in the route of such railroad, or any extensions or branches thereof, to any such street surface railroad corporation, prior to March twenty-third, nineteen hundred and twelve, are hereby ratified and confirmed and declared valid. This section shall not apply to or affect any railroad corporation in the city of New York; nor any special grant made to or authority conferred upon any street surface railroad corporation by any law of this state; nor any litigation pending on March twenty-third, nineteen hundred and twelve; nor shall it impair rights, privileges, or franchises existing on said date of any street surface railroad corporation.

Thus am'd by L. 1914, ch. 489.

Formerly L. 1890, ch. 565 (Railroad Law), § 107, section number changed to 106, and am'd by L. 1892, ch. 676, and further am'd by L. 1900, ch. 198.

§ 187. Extensions and franchises confirmed. Any street surface railroad corporation which had prior to the tenth day of May, eighteen hundred and ninety-three, constructed and was on that date operating any extension or branch of its railroad along any streets or highways or portion thereof in a city having less than fifty thousand inhabitants, or in any town adjoining such city, and which had prior to said date obtained consent of the owners of one-half in value of the property bounded on, and the consents also of the local authorities having control of that portion of the streets, roads or highways upon which such extension or branch was constructed and being operated to the construction and operation of the same, is hereby authorized to operate and maintain any such branch or extension, upon filing in the office of the secretary of state a certificate, signed by its board of direct-

ors, which certificate shall contain a statement of the names of the cities, towns, villages and counties, and the names or description of the streets, avenues and highways in which such extensions or branches have been constructed, the places from and to which the same have been constructed, and are to be maintained and operated and the length thereof, as near as may be; thereupon said extensions and branches shall be deemed and considered a part of the lines of said railroad from the date of the filing thereof, and all corporate action relating to the construction, maintenance and operation of such extensions or branches, or creating liens upon the same by said corporation, are hereby validated and confirmed. Nothing in this section contained shall affect or impair any vested right or any litigation pending on said tenth day of May, eighteen hundred and ninety-three, nor shall any corporation which shall avail itself of the provisions of this section be deemed thereby to have waived any rights which it *therefore had to maintain and operate any branches or extension named in any certificate filed by it hereunder.

Formerly L. 1893, ch. 679, §§ 1, 2.

§ 188. Certain consents of local authorities confirmed. All consents given since December first, eighteen hundred and ninety-five, and prior to February first, eighteen hundred and ninety-six, by the local authorities of any city of the first or second class, to the construction, operation and maintenance of a street surface railroad in any such city by a railroad corporation which has not complied with the provisions of section nine of this chapter, or has failed to obtain the certificate therein provided for, are hereby validated and confirmed, and any such corporation may construct, operate and maintain a street surface railroad over, along and upon the streets, avenues, highways and public places described in such consent, upon obtaining the consent of the owners of property bounded on such streets, avenues, highways or public places as provided by law.

Formerly L. 1896, ch. 649, § 1.

This section (formerly chapter 649, Laws of 1896) is available to a corporation which, being unable to secure consents of abutting owners, under section 171 (formerly section 91), obtains the confirmation by the Appellate Division of a report of commissioners, favoring the construction of the railroad, pursuant to section 174 (formerly section 94). Matter of Buffalo Traction Co., 25 A. D. 447 (1898). The fact that but one city and one railroad

* So in the original.

corporation in the State will be affected or benefited by the act does not constitute the act, which is general in its terms, a local or private bill within the meaning of the State Constitution, article 3, section 18, nor is the act offensive to article 3, section 16, that no local or private bill shall embrace more than one subject, which must be expressed in its title. Id.

§ 189. Time extended for payment of percentage based on gross receipts. Every corporation building or operating a street surface railroad, or a branch or extension thereof, under the provisions of this article, or chapter two hundred and fifty-two of the laws of eighteen hundred and eighty-four, which, at any time during the period of six years prior to January first, nineteen hundred and one, became liable to pay any percentage based upon the gross receipts of said corporation, under the provisions of section one hundred and seventy-five of this article, and which heretofore has paid or hereafter shall pay, separately or together, the amount of such percentage and, in addition thereto, interest thereon at the rate of seven per centum per annum, computed from the time such percentage became due by said section one hundred and seventy-five up to the time such percentage was or shall be paid, by virtue of such payment or payments, shall be discharged of liability with the same force and effect as if the amount of such percentage had been paid upon the date when it first became due under the provisions of the said section of this article.

Formerly L. 1901, ch. 637.

§ 190. When sand and salt may be used on tracks. The owner or operator of any street surface railroad in cities of this state, may place upon the space between the rails, and upon the rails of such road sand in sufficient quantities to prevent the horses traveling thereon from slipping, and to enable cars operated by mechanical, or electrical appliances to be safely and properly operated. The owner or operator of any street surface railroad in cities of this state may use salt in necessary quantities, upon the rails of all the switches, curves, turnouts and crossovers, between the first day of November of each year and the first day of May following, for the removal of snow and ice therefrom and to prevent the same from freezing. The quantity of salt to be used and the manner of applying salt to the rails shall be under the direction of the city officials having charge of the streets of said cities.

Formerly L. 1890, ch. 565 (Railroad Law), § 108, as am'd by L. 1892, ch. 676, and L. 1899, ch. 491.

§ 191. Road not to be constructed upon ground occupied by public buildings or in public parks. No street surface railroad shall be constructed or extended upon ground occupied by buildings belonging to any town, city, county or to the state, or to the United States, or in public parks, except in tunnels to be approved by the local authorities having control of such parks. Provided, however, that the commissioners of the state reservation at Niagara, by and with the consent of the commissioners of the land office, may construct, without expense to the state, street railroad tracks upon and along that part of the riverway, so called, between Falls and Niagara streets, in the city of Niagara Falls, and in their discretion may grant revocable licenses to street surface railroad companies to use such tracks upon such terms as said commissioners may prescribe. And provided, further, that a street railroad may be constructed or extended upon a route or routes with a right of way not exceeding fifty feet in width in the Pelham Bay park in the city of New York, said route or routes to be designated and fixed by the board of estimate and apportionment of said city, with the approval of the park board of said city, and shall constitute the most direct, appropriate route or routes in the opinion of said board of estimate and apportionment and said park board, but no such street surface railroad shall be constructed or extended until a franchise or right therefor shall have been granted by said board of estimate and apportionment, pursuant to the statutes relating to the granting of such franchises or rights, and requiring adequate compensation therefor, and no company or corporation shall be given the exclusive right to operate a street surface railroad upon such route or routes, and no such street surface railroad shall be constructed at grade upon, along or across any of the existing or proposed streets, highways, driveways, parkways or park walks within the limits of said park.

Thus am'd by L. 1912, ch. 482.

Formerly L. 1890, ch. 565 (Railroad Law), § 109, section number changed to 108, and am'd by L. 1892, ch. 676; further am'd by L. 1899, ch. 710.

Common Not Exempt from Condemnation.

A common established by a landowner who sold lots surrounding it, with rights to access over the common to the village street passing through it, is not a public park, although under control of municipal authorities, and such common is not exempted from condemnation for street railroad purposes under this section. Buf., Lockport & Roch. Ry. Co. v. Hoyer, 147 A. D. 205 (1912).

Public Park Defined.

A public park defined, and held that where a landowner sells lots, leaving in the center a public common with rights of access to a street passing through it, it is not a public park within the meaning of this section. Buf., Lockport & Roch. Ry. Co. v. Hoyer, 147 A. D. 205 (1912).

Compensation to Owner.

It is only where an owner whose lands abut upon a public street owns a fee in the street, or in some part thereof, that he is entitled to compensation when a street railroad condemns a right of way thereover. The construction of such a railroad lays an additional burden upon the lands of an abutting owner who has a fee in the street, and he is entitled to compensation. Buf., Lockport & Roch. Ry. Co. v. Hoyer, 147 A. D. 205 (1912).

Miscellaneous Cases.

When a street railroad corporation has obtained the consents from the local authorities and abutting owners to construct its railroad, and the approval of the railroad commissioners, the adoption, thereafter, for a "parkway," authorized by Laws of 1894, chapter 758, of a street upon which such railroad has acquired a franchise to build its road, will not divest it of the right to construct its road. Coney Island, Ft. Hamilton & Bklyn. R. R. Co. v. Kennedy, 15 A. D. 588 (1897). The railroad franchise was property, of which it could not be deprived, except under the power of eminent domain. Id.

The company did not become extinct because it had not built its road within three years, as required by § 99 of the Railroad Law, as non-compliance with that requirement does not, ipso facto, dissolve the corporation, but is a ground of forfeiture which can only be urged in a direct proceeding by the State. Id. A "driveway" or "parkway" does not constitute a park. Id. The foregoing section applies only to existing parks. Id.

§ 192. Center-bearing rails prohibited. No street surface railroad corporation shall hereafter lay down in the streets of any incorporated city or village of this state what are known as "center-bearing" rails; but in all cases, whether in laying new track or in replacing old rails, shall lay down "grooved" or some other kind of rail not "center-bearing" approved by the local authorities. Such grooved or other rail shall be of such shape and so laid as to permit the paving-stones to come in close contact with the projection which serves to guide the flange to the car wheel. Where in any city, the duty of repairing and repaving streets, as distinguished from the authorization of such paving, repairing and repaving, is by law vested in any local authority other than the common council of such city, such other local authority shall be the local authority referred to in this section.

Formerly L. 1890, ch. 565 (Railroad Law), § 109, as added by L. 1892, ch. 676.

§ 193. Right to cross bridge substituted for a bridge crossed for five years. Should any street surface railroad company have crossed any bridge as a part of its route for a period of more than five years and should any other bridge be substituted therefor at any time, such company shall have the right to cross such substituted bridge and to lay and use tracks thereon for the transit of its cars and to make all changes and extensions of its route subject to all the provisions of this chapter, as the convenient operation of its cars and public convenience may require.

Formerly L. 1890, ch. 565 (Railroad Law), § 110, as added by L. 1892, ch. 676.

§ 194. Protection of employees. Every corporation operating a street surface railroad in this state, except such as operate a railroad or railroads either in the borough of Manhattan or Brooklyn, in the city of New York, shall cause the front and rear platforms of every passenger car propelled by electricity, cable or compressed air, operated on any division of such railroad which extends in or between towns or outside of city limits, during the months of December, January, February and March, except cars attached to the rear of other cars, to be enclosed from the fronts of the platforms to the fronts of the hoods, so as to afford protection to any person stationed by such corporation on such platforms to perform duties in connection with the operation of such cars. Every corporation or person using and operating a car in violation of this section shall be liable to a penalty of twenty-five dollars per day for each car so used and operated, to be collected in an action brought by the public service commission and to be paid to the treasurer of the state of New York, or in a suit by the attorney of the municipality in which the violation of the provisions of this section occurs, to be paid in the treasury of such municipality.

Formerly L. 1890, ch. 565 (Railroad Law), § 111, as added by L. 1903, ch. 325.

§ 195. Platforms on new cars, how constructed. All street surface railroad passenger cars purchased, built or rebuilt after the first day of December, nineteen hundred and four, and operated in the state of New York on and after said date, except those owned by any company operating either in the borough of Man-

hattan or Brooklyn, in the city of New York, shall be constructed in accordance with the provisions of the preceding section.

Formerly L. 1903, ch. 325, § 2.

§ 196. Protection to employees in the counties of Albany and Rensselaer. Every corporation operating a street surface railroad in the counties of Albany and Rensselaer shall cause the front and rear platforms of every car propelled by electricity, cable or compressed air, during the months of December, January, February and March, except cars attached to the rear of other cars, to be inclosed from the front and at least one side of the platform to the hood, so as to afford protection to any person stationed by such corporation on such platforms to perform duties in connection with the operation of such cars. Platforms on cars on such street surface railroads used more than one mile outside the limits of a city shall be completely inclosed from platform to hood. Every corporation using and operating a car in violation of this section shall be liable to a penalty of twenty-five dollars per day for each car so used and operated, to be collected by the people to the use of the poor of the county in which such corporation has its principal office, in an action brought by the public service commission or the district attorney of such county. The supreme court may, on the application of a citizen, direct the district attorney to bring such action.

Formerly L. 1890, ch. 565 (Railroad Law), § 111-a, as added by L. 1903, ch. 426.

§ 197. Protection of employees in the counties of Kings and Queens. Every corporation operating a street surface railroad in the counties of Kings or Queens, shall cause the front and rear platforms of every passenger car propelled by electricity, cable or compressed air, operated on any division of such railroad during the months of December, January, February and March, except cars attached to the rear of other cars, to be inclosed from the fronts of the platforms to the fronts of the hoods so as to afford protection to any person stationed by such corporation on such platforms to perform duties connected with the operation of such cars. Every corporation or person using and operating a car in violation of this section shall be liable to a penalty of twenty-five dollars per day for each car used and

operated, to be collected in an action brought by the public service commission and to be paid to the treasurer of the city of New York, or in a suit by the district attorney of the counties of Kings or Queens to be paid into the treasury of the city of New York.

Formerly L. 1890, ch. 565 (Railroad Law), § 112, as added by L. 1905, ch. 453.

§ 198. Contracts for the adjustments of payments due cities of the first class. The board of estimate and apportionment, or if such board do not exist, the local authorities which have power to make appropriation of moneys to be raised by taxation, in any city of the first class, shall have the power in their discretion, to enter into a contract or contracts on behalf of the city with any railroad corporation or corporations owning or operating street surface railroads or other railroads in such city, for the purpose of adjusting any or all differences now existing between such corporation or corporations and such city with respect to car license fees, percentages upon gross earnings, rentals and any other payments, other than taxes upon real and personal property and capital stock, payable or claimed to be payable to the city under existing acts of the legislature, municipal ordinances, grants by, or contracts with, the municipal authorities or otherwise; and any such contract may provide for the payment of an annual amount to be ascertained as in such contract provided in lieu of any or all payments of any of the classes hereinbefore mentioned, other than taxes. Any such contract which shall be with a corporation operating lines of railroad by lease may provide for an annual payment, to be ascertained as in such contract provided, which shall be in lieu of any or all of the payments of any or all of said classes, other than taxes upon real and personal property and capital stock, which would otherwise be payable in respect of the leased lines so long as the lease or leases thereof shall continue. The annual payments provided for in any contract made under the authority of this section shall, so long as such contract is in force, supersede the payments which would otherwise be payable by the corporation or corporations making such contract and in lieu of which the annual payments provided for in such contract are substituted. Any contract made hereunder may, with the approval of the municipal authorities by whom the contract was made or their

successors in office be modified from time to time by the parties thereto for the purpose of meeting changed conditions. No contract shall be made or modified hereunder without the written consent and approval of the mayor and of the comptroller or other chief financial officer of the city.

Formerly L. 1890, ch. 565 (Railroad Law), § 112, as added by L. 1905, ch. 651.

§ 199. Sale of unclaimed property. It shall be the duty of every street surface railroad corporation doing business in this state, and of every corporation engaged in this state in the business of carrying passengers for hire in cabs, coaches, or other similar vehicles or of letting such vehicles for hire, or in the business of operating a line of stages or omnibuses, which shall have unclaimed property left in its cars, cabs, coaches, stages or other similar vehicles, to ascertain if possible, the owner or owners of such property, and to notify such owner or owners of the fact by mail as soon as possible, after such property comes into its possession. Every such corporation which shall have such property not perishable, in its possession for the period of three months, may sell the same at public auction, after giving notice to that effect, by one publication, at least ten days prior to the sale, in a daily newspaper published in the city or village in which such sale is to take place, of the time and place at which such sale will be held, and such sale may be adjourned from time to time until all the articles offered for sale are sold. All perishable property so left, may be sold by any such corporation without notice, as soon as it can be, upon the best terms that can be obtained.

Formerly L. 1899, ch. 488, as am'd by L. 1907, ch. 463.

§ 200. Disposition of proceeds. All moneys arising from the sale of any such unclaimed property, after deducting charges for storage and expenses of sale, shall be paid by any such corporation to the treasurer of any association, composed of the employees of such corporation, having for its object the pecuniary assistance of its members in case of disability caused by sickness or accident, for the use and benefit of such association and its members; and where no such association of the employees of any such corporation is in existence at the time of any such sale, such moneys shall be paid over to the county treasurer of the county or

if in a city, to the chief fiscal officer thereof, in which such sale took place for the benefit of such city or county.

Formerly L. 1899, ch. 488, § 2, as am'd by L. 1907, ch. 463.

§ 201. Construction of park railroads in cities having a population of one million five hundred thousand or upwards. For the purpose of providing for the more speedy transportation of persons across public parks in the cities within the state of New York having a population of one million five hundred thousand or upwards it shall be lawful for the municipal authorities, officers, departments, or boards having control of such parks to construct railroads in and upon tunnels or roads or ways depressed below the surface of said parks in such cities in this state, and to extend the same east or west to connect with any surface railroads in such cities, now in existence, and with railroads which hereafter may be built by companies now chartered and existing, and to conduct in the name of such cities, with any person or corporations for the construction thereof, and for the equipment and running of the same either with or without public advertisement upon such terms and conditions, including the rates of fare to be charged to persons using such railroads, for such compensation to be paid to such cities, and subject to such rules, regulations and requirements as may be determined upon in said contract, and as the department or board, or officer having charge of said parks may, from time to time, thereafter establish or impose.

Formerly L. 1892, ch. 532, § 1.

§ 202. Consents of property owners. No railroads shall be constructed, equipped or operated by virtue of the preceding section except upon the condition that the consent of the owners of one-half in value of the property outside of said public parks bounded on and the consent also of the local authorities having the control of that portion of a street or highway upon which it is proposed to construct, operate or extend the said railroads to connect with any surface railroads in such cities be first obtained, or in case the consent of such property owners cannot be obtained, the appellate division of the supreme court in the department in which it is proposed to be constructed may, upon application, appoint three commissioners, who shall determine, after hearing of all parties interested, whether the portion of such railroad outside of said public parks ought to be constructed or operated, and their

determination confirmed by the court may be taken in lieu of the consent of the property owners.

Formerly L. 1892, ch. 532, § 2.

§ 203. Expense of construction and operation. Whenever any railroad shall be constructed, equipped or operated under section two hundred and one, the expense of such construction, and in case said railroad shall be equipped and operated by such city, the expense of such equipment and operation shall be paid by the municipal corporation within which such railroad is situate, in the same manner as the other expenses of such municipal corporation are paid and provided for.

Formerly L. 1892, ch. 532, § 3.

§ 204. Agreements for payment of cost of construction by instalments. The department, board or officer having control of such public parks may agree with the person or corporation with whom any contract may be made for the construction, equipment and operation of said railroad that the cost of such construction shall be paid by such cities in instalments out of the compensation which such person or corporation shall agree to pay to such cities under any such contract from time to time as such compensation shall be received.

Formerly L. 1892, ch. 532, § 4.

§ 205. Disposition of income. The compensation or income which shall be received by such cities from such railroad, except as the same may be otherwise applied pursuant to the provisions of the preceding section, shall be paid into the treasury thereof.

Formerly L. 1892, ch. 532, § 5.

§ 206. Motive power. Any portion of any railroad constructed, equipped and operated under section two hundred and one may be operated by animal or horse power, or by cable.

Formerly L. 1892, ch. 532, § 6.

§ 207. Railroads in parks in New York city, by whom constructed. Whenever any railroads shall be constructed in the city of New York, under the provisions of the preceding six sections, such railroads shall be constructed by the department of

public parks of said city with the concurrence of the sinking fund commissioners of said city.

Formerly L. 1892, ch. 532, § 7.

§ 208. Issue of bonds by comptroller. Whenever any such railroad shall be constructed, equipped and operated under the provisions of the preceding seven sections in the city of New York, should no such agreement be made as is provided in section two hundred and four of this chapter, it shall be the duty of the comptroller of said city from time to time upon the request of the sinking fund commissioners to issue bonds or stock of the city in the aggregate sufficient to pay the expense of such construction, equipment or operation, which said bonds shall be paid out of taxation in not more than ten years from the date of their issue and shall bear interest not exceeding four per centum per annum and shall be sold at not less than par, and the cost of constructing, and in case the said railroad is equipped and operated by said city, the cost of equipping and operating said railroad shall be paid out of the proceeds of such bonds or stocks.

Formerly L. 1892, ch. 532, § 208.

§ 209. Change of motive power authorized. Any railroad company having the right to use any railroad now constructed in any public tunnel, road or way depressed below the surface of and wholly within any public park in any city within the state of New York having a population of one million five hundred thousand or upwards, may change the motive power and operate any such railroad by cable power, underground current of electricity, compressed air, or any other motive power other than locotive steam power *than may be consented to by the authorities having control of such park or parks, and by the public service commission, and may make changes in the construction of the road or roadbed or other property made necessary by the change of motive power. Such reconstruction shall be at the sole cost and expense of the railroad company making such change, and when completed such improved railroad shall be the property of the municipal corporation having control of such public tunnel, road or depressed way.

Formerly L. 1892, ch. 532, § 209.

* So in the original.

Explanatory Note.

The following sections, 113 to 119-a, inclusive, were added to Laws of 1890, chapter 565 (former Railroad Law), by Laws of 1910, chapter 477, taking effect June 14, 1910, the same day as chapter 481 (the Consolidated Railroad Law), which repealed Laws of 1890, chapter 565. Notwithstanding such repeal, however, of the former Railroad Law, the sections added thereto by Laws of 1910, chapter 477, were not repealed by the consolidated law, but are saved and in effect by the operation of section 100 of the General Construction Law, which provides that a consolidated law shall not supersede or repeal an amendatory law passed at the same session of the Legislature, unless it is specifically designated in the repealing schedule.

§ 113. Street railroad company to share cost of highway bridge occupied by its tracks. Whenever any bridge upon a public street or highway shall be required to be built or rebuilt or replaced with a new bridge, which bridge is occupied or to be occupied by the tracks of a street railroad and it becomes necessary to build such bridge of greater width or of greater strength, or both, in order to properly accommodate the tracks of such street railroad and the traffic carried over them, than would be required to accommodate the other traffic and travel over such bridge, the street railroad company whose tracks are to or shall so occupy said bridge shall pay toward the construction thereof whatever sum or sums shall be required to pay for such additional construction, the amount to be determined as herein provided.

Added by L. 1910, ch. 477.

§ 114. Commission to determine proportion after hearing. In case the municipality constructing such new bridge shall be unable to agree with the railroad company as to the additional width of the bridge, or the increased strength thereof, or the proportion of cost which should be borne and paid by the railroad company, either the municipality or the railroad company may apply to the public service commission of the district in which such bridge is situated for a determination of all the matters in controversy. Such application shall be made by verified petition. A hearing shall be had by the commission, upon notice to the other party, and the proceeding shall be conducted according to the rules of practice established by the commission.

Added by L. 1910, ch. 477.

§ 115. Order. The commission shall make an order, after such hearing, determining all the matters in controversy and fixing the

proportion of the cost of the bridge which shall be paid by the railroad company.

Added by L. 1910, ch. 477.

§ 116. Railroad company not liable in certain cases. If any new bridge shall be built or contract let for the construction thereof before such final order shall be made, the railroad company shall not be liable for any part of the cost thereof.

Added by L. 1910, ch. 477.

§ 117. Commission to fix amount. Upon the completion of the bridge, an account of the expenses incurred shall be presented by the municipality to the railroad company with a statement of the amount claimed to be due from the company. In case of any disagreement as to the amount due from the company the account shall be audited by the public service commission, which shall by order fix and determine the amount to be paid by the railroad company, which amount shall bear interest from the date of such order.

Added by L. 1910, ch. 477.

§ 118. Amount to be assessed and levied if not paid. If such amount shall not be paid by the railroad company the municipality shall assess and levy the same upon the taxable property of the railroad company situate within its tax district, in the next tax levy, and the same shall be collected as are other taxes upon said property.

Added by L. 1910, ch. 477.

§ 119. May be paid in installments in certain cases. In case the amount to be paid by the railroad company exceeds the sum of five thousand dollars, the company may elect to pay the same in equal annual installments, not exceeding ten in number, with interest. Such election shall be evidenced by a resolution of its board of directors, a certified copy of which shall be filed with the municipality. The amount due from the railroad company shall thereupon become a lien upon the property of the company to the same extent as a tax actually levied and assessed, and the installments, together with interest upon the whole amount, shall be inserted in the tax-roll each year for collection.

Added by L. 1910, ch. 477.

§ 119-a. Application of preceding sections. Sections one hundred and thirteen to one hundred and nineteen, both inclusive, of this article shall not apply to the construction of bridges over steam railroads.

Added by L. 1910, ch. 477.

L. 1910, Ch. 477, § 2. This act shall not affect any action or proceeding pending in any court nor the liability of any railroad company for the construction of any bridge heretofore commenced, or any bridge hereafter commenced and constructed where the taxpayers of any municipality have heretofore voted for the construction of such a bridge at the expense of the municipality.

ARTICLE 6

Rapid Transit Act of 1875

SECTION 220. Application for railroad; commissioners.
221. Oath and bond of commissioners.
222. First meeting of commissioners.
223. Determination of necessity of railroad and route.
224. Adoption of plans, and terms upon which road shall be built.
225. Appraisal of damages and deposit of money as security.
226. Shall prepare certificate of incorporation; proviso as to forfeiture.
227. Organization.
228. Commissioners to deliver certificate; affidavit of directors.
229. Powers.
230. Crossing of horse railroad track.
231. Where route coincides with another route.
232. Commissioners to transfer plans.
233. Commissioners to file report; confirmation thereof.
234. Pay of commissioners.
235. Quorum; term of office; removal; vacancies in board of commissioners.
236. Abandonment or change of route; new commissioners; their powers and proceedings.
237. Abandonment of portion of route by elevated railroad.
238. Increased deposit, when and how required.
239. Trains to come to full stop.
240. Gates or vestibule doors.
241. Penalty for violation of two preceding sections.
242. Sections to be printed and posted.
243. Extension of time.
244. Lighting cars on elevated railroads in cities of over twelve hundred thousand inhabitants.

§ 220. Application for railroad; commissioners. Upon the application of at least fifty reputable householders and taxpayers of any county or city, verified upon oath before a justice of the

supreme court, that there is need in said county or city of a steam railroad in the streets, avenues and public places thereof for the transportation of passengers, mails or freight, the board of supervisors of such county may, within thirty days thereafter by resolution, approve of the application, and authorize its presentation to the supreme court, and if the railroad is to be built wholly within the limits of a city, upon the application of a like number of householders and taxpayers of the city to the mayor thereof, such mayor may, within thirty days thereafter, indorse upon the application his approval and direction that it may be presented to the supreme court, and if the railroad is to be built, partly within the limits of a city and partly without, such application shall be approved, both by the mayor of the city and the board of supervisors of the county, and its presentation to the supreme court authorized by them, and upon the presentation of such application so approved and authorized to a special term of the supreme court, held in the district where such railroad is to be built, or some part thereof, the court may appoint five commissioners, residents of the city if the railroad is to be built wholly within the city, and of the county, if it is to be built wholly or partly outside of the limits of a city, to determine the necessity of such railroad, the route thereof, the time within which and the conditions upon which it shall be constructed, the damages to the property owners along the line thereof and all the matters lawfully submitted to them, and discharge the duties imposed upon them by law.

Formerly L. 1890, ch. 565 (Railroad Law), § 120.

An elevated railroad has no fee in the city streets over which it is constructed, in the sense in which the word "fee" is ordinarily used, but it has a franchise which cannot be abrogated or destroyed by the public authorities without their making compensation therefor. Brooklyn Elevated R. R. Co. v. City of Brooklyn, 2 A. D. 98 (1896).

§ 221. Oath and bond of commissioners. Within ten days after his appointment, and before entering upon the discharge of any of the duties of his office, each commissioner shall take and subscribe the constitutional oath of office, which shall be filed in the office of the clerk of the county and shall execute a bond to the people of the state in the penal sum of twenty-five thousand dollars, with two or more sureties, to be approved by a justice of the supreme court of the department in which the railroad is to be built and conditioned for the faithful performance of the duties

of the office, which bond shall be filed in the office of the clerk of the county.

Formerly L. 1890, ch. 565 (Railroad Law), § 121.

§ 222. First meeting of commissioners. Within fifteen days after their appointment, the commissioners shall meet in some convenient place in the county or city and organize themselves as a board with appropriate officers.

Formerly L. 1890, ch. 565 (Railroad Law), § 122.

§ 223. Determination of necessity of railroad and route. The commissioners shall, within thirty days after such organization, determine upon the necessity of such steam railroad, and if they find it to be necessary, they shall, within sixty days after such organization, fix and determine the route therefor, and shall have the exclusive power to locate such route, over, under, through or across the streets, avenues, places or lands in such county or city, and to provide for the connection or junction with any other railroad or bridge, if the consent of the owners of one-half in value of the property bounded on and the consent of the local authorities having control of that portion of a street or highway, upon which it is proposed to construct or operate such railroad have been first obtained. If the consent of such property owners can not be obtained, the determination of three commissioners appointed by the appellate division of the supreme court of the department where the railroad is to be constructed, made after due hearing of all parties interested, and confirmed by the court, that such railroad ought to be constructed and operated, may be taken in lieu of the consent of such property owners. No such railroad shall be located in or upon such portion of any street, avenue, place or lands in such county as are now occupied by an elevated or underground railroad or in which such a railroad has already been authorized by law to be so located and constructed, or which are contained in public parks, or occupied by buildings belonging to the county or the state or United States, or in or upon the following streets, avenues and public places, viz.: Broadway, Fifth avenue, Fourth avenue above Forty-second street, in the borough of Manhattan, city of New York; Debevoise place, Irving place, Lefferts place, those portions of Grand, Classon and Franklin avenues and Dowling street lying between the southerly line of Lexington

avenue and the northerly line of Atlantic avenue, that portion of Classon avenue lying between the northerly line of Lexington avenue and the southerly line of Park avenue, and that portion of Washington avenue lying between Park and Atlantic avenues in the borough of Brooklyn; and that portion of the city of Buffalo lying between Michigan and Main streets; but such railway may be located and constructed across such excepted streets, avenues and places at their intersection only with other streets, avenues and places.

Formerly L. 1890, ch. 565 (Railroad Law), § 123, as am'd by L. 1892, ch. 676.

The prohibition in the foregoing section against the construction of railroads upon certain streets applies only to railroads incorporated under chapter 606, Laws of 1875, known as the Rapid Transit Railroad Law. Beekman v. Brooklyn & Brighton B. R. R. Co., 89 Hun 14 (1895); McCullom v. Same, 89 Id. 14. Chapter 606, Laws of 1875, above referred to, was repealed in 1890 by the existing railroad laws, and the provisions thereof were substantially re-enacted in sections 120 to 142, comprising article 5.

Where a property owner joins in a request to commissioners, appointed under section 120 of this law, that they determine that an elevated road ought to be constructed and operated over the center of a street upon which such property owner's land abuts, he does not waive the right to claim the damages resulting to his property from the subsequent construction of the railroad on the street. Koehler v. N. Y. Elevated R. R. Co., 9 A. D. 449 (1896), distg. White v. Manhattan Ry. Co., 139 N. Y. 19.

The direction that no such railway shall be located on certain streets is plainly, as matter of context, limited to railroads incorporated under the Rapid Transit Railroad Law. Beekman v. Brooklyn & Brighton Beach R. R. Co., 89 Hun 14 (1895); McCullom v. Same, Id. 14.

§ 224. Adoption of plans, and terms upon which road shall be built. The commissioners by such public notice, and under such conditions, and with such inducements as they may prescribe, shall invite a submission of plans for the construction and operation of such railroad, and shall meet at a time and place in such notice named, not more than ninety days after their organization, and decide upon the plans for the construction thereof, with the necessary supports, turnouts, switches, sidings, connections, landing-places, stations, buildings, platforms, stairways, elevators, telegraph and signal devices, or other requisite appliances, upon the route or location determined upon by them. They shall, upon notice to the local authorities, and after hearing all parties interested, fix and determine what compensation, if any, in a gross sum, or in a certain percentage of receipts, shall annually be paid

to the local authorities by the corporation formed for the purpose of constructing, maintaining and operating such railroad for public use in the conveyance of persons and property, for the use and occupation by the corporation of the streets, avenues and highways in and upon which its railroad is to be constructed, and the time when such railroad, or a portion thereof, shall be constructed and ready for operation, and the maximum rates to be paid for transportation and conveyance thereon, and the hours during which special cars or trains shall be run at reduced rates of fare; and the amount of the capital stock of such corporation, and the number of shares into which it shall be divided, and the percentage thereof to be paid in cash on subscribing for such shares.

The commissioners may select two or more routes, upon one of which such railroad may be constructed and operated; and the local authorities may consent to the construction and operation of such railroad upon one or more of such routes, or parts thereof; and the commissioners shall have power to change and readopt routes and plans for the construction and operation of such railroad, after they have been submitted to the local authorities, in cases where such authorities may recommend such changes, or may not be willing to consent to the construction or operation of the railroad, upon the routes and plans adopted, unless such changes are made therein.

Formerly L. 1890, ch. 565 (Railroad Law), § 124, as am'd by L. 1892, ch. 676.

Any grant to the elevated railroad company must necessarily be construed as subject to the right of the public to enter upon the street for such a purpose as that of laying and constructing a sewer, and any interference with the elevated railroad company in the proper construction of such work must be considered as a burden which the elevated railroad company assumed to bear. Brooklyn El. R. R. Co. v. City of Brooklyn, 2 A. D. 98 (1896).

§ 225. Appraisal of damages and deposit of money as security. The commissioners shall, within one hundred and ten days after their organization, ascertain and determine the aggregate pecuniary damage arising from the diminution in the value of the property bounded on that portion of such street or streets, highway or highways, upon which it is proposed to construct and operate such railroad to be caused by the construction and operation thereof. For that purpose they shall view the several parcels of real property so bounded, and shall appraise separately the pecuniary damages arising from such diminution in value of each par-

cel thereof, and for the purposes of such appraisal they shall give notice of the time and place, when and where they will meet to hear the owners, or persons interested in such real property, which notice shall be published for at least ten days consecutively in at least two newspapers in the county where such railroad is to be constructed, and shall take such material testimony upon the probable diminution in value of any or all such parcels to be so caused as may be offered by or in behalf of any person or party interested therein, and the aggregate sum of the amounts so appraised and determined by them shall be the aggregate pecuniary damage required to be ascertained and determined as above provided. No corporation which shall hereafter be organized under this article shall enter upon any street, highway or lane therein, until it shall first have deposited with some trust company, to be designated by the mayor of the city within which it is proposed to construct the railroad or any part thereof, and by the board of supervisors, when the road does not lie wholly within a city, a sum of money equal to the amount so ascertained and determined by the commissioners to be the aggregate pecuniary damage to such property within the city, or within the county outside of any city, or shall have secured the payment of such amount by depositing with such trust company negotiable securities, equivalent at their par and actual value to such aggregate amount, and approved by the mayor of the city in which such road is wholly or in part located, and by the county treasurer of the county if the road is located wholly or in part outside of the limits of such city. The court may accept in lieu of the deposit of money or securities herein required the bond of the corporation, with two or more sureties, to be approved by the court, to the effect that the corporation before constructing or operating its railroad in front of any premises, shall pay to the owner of the real property all the damages sustained, or which will be sustained by him, as fixed and determined by such commissioners, and the costs allowed, if any. Such bond shall be in a sum double the amount of such damages, and the sureties shall justify in the agreegate to an amount equal to the amount of such bond. Such corporation shall also, at the same time, deposit with such trust company or with the county treasurer, as the commissioners may direct, the sum of five thousand dollars in cash, for the payment of the expense of apportioning and distributing such fund. Unless such moneys or securities shall be deposited by such corporation within one year after it shall have obtained the consent of the local

authorities, and of the property owners, or the confirmation by the appellate division of the supreme court, of the determination of three commissioners in lieu thereof, and in the case of a corporation organized prior to May eighteenth, eighteen hundred and ninety-two, within one year after it shall have obtained the confirmation by the appellate division of the supreme court of the report of three commissioners in lieu of the consent of property owners, or within one year after the commissioners appointed to ascertain and determine the aggregate pecuniary damages as provided in this article shall have made their report, then such corporation shall be deemed not to have accepted the franchises granted. Where the commissioners shall fix and determine different periods of time within which different sections of such railroad shall be constructed and ready for operation, they shall ascertain, determine, and report separately the aggregate pecuniary damage to property bounded upon that portion of such street or streets upon which each of such sections is located. Upon the deposit by the corporation as above provided of moneys or securities equivalent to the aggregate pecuniary damage to be sustained by any one of such sections, or of any bond given in lieu thereof, it shall immediately be vested with the right and privilege to construct its railroad through such section.

Formerly L. 1890, ch. 565 (Railroad Law), § 125, as am'd by L. 1892, ch. 676.

§ 226. Shall prepare certificate of incorporation; proviso as to forfeiture. The commissioners shall prepare an appropriate certificate of incorporation for the corporation in the last section mentioned in which shall be set forth and embodied, as component parts thereof, the several conditions, requirements and particulars by such commissioners determined pursuant to the provisions of this article, and which shall also provide for the release and forfeiture to the supervisors of the county, or if the road is to be constructed wholly or partly within a city, to such city, of all rights and franchises acquired by such corporation in case such railroad or railroads shall not be completed within the time and upon the conditions therein provided; and the commissioners shall thereupon and within one hundred and twenty days after their organization cause a suitable book of subscription to the capital stock of such corporation, to be opened pursuant to due public notice at a banking office in such county or city. A failure by any corporation

heretofore or hereafter organized under this article to complete its railroad within the time limited in and by its certificate of incorporation shall only work a forfeiture of the franchises of such corporation with respect to that portion of its route which such corporation shall have failed to complete, and shall not affect the rights and franchises of such corporation to construct and operate such part of its railroad which it shall have completed within the term prescribed by its certificate of incorporation, or as to which the time for completion shall not have expired, notwithstanding anything to the contrary in its certificate of incorporation.

Formerly L. 1890, ch. 565 (Railroad Law), § 126.

§ 227. **Organization.** Whenever the whole capital stock of such corporation or an amount of such capital stock proportioned to the part of such railroad directed by the commissioners to be constructed, shall have been subscribed by not less than fifteen persons, and the fixed percentage of such subscriptions shall have been paid, in cash, the commissioners shall, by written or printed notice of ten days, served personally or by mail, call a meeting of such subscribers for organization, and appoint the inspectors of election to serve thereat. At such meeting, or at any subsequent one to which the same may be adjourned, a majority in number and amount of such subscribers may elect persons, of a number to be theretofore determined by the commissioners not less than nine, who shall be directors for one year of the corporation formed for the purposes of constructing and operating such railroad.

Formerly L. 1890, ch. 565 (Railroad Law), § 127.

§ 228. **Commissioners to deliver certificate; affidavit of directors.** Within ten days after the election of such directors the commissioners shall deliver to them a certificate in duplicate, verified by the oath of three commissioners, before a justice of the supreme court, setting forth the certificate of incorporation and the organization of the corporation for the purposes therein mentioned, and within five days after the reception by them of such certificates three of the directors so elected shall make affidavit in duplicate that the full amount of stock has been subscribed in good faith to construct, maintain and operate the railroad or railroads in such certificate of incorporation mentioned, and such directors shall file such affidavits and certificate in the office of the

secretary of state, and a duplicate of the same in the office of the clerk of the county wherein such railroad shall be located; and thereupon the persons who have so subscribed such certificate of incorporation and all persons who shall become stockholders in such corporation shall be a corporation by the name specified in such certificate, and be subject to the duties, liabilities and restrictions of such corporations.

Formerly L. 1890, ch. 565 (Railroad Law), § 128.

§ 229. Powers. Subject to the provisions of the public service commissions law, every such corporation shall have power, in addition to the powers conferred by the general and stock corporation laws and by subdivisions two, five and seven of section eight of this chapter:

1. To take and convey persons and property on its railroad by the power or force of steam or by any motor other than animal power, and to receive compensation therefor.

2. To enter upon and underneath the several streets, avenues and public places and lands designated by the commissioners, and enter into and upon the soil of the same, to construct, maintain, operate and use in accordance with the plan adopted by the commissioners, a railroad upon the route or routes and to the points decided upon and to secure the necessary foundations and erect the columns, piers and other structures which may be required to secure safety and stability in the construction and maintenance of the railroad constructed upon such plan and for operating the same; and to make such excavations and openings along the route through which such railroad shall be constructed as shall be necessary from time to time. In all cases the surface of the streets around such foundations, piers and columns shall be restored to the condition in which they were before such excavations were made, as near as may be, and any interference with or change in the water mains, or in the sewers or lamp posts, except such changes as may be made with the concurrence of the proper department or authority shall be avoided; and the use of the streets, avenues, places and lands designated by the commissioners and the right of way through the same for the purpose of a railroad, as herein authorized, shall be considered and is hereby declared to be a public use, consistent with the uses for which the roads, streets, avenues and public places are publicly held. No such corporation shall have the right to acquire

the use or occupancy of public parks or squares in any such city or county, or the use or occupancy of any of the streets or avenues, except such as may have been designated for the route or routes of such railroad, and except such temporary privileges as the proper authorities may grant to such corporations to facilitate such construction, and no such railroad shall be constructed across the track of any steam railroad now in actual operation at the grade thereof, nor shall any piers or supports for any elevated railroad be erected upon a railroad track now actually in use in any street or avenue; and no such corporation shall construct a street surface railroad to run in whole or in part upon the surface of any street or highway under the provisions of this article.

Formerly L. 1890, ch. 565 (Railroad Law), § 129.

§ 230. Crossing of horse railroad track. Whenever the route selected by the commissioners for the construction of such railroad shall intersect, cross or coincide with any horse railroad track occupying the surface of the street or avenues, such railroad corporation is hereby authorized to remove, for the purpose of constructing its road, the tracks of such horse railroad; but the same shall be done in such manner as to interfere as little as possible with their practical operation or working, and upon the construction of such railroad, where such removals or changes have been made, the same shall be restored as near as may be to the condition in which they were previous to the construction of such railroad. All such removals and restorations shall be made at the proper cost and charges of such corporation, but no authority is herein given to any such corporation to use the tracks of any horse railroad.

Formerly L. 1890, ch. 565 (Railroad Law), § 130.

§ 231. Where route coincides with another route. Whenever the route or routes determined upon by the commissioners coincide with the route or routes covered by the charter of an existing corporation, formed for the purpose of constructing and operating such a railroad, and it has not forfeited its charter or failed to comply with the provisions thereof, requiring the construction of a road or roads within the time therein prescribed, such corporation shall have the like power to construct and operate such railroad upon the fulfillment of the like requirements and conditions

imposed by the commissioners as a corporation specially formed under this article, and the commissioners may fix and determine the route or routes by which any elevated steam railroad now in actual operation may connect with other steam railroads or the depots thereof, or with steam ferries, upon making compensation therefor, and in case such corporations can not agree with the owners of such steam railroads, depots or ferries upon the amount of such compensation, and such owners may be entitled to compensation therefor, the amount of such compensation shall be ascertained and paid in the manner prescribed in the condemnation law, and upon fulfillment by such elevated railroad corporation, so far as it relates to such connection, of the requirements and conditions imposed by this article, it shall possess all the powers conferred by section two hundred and twenty-nine of this article, and when any connecting route or routes shall be so designated, such elevated railroad corporation may construct such connection with all the rights and with like effect as though the same had been part of the original route of such railroad.

Formerly L. 1890, ch. 565 (Railroad Law), § 131, as am'd by L. 1892, ch. 676.

§ 232. Commissioners to transfer plans. Within one month after such corporation shall have been formed and organized in the manner hereinbefore provided, the commissioners shall transfer and deliver to the corporation all plans, specifications, drawings, maps, books and papers in their possession, and they shall, within the like period of one month after the organization of such corporation, cause to be paid to the treasurer thereof all money collected under the provisions of this article, after deducting therefrom the necessary expenses incurred by the commissioners and the amounts due to them for their salaries.

Formerly L. 1890, ch. 565 (Railroad Law), § 132.

§ 233. Commissioners to file report; confirmation thereof. The commissioners shall within one hundred and forty days after their appointment, make a report to a special term of the supreme court of the department in which such railroad may be located, of the amount of the pecuniary damages arising from the diminution of value of each parcel of property bounded on that portion of the street or streets, highway or highways, upon which it is proposed to construct such railroad or railroads, which will be caused by the construction, maintenance and operation thereof. The name

and place of residence of the owner or owners of each parcel shall be stated if the same are known, or can be ascertained, and if not known the name of the person or persons appearing by the certificate of the clerk or register of the county, to have the title thereto from the records in his office, and a specific description of each parcel of property with reasonable certainty. The testimony, if any, taken by the commissioners as to the amount of such damage, shall accompany their report. Within thirty days after filing and recording its certificate of incorporation, the corporation authorized to construct and operate such railroad or railroads shall move to confirm such report by giving notice of such motion to the property owners in the manner in which notice of the time and place of hearing before the commissioners is required by section two hundred and twenty-five of this article to be given, and if the corporation fails to so move, any property owner may make the motion; and thereafter the proceedings shall be conducted in the manner prescribed in the condemnation law.

Before constructing and operating its railroad in front of any real property bounded upon any street, avenue or public place wherein the corporation is authorized by the certificate and report of the commissioners to construct and operate its road, such corporation shall pay to the owner of the real property the damages sustained, or which will be sustained by him in consequence thereof, as finally fixed and ascertained, and the costs allowed him, if any, and the court may direct that such damages be paid out of the moneys deposited pursuant to the provisions of section two hundred and twenty-five of this article, or in case negotiable securities shall have been deposited in lieu of money, that so much of such securities shall be sold as may be necessary to raise the amount required to be paid to such owner for damages and costs if any. If a bond shall have been executed in lieu of such deposit, the court may order the sureties in such bond to pay the damages so fixed and ascertained, and in default thereof may cause them to be proceeded against and punished as for a contempt of court.

Formerly L. 1890, ch. 565 (Railroad Law), § 133, as am'd by L. 1892, ch. 676.

§ 234. **Pay of commissioners.** Each of the commissioners shall be paid for his services at the rate of ten dollars per day for each day of actual service as such commissioner, and all expenses necessarily incurred by him in the discharge of his duties, to be

paid by such corporation, but if a sufficient amount of capital stock shall not be subscribed within one year after the appointment of such commissioners to authorize the formation of such corporation, the commissioners shall receive no salary, and shall cause to be returned to the subscribers for such stock the amounts paid in by them, after deducting therefrom the necessary expenses incurred by the commissioners, but the time, if any, unavoidably consumed by the pendency of legal proceedings shall not be deemed a part of any period of time limited by this article.

Formerly L. 1890, ch. 565 (Railroad Law), § 134.

§ 235. Quorum; term of office; removal; vacancies in board of commissioners. A majority of the members of any board of commissioners appointed under this article shall be a quorum for the transaction of any business or the performance of any duty or function, or the exercise of any power, conferred or enjoined upon them. Any commissioner may be removed for cause at any time by the power appointing him, but no commissioner shall be removed without due notice and an opportunity to be heard in defense; and no commissioner thus removed is or shall be eligible to be again appointed to the office of commissioner. In case of the death, resignation or removal from office of any commissioner the vacancy shall be filled by the power appointing him, within thirty days after such removal, or within thirty days after notice in writing to such appointing power given by some member of the board, or by the corporation hereinafter mentioned, of such death or resignation, and a certificate of every such appointment shall be filed as hereinbefore required. Except as otherwise provided by law, the terms of office of the commissioners shall determine and expire with the performance of their functions as herein above prescribed.

Formerly L. 1890, ch. 565 (Railroad Law), § 135.

§ 236. Abandonment or change of route; new commissioners; their powers and proceedings. Any corporation heretofore organized or hereafter to be organized under this article, its successor or assigns, which shall have constructed or put in operation a railroad upon a part and not upon the whole of the route fixed, determined and located for such railroad by a board of commissioners, may at any time apply for authority to abandon

any portion of the route upon which the railroad shall not have been theretofore constructed or shall not then be in operation, with or without a change and relocation of such portion, and with or without extension of the portion not abandoned, or of any part thereof. Such application shall be made by petition in writing, addressed by such corporation to the board of supervisors of the county in which such portion of the route so desired to be changed or abandoned shall be situated, which is not within the limits of any city, or if such route, or any part thereof, shall be within the limits of a city, to the mayor of the city, for the route or portion thereof within such city. Five commissioners may be appointed pursuant to such an application as hereinafter provided, who shall be residents of the county or city and who shall have full power as herein provided. When such application is made by a corporation heretofore organized such commissioners may be appointed within thirty days after presentation of the same by such board of supervisors, or, as the case may be, by such mayor. When such application is made by a corporation hereafter to be organized under this article, such board of supervisors, or, as the case may be, such mayor, may within thirty days after presentation of such application, indorse thereon their or his approval and direction that it may be presented to the supreme court in the manner provided in section 220 of this article, and such court may thereupon appoint such commissioners. Within ten days after his appointment each commissioner so appointed shall take, subscribe and file the oath and give and file the bond prescribed by section 221 of this article; and if any one so appointed shall not comply with this requirement, he shall be deemed to have declined to accept such appointment, and to have made a vacancy which the appointing power shall fill by another appointment as herein provided. Within fifteen days after such appointments shall have been so made, the commissioners shall meet at some convenient place in such county and complete their organization as a board with appropriate officers. Such board shall have all the authority conferred by law upon commissioners appointed, or authorized to be appointed under this article. Before proceeding to hear the application of the corporation, the board shall give such public notice as it may deem most proper and effective of the time and place of the hearing. Within thirty days after completing their organization such board shall hear the appli-

cation of the corporation, and all parties who may be interested therein, and within sixty days after their organization they shall determine whether any part of such route should be authorized to be abandoned, or should be changed and relocated with or without extension or extensions. If the board shall determine that no abandonment of any part of the route should be allowed, and that no change and relocation of any part thereof should be effected, and that no extension should be made, the board shall dismiss the application. If the board shall determine that an abandonment of any portion of the route should be allowed, or that any change therein or extension thereof should be made, the board shall proceed to authorize and require the same upon such conditions as to the board shall seem proper, and with or without extension of the remainder of the route or of any part thereof, by fixing, determining and locating the route or routes of the extension or extensions, if any, and by directing the abandonment of the part of the route theretofore located, but by the board allowed to be abandoned, if any, and by fixing, determining and relocating the part of the route theretofore located, but by the board changed, if any; and the board shall cause to be made in duplicate a survey and map of the routes as so changed and fixed, determined and located. Neither such corporation nor any assign or successor thereof shall thereafter have any authority, by reason of any thing done under this article to operate or construct any railroad upon any portion of the route by the board so required to be abandoned. The board shall also fix and determine the time within which the railroad by it authorized and required upon any portion of the route so changed, shall be reconstructed and ready for operation. If the railroad on any portion of the route not by the board changed or allowed to be abandoned, shall not have been theretofore constructed and made ready for operation, the board may extend, and fix and determine anew the time within which such railroad shall be completed, but such extension of time shall not be for a longer period than that originally allowed by law for the completion thereof. If the board shall have determined that any portion of the route theretofore located should be allowed to be abandoned, with or without a change or relocation thereof or any part thereof, and with or without extension, or if the board shall have extended the time within which such railroad shall be completed, the board shall make a report in writing in accordance with the determination so made,

describing the portion of the route, if any there be, as so fixed, determined and located anew, and the part, if any there be, of the route allowed to be abandoned, and stating the period of time, if any, by the board fixed and determined within which such corporation shall construct and complete the railroad theretofore authorized or by it authorized to be constructed, and prescribing that a failure by the corporation, its successors or assigns, to complete it within the time, if any so limited, shall work a forfeiture to the supervisors of the county if no part of the road is within a city, or in any city, to such city, of the rights and franchises of such corporation with respect to that portion of the route so fixed, determined and located anew, and with respect to the then authorized extension or extensions, if any there be of said route, upon which a railroad shall not be constructed within the time so limited; but the time, if any, unavoidably consumed by the pendency of legal proceedings, shall not be deemed a part of any period of time limited in this article, and any recital of any forfeiture of any of the rights or franchises prescribed by any commissioners heretofore appointed, to be to the mayor, aldermen and commonalty of the city of New York, shall be as effectual for any and all purposes as if such forfeiture had been in terms recited to be to the board of supervisors of the county of New York. Such report shall be signed in duplicate by at least a majority of the then members of the board, and there shall be thereto annexed the survey and map as hereinabove directed, showing the line and location of each and all the routes, with or without the extension or extensions, as fixed, determined and located, and showing also the parts or part, if any there shall be, of the route or routes as theretofore fixed, determined and located, but by the board allowed to be abandoned. Within ten days after so signing such report the board shall cause the same to be filed in the office of the secretary of state, and the duplicate thereof in the office of the clerk of the county wherein such railroad shall be located; and thereupon the corporation making such application, its successors or assigns, is and shall be authorized to construct, maintain and operate a steam railroad for the transportation of passengers, mail and freight, upon the route or routes so fixed, determined and located, and in said report described, but the construction or operation of a railroad upon any new location or selection of route is not and shall not be thus authorized except upon the condition that the consent of the owners

of one-half in value of the property bounded on, and the consent also of the local authorities having control of that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained, or in case the consent of such property owners can not be obtained, that the determination of three commissioners, to be upon application appointed by the appellate division of the supreme court, in the department in which such railroad is proposed to be constructed, be given after a hearing of all parties interested that such railroad ought to be constructed or operated, which determination, confirmed by the court, may be taken in lieu of the consent of the property owners. Such corporation is and the successors and assigns thereof shall be authorized to maintain and operate all the railroads and the appurtenances thereof by it or them theretofore constructed upon any portion of a route or routes which shall have been located by commissioners under this article, and to complete within the time in and by such report so extended, fixed and determined anew, and thereafter to maintain and operate, the railroad and the appurtenances, upon so much of the route or routes theretofore fixed, determined and located as shall not have been so authorized and required to be abandoned, and with the same rights and effect, in all respects, as if such extended period of time had been originally fixed and determined, and in the original certificate of incorporation of such corporation recited, for completing such railroad and putting it in operation. The other terms and conditions in and by such certificate mentioned and prescribed, except as the same are hereinbefore modified or may be modified by the board as hereinabove authorized, shall apply to the railroad herein authorized to be constructed and operated upon the route or routes as so changed, fixed, determined and located, with the same force and effect as if such route or routes, as finally so changed and located, had been in and by such articles or certificates themselves prescribed. If a new location or extension of routes shall be fixed and determined by commissioners who shall have been appointed by the court pursuant to this section, they shall also ascertain and determine the aggregate pecuniary damages arising from the diminution of value of the property bounded on that portion of the street or highway upon the line of such new location or extension and of each parcel of real property so bounded, and their proceedings thereupon shall be conducted in the same manner and upon the like notice as the proceedings for that purpose before the

commissioners specified in section 225 and they shall make to the supreme court the report required by section 233, and thereupon the same proceedings shall be had as are provided for in such last named section. Each commissioner shall be paid for his services at the rate of ten dollars per day for each day of actual services as such commissioner, and all reasonable expenses incurred by him in or about any of the matters referred to such board, to be paid by the corporation making the application so heard and determined. No corporation shall be authorized under this section to extend, abandon or change the location of its route, or any part thereof, where the greater portion of the route or routes is or shall be in that portion of the city of New York south or west of Harlem river, or of any route or part thereof in the borough of Brooklyn or county of Kings, or to construct, extend, abandon or change the location of any railroad or route for a railroad over, under, through or across any street, avenues, place or lands south of One Hundred and Twenty-eighth street or west of Third avenue in that portion of the city of New York south or west of Harlem river, or where a railroad might not by law be constructed, or was not by law authorized to be by a board of commissioners located on the 5th day of June, 1888.

Formerly L. 1890, ch. 565 (Railroad Law), § 136, as am'd by L. 1892, ch. 676.

A railroad corporation organized under the Railroad Law of 1850, chapter 140 (now repealed), may extend its road by means of an elevated track in a city, without acquiring the right to do so under the Rapid Transit Act of 1875, where it does so solely for the purpose of connecting with an elevated road. Beekman v. Brooklyn & Brighton Beach R. R. Co., 89 Hun 14 (1895); McCullom v. Same, 89 id. 14. The Rapid Transit Act of 1875, chapter 606, above referred to, was repealed in 1890 and its provisions substantially re-enacted in sections 120 to 142 of the present Railroad Law.

§ 237. Abandonment of portion of route by elevated railroad. Any company operating an elevated railroad or railroads in any city of this state for the transportation of passengers, mails or freight, and which, prior to the twenty-ninth day of April, eighteen hundred and ninety-one, shall have built and operated six-tenths of its route as set forth and embodied in its articles of incorporation, may declare relinquished and abandoned any portion of its said route, which it may deem no longer necessary for the successful operation of its road and the convenience of the public. Such declaration of abandonment to be valid shall

be adopted by the board of directors, under the seal of such company, and shall be submitted to the stockholders thereof at a meeting called for the purpose of taking the same into consideration. Due notice of the time and place of holding said meeting and stating the object thereof shall be given by the company to its stockholders by written or printed notices addressed to each of the persons in whose name the capital stock of the company stands on the books thereof, at the address of such persons as stated on the books, or as known to the secretary of the company, and delivered or mailed to such persons, or the legal representatives of such persons, respectively, at least thirty days before the time of holding the meeting of such company, and also by a general notice published daily for at least four weeks in some newspaper last designated for the publication of the session laws or of judicial proceedings and legal notices in the county where the route of such company is located; and at the said meeting of stockholders the declaration of the said directors shall be considered and a vote by ballot taken for the adoption or rejection of the same, each share entitling the holder thereof to one vote, and said ballots shall be cast in person or by proxy, and if two-thirds of all the votes of the stockholders cast in person or by proxy at said meeting shall be for the adoption of said declaration of abandonment, then that fact shall be certified thereon by the secretary of the company under the seal thereof, and the declaration so adopted shall be submitted for approval to the public service commission, and if approved by it, such approval shall be indorsed thereon, and the said declaration so certified and indorsed shall be filed and recorded in the office of the secretary of state, and from the time of such filing such portion of said route designated in such declaration of such company shall be deemed to be abandoned. A copy of such declaration of abandonment, duly certified by the secretary of state under his official seal, shall be presumptive evidence in all courts and places of the facts which it recites, and of the regularity of the proceedings resulting in such abandonment.

§ 238. Increased deposit, when and how required. In case any of the securities deposited in lieu of money as provided in section two hundred and twenty-five, shall in the opinion of the county treasurer or trust company with whom they may be de-

posited, fall below their actual value at the time of deposit, the county treasurer or trust company shall call upon such railroad corporation to substitute therefor other securities equivalent at their par or market value to the amount in lieu of which the securities for which they are to be substituted were deposited, and in case such other securities shall not be furnished, the county treasurer or trust company shall call upon such corporation to furnish as a substitute, and it shall so furnish an amount of money equal to the amount in lieu of which the securities first above referred to were deposited.

Formerly L. 1890, ch. 565 (Railroad Law), § 137.

§ 239. Trains to come to full stop. All trains upon elevated railroads shall come to a full stop before any passenger shall be permitted to leave such trains; and no train on such railroad shall be permitted to start until every passenger desiring to depart therefrom shall have left the train, provided such passenger has manifested his intention to so depart by moving toward or upon the platform of any car; nor until every passenger upon the platform or station at which such train has stopped, and desiring to board or enter such cars, shall have actually boarded or entered the same, but no person shall be permitted to enter or board any train after due notice from an authorized employe of such corporation that such train is full and that no more passengers can be then received.

Formerly L. 1890, ch. 565 (Railroad Law), § 138.

An elevated railroad company which, after its station platform is full, continues to sell tickets and allows passengers to go upon such platform in numbers sufficient to crowd a passenger already there forward, and off from the front edge of the platform, on which there is no protecting rail, is liable for the injury thus occasioned to him. McGearty v. Manhattan Ry. Co., 15 A. D. 2 (1897).

§ 240. Gates or vestibule doors. Every car used for passengers upon elevated railroads shall have gates at the outer edge of its platforms so constructed that they shall, when opened, be caught and held open by such catch or spring as will prevent their swinging and obstructing passengers in their egress from or ingress to such cars, or vestibule doors so constructed as to slide into the body of the car; and every such gate or door shall be kept closed while the car is in motion; and when the car has

stopped and a gate or door has been opened, the car shall not start until such gate or door is again firmly closed.

Formerly L. 1890, ch. 565 (Railroad Law), § 139, as am'd by L. 1903, ch. 273.

§ 241. Penalty for violation of two preceding sections. Any elevated railroad corporation that shall fail or neglect to comply with or enforce the provisions of the two preceding sections, shall upon the petition of any citizen to any court of record, and upon due notice to such corporation, and proof of such failure or neglect, pay to the clerk of the court wherein such petition was made, a sum not less than two hundred and fifty nor more than one thousand dollars, as such court may direct by its order. The sum so ordered to be paid shall be paid by such clerk of the court to the county treasurer, and shall be distributed by such treasurer equally among the public hospitals of the county in which the proceeding is had, at such time, as the board of supervisors or board of aldermen in any such county shall direct. Nothing in this section shall relieve elevated railroad corporations from any liability under which they may now be held by existing laws for damages to persons or property.

Formerly L. 1890, ch. 565 (Railroad Law), § 140, as am'd by L. 1892, ch. 676.

§ 242. Sections to be printed and posted. The officers and board of directors of such railroad corporations shall cause copies of sections two hundred and thirty-nine, two hundred and forty and two hundred and forty-one to be printed conspicuously and posted in the depots or stations and in each car belonging to them.

Formerly L. 1890, ch. 565 (Railroad Law), § 141.

§ 243. Extension of time. The time within which any act is required to be done under the foregoing sections of this article may be extended by the supreme court for good cause shown, for one year, and but one extension will be granted. Any company that has heretofore constructed or is now operating an elevated railroad shall be deemed to have been duly incorporated notwithstanding any failure on the part of commissioners to insert in its articles of association provisions complying with statutory requirements relative to such articles.

Formerly L. 1890, ch. 565 (Railroad Law), § 142, as added by L. 1892, ch. 676.

§ 244. Lighting cars on elevated railroads in cities of over twelve hundred thousand inhabitants. Every corporation operating an elevated railroad in any city of over twelve hundred thousand inhabitants in this state, computed according to the state enumeration had in eighteen hundred and ninety-two, shall equip all cars used for the transportation of passengers with the most approved system of lighting passenger cars now in use upon railroads, either by electricity or gas of not less than eighteen candle power, and every such corporation is prohibited from using kerosene or coal oils as a means of lighting any of its passenger cars. Any violation of the provisions of this section shall render any such corporation liable to pay a fine or penalty of fifty dollars for each and every day, for each and every passenger car run over its railroad which is not equipped and lighted as provided herein; and such fine may be recovered by any passenger on such railroad who may sue therefor; and any violation of the provisions of this section on the part of any such railroad corporation shall also be a misdemeanor.

Formerly L. 1896, ch. 388, §§ 1, 2.

ARTICLE 7

LAWS REPEALED; WHEN TO TAKE EFFECT

SECTION 250. Laws repealed.
251. When to take effect.

§ 250. Laws repealed. Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

§ 251. When to take effect. This chapter shall take effect immediately.

SCHEDULE OF LAWS REPEALED

Laws of	Chapter.	Section.	Laws of	Chapter.	Section.
1834	249	20	1847	222, 270, 272	
1834	311	All		404, 405	All
1835	300	All	1848	140	All
1836	316	All	1849	271, 434	All
1838	160, 161	All	1850	140	All
1839	218	All	1851	19, 497	All
1845	149, 230	All	1853	53, 62	All
1846	155	All	1854	140, 282	All
1846	215	17, 18	1855	302, 478, 526	All
1847	100	3–5	1857	185, 444	All

The Railroad Law.

Laws of	Chapter.	Section.
1858	125	All
1862	449	All
1863	346	All
1864	582	All
1865	246	All
1866	259, 697, 798	All
1867	4, 49, 254	
	368, 483, 515	
	775, 793, 906	All
1868	573	All
1869	237	All
1869	607	1
1869	844, 917	All
1871	560, 669	All
1872	81, 350	All
1872	612	3
1872	829, 843	All
1873	352, 432, 710	All
1874	240, 430	All
1875	108, 193, 256	
	586, 598, 606	All
1876	77, 198, 446	All
1877	103, 224	All
1878	261	All
1879	293, 350, 395	
	415, 503	
	505, 541	All
1879	541	All
1880	5, 94, 133	
	155, 223, 267	
	349, 415, 417	
	575, 582, 583	All
1881	148, 296, 317	
	338, 399, 452	
	468, 470, 485	
	649, 685	All
1882	82, 140	All
1882	273	2
1882	349, 353	
	393, 405	All
1883	46, 381, 382	
	384, 386	
	387, 388	All
1884	193, 223, 252	
	421, 422, 439	
	441, 444	All
1885	305, 369	
	498, 530	All
1886	65, 271, 403	
	415, 509, 551	
	601, 605	
	634, 642	All
1887	536, 616	
	622, 724	All
1888	189, 514	
	549, 560	All
1889	38, 76, 78	
	236, 242, 281	
	426, 524, 531	
	532, 564	All
1890	98, 421	
	483, 543	All
1890	565	1–141
		180–183
1891	267, 294, 360	
	362, 367	All
1892	306, 425, 460	
	532, 604	All
1892	676	All, except part amdg. L. 1890, ch. 565, § 162
1892	700, 702	All
1893	225, 238, 239	
	316, 433, 434	
	543, 544	
	546, 679	All
1894	648, 693, 723	All
1895	454, 513, 545	
	700, 921, 933	
	1027	All
1896	299, 333, 356	
	388, 485, 486	
	649, 835	
	855, 974	All
1897	193, 235, 377	
	484, 504	
	688, 754	All
1898	80, 170, 263	
	466, 520, 521	
	577, 590, 597	
	643, 656	All
1899	226, 359, 488	
	491, 497, 539	
	541, 582, 583	
	584, 597	
	647, 710	All
1900	198, 478, 482	
	517, 549, 679	
	739, 740	All
1901	301, 419, 494	
	508, 553, 617	
	637, 638	
	639, 731	All

The Railroad Law.

Laws of	Chapter.	Section.	Laws of	Chapter.	Section.
1902...	140, 198, 209		1905...	222, 453, 611	
	225, 226, 338			650, 651	
	487, 504.....	All		695, 727.....	All
1903...	30, 273, 325		1906.....	380, 657.....	All
	426, 537, 597		1907.....	156, 208	
	626, 627.....	All		229, 463.....	All
1904.....	228, 313.....	All	1908...	448, 459, 475.....	All

Note.— L. 1909, chs. 153 and 564, amending L. 1890, ch. 565, although not embodied in the foregoing schedule, are also repealed, pursuant to the Gen. Construction Law, § 91, which provides that the repeal by a consolidated law of any statute includes a statute amendatory thereof.

MISCELLANEOUS RAILROAD LAWS

Various Acts and Parts of Acts Affecting Railroads

L. 1909, Ch. 16 (County Law).

*in relation to counties, constituting chapter eleven of the consolidated laws.

§ 70. Streets outside of city limits. When any territory in a county containing an incorporated city of one hundred thousand inhabitants or upward, lying outside the limits of such city, has been mapped into streets and avenues pursuant to law, the board of supervisors may authorize the establishment of a plan for the grade of such streets and avenues; the alteration of such plan of grades, or of any plan thereof that shall have been established by law; the laying out, opening, grading, constructing, closing and change of line or width, of any one or more of them, and provide for the assessment on property intended to be benefited thereby, and fixing assessment districts therefor, and for the levy, collection and payment of the amount of damages sustained and the charges and expenses incurred, or which may be necessary to incur in carrying out such provisions; the laying out of new or additional streets and avenues upon the established map or plan thereof, the acceptance by town officers of conveyances of lands, for public highways, the naming and changing of names of streets and avenues laid down on said map or plan, and the numbering or renumbering of houses and building lots fronting on such streets and avenues. But such last named power in regard to the alteration of said map or

* Words "An Act" omitted in original.

plan, laying out, opening, grading, constructing, closing and change of line, of such streets or avenues, or the numbering or naming thereof, or defraying the expenses thereof, shall only be exercised on the petition of the property owners, who own more than one-half of the frontage on any such street or avenue, or on a certificate of the town board and commissioners of highways of the town, that the same is, in their judgment, proper and necessary for the public interest. If the streets and avenues, in respect to which such action is proposed to be taken, shall lie in two or more towns, a like certificate shall be required of the town board and commissioners of highways, of each town. Before making such certificate, such town board, or boards and commissioners of highways, shall give ten days' notice by publication in one of the daily papers of the county, and by conspicuously posting in six public places in each of such towns, of the time and place at which they will meet to consider the same, at which meeting the public, and all persons interested, may appear and be heard in relation thereto. No such street or avenue shall be laid out, opened or constructed, upon or across any lands acquired by the right of eminent domain, and held in fee for depot purposes by any railroad corporation, or upon or across any lands now held by a corporation formed for the purpose of improving the breed of horses, without the consent of such corporations. No town officer shall charge anything for his services under this section, nor shall any charge be made against any such town or the property therein, for the expense of the publication of the notice herein required.

Formerly L. 1892, ch. 686 (County Law), § 71.

L. 1911, CH. 647 (CONSERVATION LAW).

An Act relating to conservation of land, forests, waters, parks, hydraulic power, fish and game, constituting chapter sixty-five of the consolidated laws.

§ 101. Fire patrol by railroads within forest preserve counties. 1. All railroads operating as common carriers through forests in the forest preserve counties of the state shall, at their own expense, organize and maintain a competent and sufficient fire

patrol to protect the forests from fires which may be set or occur upon, or adjacent to, the rights of way or lands of such railroads, and shall file with the commission on or before April first of each year a statement showing the names and addresses of the persons employed on such patrol, and unless otherwise directed by the commission, such patrol shall be maintained continuously from April first to November first of each year, and at such other times as the commission may direct.

2. If such railroads do not organize and maintain such fire patrols, or if, in the judgment of the commission, they do not organize and maintain fire patrols which are adequate and sufficient to protect and save the forests from fires which may be set or occur upon, or adjacent to, rights of way or lands of such railroads, then the commission shall organize and maintain such fire patrol in such manner and under such rules and regulations as it shall from time to time deem proper. The persons placed upon patrol of railroad lines and lands and railroad rights of way, and lands and ways adjacent thereto, as herein provided, shall be transported without charge from point to point by the railroads along whose lines such fire patrol is being maintained, as their duties shall require.

The commission shall keep, or cause to be kept, an account of the cost of organizing and maintaining such fire patrol along the line of any such railroad, including therein the salaries, expenses and wages of public officers or employees engaged in organizing and maintaining such fire patrol, and the total cost thereof shall be paid to the commission by the railroad along whose line or lands or rights of way such patrol is maintained. Such payment shall be made on the first day of December of each year, and may be recovered by the commission in a civil action in the name of the people of the state of New York, and in addition thereto said company shall be liable to a penalty of one hundred dollars for each violation of the provisions of this section; and every day such railroad shall fail to maintain the patrol required by this section shall be deemed a separate violation.

3. Any person employed upon fire patrol of such railroads shall immediately report to the commission, upon blanks to be furnished by it, every fire within his line of patrol which started upon the line of the railroad or ways or lands adjacent thereto, or ran off

the railroad's right of way or lands to other lands, setting forth the origin of such fire and the extent and character of the land burned over, and, if the fire was started by a locomotive, he shall give the number thereof. Such report shall be verified by the person making it and if he is unable to state or ascertain the origin of such fire he shall in his report make oath of such fact. Any person so employed who fails to make such report immediately shall be liable to a penalty of twenty-five dollars; and if he makes a false report he shall be guilty of a felony and be punishable therefor.

Added by L. 1912, ch. 444.

§ 102. Fire patrol by railroads outside forest preserve counties. 1. When, in the judgment of the commission, there is danger of the setting and spreading of fires from locomotives in operating through any wooded or forest lands outside the forest preserve counties, the commission may order said railroad company to provide patrolmen to patrol the right of way, and lands adjacent thereto, as it may deem necessary to prevent fires, and such patrol shall be maintained continuously during the time directed by the commission, and such company or person shall immediately file with the commission a statement showing the names and addresses of the persons employed on such patrol.

2. When the commission has notified a railroad company to provide such patrol the said railroad company shall immediately comply with such instructions, throughout the territory designated; and upon its failure so to do, then the commission shall organize and maintain such fire patrol in such manner and under such rules and regulations as it shall from time to time deem proper; and such patrolmen shall be transported without charge from point to point by the railroads along whose lines such fire patrol is maintained as their duties shall require.

3. The cost of organizing and maintaining such fire patrol, including the salaries, expenses and wages of public officers or employees engaged therein, shall be charged to and paid by said railroad company on December first of each year, and may be recovered by the commission in a civil action in the name of the people of the state of New York, and in addition thereto said railroad company shall be liable to a penalty of one hun-

dred dollars for each and every day's refusal or neglect to comply with the provisions of this section. Every person employed upon fire patrol under this section shall report to the commission in the manner, and be subject to the penalties, prescribed in the preceding section.

Added by L. 1912, ch. 444.

§ 103. Clearing right of way and fire protection devices by any railroads in forest lands. 1. Every railroad company or person operating a railroad with steam power in any part of the state shall, on such part of its road as passes through forest land or lands subject to fires from any cause, cut and remove from its right of way along such lands, all grass, brush or other inflammable materials whenever required by the commission; and shall provide each locomotive thereon with a practical and efficient spark arresting device, so constructed as to give the best practicable protection against the escape of fire and sparks from the smoke stacks thereof, and adequate devices to prevent the escape of fire from ash pans and furnaces which shall be used on such locomotives, and all said devices shall be approved by the public service commission and shall at all times be maintained in good repair. If the right of way aforesaid is more than one hundred feet in width the same shall be cleared as above provided, for a distance of fifty feet on each side of the center line thereof.

2. The public service commission must upon the request of the conservation commission and on notice to the person or companies affected, require any person, railroad or other company having a railroad running through forest lands, to adopt such devices and precautions against setting fire upon its line in such forest lands as the public interest requires. The supreme court may on notice to the persons or corporations affected enforce compliance with any such order of the public service commission.

3. It shall be the duty of the superintendent of motive power or equivalent officer of each railroad acting as a common carrier to designate an employee of such railroad at each division point and round house who shall examine each locomotive each time it leaves the division point or round house between March first and December first, and report the condition of said devices; such reports to

be kept on file for examination of inspectors and employees of the conservation commission.

4. No corporation or person acting as a common carrier or employee thereof shall deposit fire coals or ashes on any railroad track or right of way near forest lands. In case of fire on its own, or neighboring lands, the railroad company shall use all practicable means to put it out. Engineers, conductors or trainmen discovering or knowing of fires in fences or other material along or near the right of way of the railroad in such lands, shall report the same at the first station to the station agent, and such station agent shall forthwith notify the nearest fire warden, forest ranger or district forest ranger thereof, and use all necessary means to extinguish the same.

Any person, railroad or other company failing or neglecting to comply with any of the provisions of this section, or any order of the public service commission made pursuant to the provisions of this section, shall be liable to a penalty of one hundred dollars for each day that it continues a violation thereof, and any officer or employee of a railroad or other company violating any provisions of this section or neglecting to comply with any requirement of the public service commission duly ordered, shall be liable to a penalty of one hundred dollars for every such violation. The term "logging road" as used in this chapter shall be construed to mean any railroad branch, line or division, or independent line, the chief or main business of which is the transportation of logs, lumber or other forest products.

Added by L. 1912, ch. 444.
Thus am'd by L. 1913, ch. 723.

§ 104. Fire inspectors — railroads. The commission may divide the state into two districts and appoint one chief fire inspector for each district, who shall receive an annual salary of twelve hundred dollars and his necessary expenses, and such other fire inspectors, not exceeding four, as may be necessary, in the judgment of the commission, during seasons of the year when forest fires occur, and such inspectors shall serve along lines of steam and logging railroads. They shall inspect such railroads and the locomotive and logging engines thereon for the purposes of

fire prevention as directed by the commission or superintendent of forests, reporting to the commission the condition thereof, and perform such other duties in preventing forest fires and protecting the forest as the superintendent of forests or the commission shall direct. They shall also have the powers of game protectors and shall each receive an annual salary of nine hundred dollars and necessary expenses.

Added by L. 1912, ch. 444.

§ 105. Rejection from service of defective engines. The chief fire inspectors appointed by the conservation commission shall immediately report to the conservation commission any locomotive or logging engine which in the opinion of the said inspector is deficient in adequate design, construction or maintenance of the fire protective devices designated in section one hundred and three of this article, and any such locomotive or logging engine so reported shall not be continued in service after five days' notice from the conservation commission until such defects have been remedied to the satisfaction of the conservation commission. In case of disagreement between said conservation commission and the owner of the locomotive or logging engine so rejected from service, as to the efficiency or proper maintenance of said protective devices, then the owner of said locomotive or logging engine may apply to the public service commission of the department in which the rejected locomotive or logging engine is located for a decision of said matter, but pending such decision the said locomotive or logging engine shall not be returned to service.

Added by L. 1912, ch. 444.

Formerly L. 1885, ch. 283, §§ 25–29 (An act to establish a forest commission); re-enacted by L. 1893, ch. 332 (An act in relation to the forest preserve and Adirondack park), § 107; re-enacted by L. 1895, ch. 395 (An act to amend the Game Law), § 275; re-enacted by L. 1900, ch. 20 (An act for the protection of the forests, fish and game of the State), § 228; am'd by L. 1904, ch. 590, § 228; re-enacted by L. 1909, ch. 24, § 72.

The provisions of this section do not relate exclusively to lands within the forest preserve. It applies to forest lands in counties outside the forest preserve, and is of general application throughout the State. People v. L. Isl. R. R. Co., 194 N. Y. 130 (1909), modifying 126 A. D. 477.

L. 1909, CH. 29 (GENERAL MUNICIPAL LAW).

An Act relating to municipal corporations, constituting chapter twenty-four of the consolidated laws.

§ 13. Municipal taxes of railroads payable to county treasurer. If a town, village or city has outstanding unpaid bonds, issued, or substituted for bonds issued, to aid in the construction of a railroad therein, so much of all taxes as shall be necessary to take up such bonds, except school district and highway taxes, collected on the assessed valuation of such railroad in such municipal corporation, shall be paid over to the treasurer of the county in which the municipal corporation is located. Such treasurer shall purchase with such moneys of any town, village or city, such bonds, when they can be purchased at or below par, and shall immediately cancel them in the presence of the county judge. If such bonds can not be purchased at or below par, such treasurer shall invest such moneys in the bonds of the United States, of the state of New York, or of any town or village or city of such state, issued pursuant to law; and shall hold such bonds as a sinking fund for the redemption and payment of such outstanding railroad aid bonds. If a county treasurer shall unreasonably neglect to comply with this section, any taxpayer of the town, village or city having so issued its bonds may apply to the county judge of the county in which such municipal corporation is situated, for an order compelling such treasurer to execute the provisions of this section. Upon application of the town board of any town, the board of supervisors of the county in which said town is situated may authorize payment by the county treasurer of all moneys thus paid to him in any year by the railroads mentioned in this section, to the supervisor of such town, for its use and benefit; to be applied either to the purchase of outstanding railroad aid bonds or the payment of interest thereon, and any payment heretofore made in good faith by the treasurer of any county to any town or to the supervisor thereof, of the taxes received in any year by such treasurer, from railroad corporations in that town, is hereby validated. The county treasurer of any county in which one or more towns therein shall have issued bonds for railroad purposes, shall when directed by the board of supervisors or county judge of the county, execute and file in the office of the clerk of the county an undertaking with not less than two sureties, approved by such board or

judge, to the effect that he will faithfully perform his duties pursuant to this section. The annual report of a county treasurer shall fully state, under the head of "railroad sinking fund," the name and character of all such investments made by him or his predecessors, and the condition of such fund.

Formerly L. 1892, ch. 685 (General Municipal Law), § 12, as am'd by L. 1893, ch. 466; L. 1903, ch. 515.

§ 14. Appointment of railroad commissioners. The county judge of any county within which is a municipal corporation having or being entitled to have railroad commissioners, on October first, eighteen hundred and ninety-two, and in which the duties imposed upon such commissioners are not fully performed, shall continue to appoint and commission, upon the application of twenty freeholders within such corporation, three persons, who shall be freeholders and resident taxpayers therein, commissioners for the purpose of performing the duties and completing the business required of them pursuant to this chapter or any law. Such commissioners shall hold their office for five years, and until others are appointed by the county judge, unless their duties shall be sooner performed, or the office shall be abolished, who shall also, in like manner, fill any vacancies that may exist therein. Such commissioners shall each receive the sum of three dollars per day for each day actually engaged in the discharge of their duties, and the necessary disbursements to be audited and paid by the usual auditing and disbursing officers of such municipal corporation. A majority of such commissioners, at a meeting of which all have notice, shall constitute a quorum.

Formerly L. 1892, ch. 685, § 14.

§ 15. Oath and undertaking of commissioners. Before entering upon their duties such commissioners shall take the constitutional oath of office, and make and file with the county clerk of their county, their joint and several undertaking, with two or more sureties to be approved by the county judge of their county, to the effect that they will faithfully discharge their duties as such commissioners, and truly keep, pay over and account for all moneys belonging to such corporation coming into their hands.

Formerly L. 1892, ch. 685, § 15.

§ 16. Abolition of office of railroad commissioners. The board of supervisors of any county may, upon the application of

the auditing board of any municipal corporation therein, by resolution, abolish the office of railroad commissioners of such municipal corporation, and direct the manner of the transfer of their duties to the supervisor of the town, or the treasurer of the municipal corporation other than a town, and upon his compliance with such directions, such transferee shall be vested with all the powers conferred upon such railroad commissioners and subject to all the duties imposed upon them.

Formerly L. 1892, ch. 685, § 13.

§ 17. Exchange or sale of railroad stock and bonds. The railroad commissioners or officers of a municipal corporation, having the lawful charge and control of any railroad stock or bonds, for or in payment of which the bonds of such municipal corporation have been lawfully issued in aid of such railroad corporation, may exchange the stock or bonds of such railroad corporation for and in payment of such bonds, or the new substituted bonds of such municipal corporation, when such exchange can be made for not less than the par value of the stocks or bonds so held by them. If they can not make such exchange they may sell such stocks or bonds at not less than par; but they may, on the application and with the approval of the governing board of the municipal corporation owning such stock or bonds, exchange, sell or dispose of such stock or bonds, at the best price and upon the best terms obtainable, for the municipal corporation they represent, and shall execute to the purchaser the necessary transfers therefor. All moneys received for any stock or bonds shall only be applied to the payment and extinguishment of the bonds of the municipal corporation, lawfully issued in aid of any such railroad, or substituted therefor; except that if the bonds so issued or substituted have all been paid, or the moneys so realized shall be more than sufficient to pay them in full, and all the costs and expenses of the sale, such proceeds or balance thereof shall be paid by the officers making the sale, to the supervisor of the town, or the treasurer of the municipal corporation, and applied to such lawful uses as the governing board of the municipal corporation, entitled to the same, may direct. The provisions of this section shall apply to all such commissioners or officers of a municipal corporation elected or appointed or acting under the provisions of any special act, and the authority hereby conferred shall not be limited by the provisions of any such special act.

Formerly L. 1892, ch. 685, § 16, as am'd by L. 1893, ch. 490.

§ 18. Annual report of commissioners and payment of bonds. The railroad commissioners of a municipal corporation, having in charge the moneys received and collected, and who are responsible for the payment of the interest of the bonds lawfully issued by such municipal corporation, in aid of railroads, shall annually report to the governing board of the municipal corporation, the total amount of the municipal indebtedness of the municipal corporation they represent, upon such bonds or such new bonds substituted therefor, the date of the bonds and when payable, the rate of interest thereon, the acts under which they were issued, the amount of principal and interest that will become due thereon before the next annual tax levy and collection of taxes for the next succeeding year, and the amount in their hands applicable to the payment of the principal or interest thereon. Each year such governing board shall levy and collect of the municipal corporation sufficient money to pay such principal and interest, as the same shall become due and payable. When collected, such moneys, with the unpaid sums on hand, shall be forthwith paid over to such commissioners, and applied by them to the purposes for which collected or held. When paid, such bonds shall be presented by such railroad commissioners to the governing board of the municipal corporation, at least five days before the annual town meeting, village or city election, or meeting of the board of supervisors, next thereafter held, who shall cancel the same, and make and file a record thereof in the clerk's office of the municipal corporation, whose bonds were so paid or canceled.

Formerly L. 1892, ch. 685, § 17, as am'd by L. 1893, ch. 466.

L. 1909, CH. 30 (HIGHWAY LAW).

An Act relating to highways, constituting chapter twenty-five of the consolidated laws.

§ 142-a. Where a street surface railroad shall be laid in any street, highway or public place in any village, or in any city of the second or third classes, which it was heretofore or shall hereafter be determined to pave or improve as provided in this chapter, the proposals and contract for such improvement shall include

the improvement of the space between the tracks of such street surface railroad, the rails of such tracks and two feet in width outside of such tracks, and the work of improvement in such space shall be done at the same time and under the same supervision as the work of improvement of the remainder of such street, highway or public place. The commission may prescribe the materials to be used in paving or improving such street, highway or public place within the railroad space above described, and upon the proper completion of the work, the commission shall certify to the board of trustees of such village, or the common council of cities of the second or third classes, as the case may be, the cost of the pavement or improvement of such street, highway or public place within such railroad space, and the entire expense of the pavement or improvement within such railroad space whether heretofore or hereafter made or ordered, shall be assessed and levied upon the property of the company owning or operating such railroad, and shall be collected in the same manner as other expenses for local improvements are assessed, levied and collected in such village or city; and an action may also be maintained by the municipality against the company in any court of record for the collection of such expense and assessment. This section shall not apply to such paving or improvements in villages in counties adjoining cities of the first class.

New section, added by L. 1913, ch. 177.

§ 145. Abolition of railroad grade crossings. The commission shall provide for and cause the abolition of railroad grade crossings on a state or county highway whenever practicable, in the manner provided by the railroad law. The portion of the cost of abolishing such grade crossings, which is payable under the railroad law by the state and town or village, shall be paid out of the funds available for the construction or improvement of such state or county highway as provided in this article.

§ 146. Railroads and other works and structures in and upon highways. No street surface or other railroad shall be constructed upon any portion of a state or county highway which has been or may be improved under the provisions of this article, nor shall any person, firm or corporation enter upon or construct any works in or upon any such highway, or construct any overhead or underground crossing thereof, or lay or maintain therein drainage,

sewer or water pipes underground, except under such conditions and regulations as may be prescribed by the commissioner of highways, notwithstanding any consent or franchise granted by any town, county or district superintendent, or by the municipal authorities of any town. Any person, firm or corporation violating this section shall be liable to a fine of not less than one hundrede* dollars nor more than one thousand dollars for each day of such violation, to be recovered by the commissioner of highways and paid to the state treasurer to the credit of the fund for the maintenance and repair of state and county highways, and may also be removed therefrom as a trespasser by the commissioner of highways upon petition to the county court of the county or the supreme court of the state.

Thus am'd by L. 1911, ch. 646; L. 1913, ch. 80.

L. 1909, CH. 38 (LIEN LAW).

An Act in relation to liens, constituting chapter thirty-three of the consolidated laws.

§ 6. Liens for labor on railroads. Any person who shall hereafter perform any labor for a railroad corporation shall have a lien for the value of such labor upon the railroad track, rolling-stock and appurtenances of such railroad corporation and upon the land upon which such railroad track and appurtenances are situated, by filing a notice of such lien in the office of the clerk of any county wherein any part of such railroad is situated, to the extent of the right, title and interest of such corporation in such property, existing at the time of such filing. The provisions of this article relating to the contents, filing and entry of a notice of a mechanic's lien, and the priority and duration thereof, shall apply to such liens. A copy of the notice of such lien shall be personally served upon such corporation within ten days after the filing thereof in the manner prescribed by the code of civil procedure for the service of summons in actions in justices' courts against domestic railroad corporations.

Formerly L. 1897, ch. 418 (Lien Law), § 6.

L. 1875, ch. 392, § 8, relative to individual liability of stockholders of railroad corporations for services of laborers, etc., has been repealed by the Stock Corporation Law, because like provisions are contained in section 57 of said law.

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* So in original.

L. 1909, CH. 43 (NEGOTIABLE INSTRUMENTS LAW).

An Act in relation to negotiable instruments, constituting chapter thirty-eight of the consolidated laws.

§ 332. How negotiable bonds are made non-negotiable. The owner or holder of any corporate or municipal bond or obligation (except such as are designated to circulate as money, payable to bearer), heretofore or hereafter issued in and payable in this state, but not registered in pursuance of any state law, may make such bond or obligation, or the interest coupon accompanying the same, non-negotiable, by subscribing his name to a statement indorsed thereon, that such bond, obligation or coupon is his property; and thereon the principal sum therein mentioned is payable only to such owner or holder, or his legal representatives or assigns, unless such bond, obligation or coupon be transferred by indorsement in blank, or payable to bearer, or to order, with the addition of the assignor's place of residence.

Formerly L. 1897, ch. 612 (Negotiable Instruments Law), § 332.

L. 1909, CH. 45 (PERSONAL PROPERTY LAW).

An Act relating to personal property, constituting chapter forty-one of the consolidated laws.

§ 61. Conditional sale of railroad equipment and rolling stock. Whenever any railroad equipment and rolling stock is sold, leased or loaned under a contract which provides that the title to such property, notwithstanding the use and possession thereof by the vendee, lessee or bailee, shall remain in the vendor, lessor or bailor, until the terms of the contract as to the payment of instalments, amounts or rentals payable, or the performance of other obligations thereunder, are fully complied with, and that title to such property shall pass to the vendee, lessee or other bailee on full payment therefor, such contract shall be invalid as to any subsequent judgment creditor of or purchaser from such vendee, lessee or bailee for a valuable consideration, without notice, unless

1. Such contract is in writing, duly acknowledged and recorded in the book in which real estate mortgages are recorded in the office of the county clerk or register of the county in which is located

the principal office or place of business of such vendee, lessee or bailee; and unless

2. Each locomotive or car so sold, leased or loaned, has the name of the vendor, lessor or bailor, or of the assignee of such vendor, lessor or bailor, plainly marked upon both sides thereof, followed by the word owner, lessor, bailor or assignee, as the case may be.

Formerly L. 1897, ch. 418 (Lien Law), § 111.

STOCK TRANSFER ACT

L. 1913, Ch. 600, An Act to amend the personal property law, relative to transfers of shares of stock in corporations.

[This act amending the Personal Property Law, by adding thereto sections 162–185, inclusive, took effect May 17, 1913. Said provisions are known as the "Uniform Stock Transfer Act," having been enacted, with some slight variations of language and section numbers, in New York, Ohio, Pennsylvania, Rhode Island, Wisconsin, Alaska, Louisiana, Maryland, Massachusetts and Michigan.]

ARTICLE 6

§ 162. How title to certificates and shares may be transferred. Title to a certificate and to the shares represented thereby can be transferred only,

(a) By delivery of the certificate indorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby, or

(b) By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person.

The provisions of this section shall be applicable although the charter or articles of incorporation or code of regulations or by-laws of the corporation issuing the certificate and the certificate itself provide that the shares represented thereby shall be transferable only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent.

§ 163. Powers of those lacking full legal capacity and of fiduciaries not enlarged. Nothing in this article shall be construed as enlarging the powers of an infant or other person lacking full legal capacity, or of a trustee, executor or administrator, or other fiduciary, to make a valid indorsement, assignment or power of attorney.

§ 164. Corporation not forbidden to treat registered holder as owner. Nothing in this article shall be construed as forbidding a corporation,

(a) To recognize the exclusive right of a person registered on its books as the owner of shares to receive dividends, and to vote as such owner, or

(b) To hold liable for calls and assessments a person registered on its books as the owner of shares.

§ 165. Title derived from certificate extinguishes title derived from a separate document. The title of a transferee of a certificate under a power of attorney or assignment not written upon the certificate, and the title of any person claiming under such transferee, shall cease and determine if, at any time prior to the surrender of the certificate to the corporation issuing it, another person, for value in good faith, and without notice of the prior transfer, shall purchase and obtain delivery of such certificate with the indorsement of the person appearing by the certificate to be the owner thereof, or shall purchase and obtain delivery of such certificate and the written assignment or power of attorney of such person, though contained in a separate document.

§ 166. Who may deliver a certificate. The delivery of a certificate to transfer title in accordance with the provisions of section one hundred and sixty-two is effectual, except as provided in section one hundred and sixty-eight, though made by one having no right of possession and having no authority from the owner of the certificate or from the person purporting to transfer the title.

§ 167. Indorsement effectual in spite of fraud, duress, mistake, revocation, death, incapacity or lack of consideration or authority. The indorsement of a certificate by the person appearing by the certificate to be the owner of the shares represented thereby is effectual, except as provided in section one hundred and sixty-eight, though the indorser or transferor,

(a) Was induced by fraud, duress or mistake to make the indorsement or delivery, or

(b) Has revoked the delivery of the certificate, or the authority given by the indorsement or delivery of the certificate, or

(c) Has died or become legally incapacitated after the indorsement, whether before or after the delivery of the certificate, or

(d) Has received no consideration.

§ 168. Rescission of transfer. If the indorsement or delivery of a certificate,

(a) Was procured by fraud or duress, or

(b) Was made under such mistake as to make the indorsement or delivery inequitable; or

If the delivery of a certificate was made

(c) Without authority from the owner, or

(d) After the owner's death or legal incapacity, the possession of the certificate may be reclaimed and the transfer thereof rescinded, unless:

1. The certificate has been transferred to a purchaser for value in good faith without notice of any facts making the transfer wrongful, or,

2. The injured person has elected to waive the injury, or has been guilty of laches in endeavoring to enforce his rights.

Any court of appropriate jurisdiction may enforce specifically such right to reclaim the possession of the certificate or to rescind the transfer thereof and, pending litigation, may enjoin the further transfer of the certificate or impound it.

§ 169. Rescission of transfer of certificate does not invalidate subsequent transfer by transferee in possession. Although the transfer of a certificate or of shares represented thereby has been rescinded or set aside, nevertheless, if the transferee has possession of the certificate or of a new certificate representing part or the whole of the same shares of stock, a subsequent transfer of such certificate by the transferee, mediately or immediately, to a purchaser for value in good faith, without notice of any facts making the transfer wrongful, shall give such purchaser an indefeasible right to the certificate and the shares represented thereby.

§ 170. Delivery of unindorsed certificate imposes obligation to indorse. The delivery of a certificate by the person appearing by the certificate to be the owner thereof without the indorsement requisite for the transfer of the certificate and the shares represented thereby, but with intent to transfer such certificate or shares, shall impose an obligation, in the absence of an agreement to the contrary, upon the person so delivering, to complete the transfer by making the necessary indorsement. The transfer shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced.

§ 171. Ineffectual attempt to transfer amounts to a promise to transfer. An attempted transfer of title to a certificate or to the shares represented thereby without delivery of the certificate shall have the effect of a promise to transfer and the obligation, if any, imposed by such promise shall be determined by the law governing the formation and performance of contracts.

§ 172. Warranties on sale of certificate. A person who for value transfers a certificate, including one who assigns for value a claim secured by a certificate, unless a contrary intention appears, warrants —

(a) That the certificate is genuine,

(b) That he has a legal right to transfer it, and

(c) That he has no knowledge of any fact which would impair the validity of the certificate.

In the case of an assignment of a claim secured by a certificate, the liability of the assignor upon such warranty shall not exceed the amount of the claim.

§ 173. No warranty implied from accepting payment of a debt. A mortgagee, pledgee or other holder for security of a certificate who in good faith demands or receives payment of the debt for which such certificate is security, whether from a party to a draft drawn for such debt, or from any other person, shall not by so doing be deemed to represent or to warrant the genuineness of such certificate, or the value of the shares represented thereby.

§ 174. No attachment or levy upon shares unless certificate surrendered or transfer enjoined. No attachment or levy upon shares of stock for which a certificate is outstanding shall be valid until such certificate be actually seized by the officer making the attachment or levy, or be surrendered to the corporation which issued it, or its transfer by the holder be enjoined. Except where a certificate is lost or destroyed, such corporation shall not be compelled to issue a new certificate for the stock until the old certificate is surrendered to it.

§ 175. Creditor's remedies to reach certificate. A creditor whose debtor is the owner of a certificate shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and

otherwise, in attaching such certificate or in satisfying the claim by means thereof as is allowed at law or in equity, in regard to property which cannot readily be attached or levied upon by ordinary legal process.

§ 176. There shall be no lien or restriction unless indicated on certificate. There shall be no lien in favor of a corporation upon the shares represented by a certificate issued by such corporation and there shall be restriction upon the transfer of shares so represented by virtue of any by-law of such corporation, or otherwise, unless the right of the corporation to such lien or the restriction is stated upon the certificate.

§ 177. Alteration of certificate does not divest title to shares. The alteration of a certificate, whether fraudulent or not and by whomsoever made, shall not deprive the owner of his title to the certificate and the shares originally represented thereby, and the transfer of such a certificate shall convey to the transferee a good title to such certificate and to the shares originally represented thereby.

§ 178. Lost or destroyed certificate. Where a certificate has been lost or destroyed, a court of competent jurisdiction may order the issue of a new certificate therefor on service of process upon the corporation and on reasonable notice by publication, and in any other way which the court may direct, to all persons interested, and upon satisfactory proof of such loss or destruction and upon the giving of a bond with sufficient surety to be approved by the court to protect the corporation or any person injured by the issue of a new certificate from any liability or expense, which it or they may incur by reason of the original certificate remaining outstanding. The court may also in its discretion order the payment of the corporation's reasonable costs and counsel fees. The issue of a new certificate under an order of the court as provided in this section shall not relieve the corporation from liability in damages to a person to whom the original certificate has been or shall be transferred for value without notice of the proceedings or of the issuance of the new certificate.

§ 179. Rule for cases not provided for by this act. In any case not provided for by this act, the rules of law and equity, in-

cluding the law merchant, and in particular the rules relating to the law of principal and agent, executors, administrators and trustees, and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy or other invalidating cause, shall govern.

§ 180. Interpretation shall give effect to purpose of uniformity. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

§ 181. Definition of indorsement. A certificate is indorsed when an assignment or a power of attorney to sell, assign or transfer the certificate or the shares represented thereby is written on the certificate and signed by the person appearing by the certificate to be the owner of the shares represented thereby, or when the signature of such person is written without more upon the back of the certificate. In any of such cases a certificate is indorsed though it has not been delivered.

§ 182. Definition of person appearing to be the owner of certificate. The person to whom a certificate was originally issued is the person appearing by the certificate to be the owner thereof, and of the shares represented thereby, until and unless he indorses the certificate to another specified person, and thereupon such other specified person is the person appearing by the certificate to be the owner thereof until and unless he also indorses the certificate to another specified person. Subsequent special indorsements may be made with like effect.

§ 183. Other definitions. 1. In this article, unless the context or subject-matter otherwise requires —

"Certificate" means a certificate of stock in a corporation organized under the laws of this state or of another state whose laws are consistent with this act.

"Delivery" means voluntary transfer of possession from one person to another.

"Person" includes a corporation or partnership or two or more persons having a joint or common interest.

To "purchase" includes to take as mortgagee or as pledgee.

"Purchaser" includes mortgagee and pledgee.

"Shares" means a share or shares of stock in a corporation organized under the laws of this state or of another state whose laws are consistent with this act.

"State" includes state, territory, district and insular possession of the United States.

"Transfer" means transfer of legal title.

"Title" means legal title and does not include a merely equitable or beneficial ownership or interest.

"Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where a certificate is taken either in satisfaction thereof or as security therefor.

2. A thing is done "in good faith" within the meaning of this act, when it is in fact done honestly, whether it be done negligently or not.

§ 184. Article does not apply to existing certificates. The provisions of this article apply only to certificates issued after the taking effect of this article.

§ 185. Inconsistent legislation repealed. All acts or parts of acts inconsistent with this article are hereby repealed.

In re development of joint-stock [illegible] and comparison with Massachusetts trusts, see 9 ABA. J. 764.

JOINT-STOCK ASSOCIATION LAW

AND

CODE PROVISIONS RELATIVE THERETO

Laws of 1909, Chapter 34, Entitled: "An Act in Relation to Joint-stock Associations, Constituting Chapter Twenty-nine of the Consolidated Laws," Passed February 17, 1909.

JOINT-STOCK ASSOCIATION LAW

ARTICLE 1. Short title; definitions (§§ 1, 2).
2. General provisions (§§ 3–8).
3. Laws repealed; when to take effect (§§ 20, 21).

ARTICLE 1

Short Title; Definitions

SECTION 1. Short title
2. Definitions.

§ 1. Short title. This chapter shall be known as the "Joint-Stock Association Law."

§ 2. Definitions. As used in this chapter, the term "joint-stock association" includes every unincorporated joint-stock association, company or enterprise having written articles of association and capital stock divided into shares, but does not include a corporation; and the term "stockholder" includes every member of such an association.

There is no provision in this law prescribing the manner in which directors shall be chosen, nor limiting the right of an association to prescribe the method of their election or the right to provide that directors may themselves indefinitely fill vacancies. Spraker v. Platt, 158 A. D. 377 (1913).

Where the certificates of shares in a joint-stock association state that by the acceptance thereof a purchaser becomes a member on the terms and conditions set forth in the articles of association he is bound thereby. Spraker v. Platt, 158 A. D. 377 (1913).

A joint-stock association formed under the laws of this State may do business only under the name stated in its certificate. Opinion of Atty. Genl., Nov. 25, 1913.

The distinction between joint stock companies and corporations and the essential characteristics of each are not clearly defined, but a full discussion of

the differences may be found in Hibbs v. Brown, 190 N. Y. 167 (1907); Matter of Jones, 172 N. Y. 575 (1902); Peo. ex rel. Winchester v. Coleman, 133 N. Y. 279 (1892); Peo. ex rel. Platt v. Wemple, 117 N. Y. 136 (1889); Lane v. Albertson, 78 A. D. 607 (1903).

Where a joint stock association issues its bonds secured by a deed of trust containing the provision that no present or future shareholder, officer, manager or trustee shall be liable as partner, or otherwise in respect of the bond, but that the same shall be payable solely out of the assets transferred to the trustee or out of other assets of the association, the bond is a negotiable instrument and is not payable out of a particular fund within the meaning of the Negotiable Instruments Law so as to become non-negotiable. Hibbs v. Brown, 190 N. Y. 167 (1907), but see concurring opinion on the ground that the exemption clause is void.

The shares of a joint stock association constitute personal property and are taxable as such under the Transfer Tax Law whether the property represented thereby be real or personal. Matter of Jones, 172 N. Y. 575 (1902).

A joint stock company was not liable to local taxation under the provisions of the Revised Statutes, 1 R. S., tit. 4, ch. 13, pt. I, which enacted "that all monied or stock corporations deriving an income or profit from their capital or otherwise shall be liable to taxation on their capital." Peo. ex rel. Winchester v. Coleman, 133 N. Y. 279 (1892).

In view of the reasoning in the foregoing cases it very clearly appears that joint stock associations are not liable to the tax for the privilege of organization under section 180 of the Tax Law (Cons. L., ch. 60; L. 1909, ch. 62).

Joint stock companies are, however, subject to annual taxation under the State Tax Law. Peo. ex rel. Platt v. Wemple, 117 N. Y. 136 (1889), and see Tax Law, § 182 (Cons. L., ch. 60; L. 1909, ch. 62), post.

An action for libel may be maintained against the company for the officers and employees have the same power when acting within the scope of their authority to bind the company and all the associates which an ordinary partner or an agent of a partnership has to bind the firm and the co-partners. Van Aernan v. Bleistein, 102 N. Y. 355 (1886).

A member of a joint stock express company may maintain an action against it to recover for goods lost as if he was not connected with the company. Westcott v. Fargo, 61 N. Y. 542 (1875).

Each member is personally liable for debts as in a co-partnership. Skinner v. Dayton, 9 Johns. 513 (1822); Townsend v. Goewey, 19 Wend. 424 (1837); Cross v. Jackson, 5 Hill 478 (1843); Moore v. Brink, 4 Hun 402 (1875); and see Hibbs v. Brown, 190 N. Y. 167 (1907), as to effect of exemption clause in a trust mortgage given to secure bonds.

ARTICLE 2

General Provisions

SECTION 3. Contents of articles of association.
4. Certificate to be filed within sixty days and annually thereafter; penalty; evidence.
5. Dissolution.
6. Power to take and convey real property.
7. Changing articles of association.
8. Proceedings to mortgage, lease or sell real estate.

§ 3. Contents of articles of association. The articles of association of a joint-stock association may:

1. Provide that the death of a stockholder thereof, or the transfer of his shares of stock therein, shall not work a dissolution of the association;

2. Prescribe the number of its directors, not less than three, to have the sole management of its affairs;

3. Contain any other provision for the management of its affairs not inconsistent with law.

Formerly L. 1894, ch. 235, § 3.

This act fails to provide for the filing of the articles of association in any public office.

The articles of association of an unincorporated joint-stock company bear the same relation to it as the charter bears to an incorporated company; the shareholders of such a company are not bound to pay assessments upon their stock until the whole capital of the company has been subscribed for unless this right has been waived. Bray v. Farwell, 81 N. Y. 600 (1880).

Subscribers to shares who pay a deposit and do other acts showing an intention to become associates but who afterwards fail to comply with the terms of the association and never become entitled to share the profits are not liable as general partners for the debts which may have been contracted unless they have been active in contracting the same, or have held themselves out to the others as actual partners. Those only are liable who enter into the contracts and they have no authority to bind the others until the formation of the company is completed. West Point Foundry Assn. v. Brown, 3 Edw. Ch. 284 (1839).

§ 4. Certificate to be filed within sixty days and annually thereafter; penalty; evidence. Every joint-stock association transacting business within this state shall, within sixty days after its formation, and in each January thereafter, file with the secretary of state, and with the clerk of the county in which its principal business is carried on, a written certificate, signed and verified by its president and treasurer, stating the name and date of organization of such association, the number of its stockholders, the names and places of residence of its officers, and its principal place of business. Such certificates shall be recorded in such offices respectively. Any such certificate, the record thereof, or a certified copy of such certificate or record shall be presumptive evidence of the truth of all facts therein stated against such association, its officers and stockholders. The officers of a joint-stock association who fail to comply with the provisions of this section shall be jointly and severally liable to pay to the people of this state a penalty of fifty dollars for each day such failure continues.

Formerly L. 1894, ch. 235, § 4.

For form of certificate, see Form No. 480.

§ 5. Dissolution. A joint-stock association shall not be dissolved except in pursuance of its articles of association, or by consent of all its stockholders, or by judgment of a court for fraud in its management, or for good cause shown.

Formerly L. 1894, ch. 235, § 5.

One or more members of a joint stock association may maintain an action for its dissolution whenever a proper occasion arises rendering it legitimately desirable to wind up its affairs, and the right to bring such an action is not confined to the Attorney-General as in the case where it is sought to dissolve a corporation. Snyder v. Lindsey, 92 Hun 432 (1895), modified in 157 N. Y. 616 (1899).

The two grounds for dissolution specified are not, it seems, identical. A "good cause shown" refers to a condition of affairs where the business of the association can no longer be carried on either because of the inherent failure of the enterprise or because of considerable loss of the assets and consequent danger of continuing the business, or because of the existence of other reasons which threaten to eventually wipe out the assets or divert the business from the original purposes for which it was formed. The phrase "fraud in management" would seem to refer to a case of fraud in the management which would tend to defeat the rights of the stockholders in violation of and contrary to the spirit of the agreement of association or result in a wrongful diversion or spoliation of the assets. Instances of such fraud of management would be where those in charge were converting to their own use either the profits or other assets of the business or securing personal advantage or benefit in the management of the business at the expense of other stockholders. Colton v. Raymond, 41 Misc. 580 (1903), affd. on op. below, 114 A. D. 911 (1906).

§ 6. Power to take and convey real property. A joint-stock association, in the name of its president, as such president, may purchase, take, hold and convey such real property only,

1. As may be necessary for its immediate accommodation in the convenient transaction of its business.

2. As may be mortgaged to it in good faith by way of security for loans made by or moneys due to it.

3. As it may purchase at sales under judgments, decrees or mortgages held by it.

Formerly L. 1894, ch. 235, § 6.

This section may be construed as a restraint upon the right of a joint stock corporation to purchase and hold real estate not needed for their immediate use, but it seems that if the statute is violated it is the province of the State alone to see to its enforcement. Howell v. Earp, 21 Hun 393 (1880).

§ 7. Changing articles of association. Any change in the articles of association of a joint-stock association not inconsistent with law may be made with the consent of all its stockholders, or otherwise, as the articles of association may provide. Unless the articles of association of a joint-stock association contain provi-

sions to the contrary, its directors may be increased or reduced to not less than three; its capital stock may be increased or reduced; or the term of its existence may be extended, with the consent of its stockholders owning at least two-thirds of its stock issued and outstanding, on the following terms and conditions: The consent of the requisite number of stockholders must be given by vote, or by writing presented and filed, at a regular or regularly called special meeting. Notice of the time and place of such meeting, with notice of the proposed change, must be personally served on each stockholder of the association at least thirty days before the meeting, or by mailing it to such stockholder at his last-known post-office address at least sixty days before the meeting. The amount of its capital stock shall not be reduced below the amount of its paid-up capital stock, nor shall it be reduced if the liabilities of the association exceed its assets.

Formerly L. 1894, ch. 235, § 7.

§ 8. **Proceeding to mortgage, lease or sell real estate.** Whenever any joint-stock association is required by law to make application to the court for leave to mortgage, lease or sell its real estate, the proceeding therefor shall be had as prescribed for corporations in article four of the general corporation law.

Formerly Code Civ. Pro. § 3390, in part.

Former section 8 of this law, which provided that "An officer or stockholder of a joint-stock association is not privileged from testifying in an action or proceeding against such association or any stockholder thereof as to its existence, the members composing it, or any fact relating to its organization," has been omitted because covered generally by Code Civ. Pro. § 828.

ARTICLE 3

Laws Repealed; When to Take Effect

SECTION 20. Laws repealed.
21. When to take effect.

§ 20. **Laws repealed.** Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

§ 21. **When to take effect.** This chapter shall take effect immediately.

SCHEDULE OF LAWS REPEALED.

Laws of	Chapter	Section
1854	245	All
1867	289	All
1881	599	All
1885	505	All
1894	235	All
Code Civil Procedure		3390–3397, part relating to joint-stock associations

CIVIL CODE PROVISIONS CONCERNING JOINT-STOCK ASSOCIATIONS

§ 1809. Requisites of injunction against joint-stock associations in certain cases. An injunction order, suspending the general and ordinary business of a joint-stock association, consisting of seven or more persons, or suspending from office, or restraining from the performance of his duties, a trustee, director, or other officer thereof, can be granted only by the court, upon notice of the application therefor, to the proper officer of the association, or to the trustee, director, or other officer enjoined. If such an injunction order is made, otherwise than as prescribed in this section, it is void.

Code Civ. Pro. § 1809, as am'd by L. 1909, ch. 65.

See Gen. Corp. Law, § 305, which contains the same provisions with respect to corporations, and cases there cited; also Penal Law, § 665, post.

§ 1812. Application of certain provisions to joint-stock associations. Section eighteen hundred and nine of the code of civil procedure and sections three hundred and six and three hundred and seven of the general corporation law apply to an action or a special proceeding, against a joint-stock association created by or under the laws of the state, or a trustee, director, or other officer thereof; or against a joint-stock association created by or under the laws of another state, government, or country, or a trustee, director, or other officer thereof, where the association does business within the state, or has, within the state, a business agency or a fiscal agency, or an agency for the transfer of its stock.

Code Civ. Pro. § 1812, as am'd by L. 1909, ch. 65.

See cases cited under Gen. Corp. Law, §§ 306 and 307.

§ 1813. In action against stockholders, misnomer not available. Where an action, authorized by a law of the state, is brought against one or more persons, as stockholders of a joint-stock association, an objection to any of the proceedings cannot be taken, by a person properly made a defendant in the action, on the ground that the plaintiff has joined with him, as a defendant in the action, a person, whose name appears on the stock-books of the association, as a stockholder thereof, by the name so appearing; but who is misnamed, or dead, or is not liable for any cause. In such a case, the court may, at any time before final judgment, upon motion of either party, amend the pleadings and other papers, without prejudice to the previous proceedings, by substituting the true name of the person intended, or by striking out the name of the person who is dead, or not liable, and, in a proper case, inserting the name of his representative or successor.

Code Civ. Pro. § 1813, as am'd by L. 1909, ch. 65.

The same provision with respect to corporations is found in Gen. Corp. Law, § 309.

§ 1919. Actions, etc., by or against associations of seven or more persons. An action or special proceeding may be maintained, by the president or treasurer of an unincorporated association, consisting of seven or more persons, to recover any property, or upon any cause of action, for or upon which all the associates may maintain such an action or special proceeding, by reason of their interest or ownership therein, either jointly or in common. An action may likewise be maintained by such president or treasurer to recover from one or more members of such association his or their proportionate share of any moneys lawfully expended by such association for the benefit of such associates, or to enforce any lawful claim of such association against such member or members. An action or special proceeding may be maintained, against the president or treasurer of such an association, to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefor, either jointly or severally. Any partnership, or other company of persons, which has a president or treasurer, is deemed an association within the meaning of this section.

Code Civ. Pro. § 1919, as am'd by L. 1900, ch. 184.

The plaintiff must allege and prove and it must be found that all the mem

bers of the association are liable jointly or severally to pay his claim. McCabe v. Goodfellow, Treas., etc., 133 N. Y. 89 (1892); Lightbourn v. Walsh, 97 A. D. 187 (1904); but see Hibbs v. Brown, 190 N. Y. 167 (1907).

It is necessary for the president when plaintiff to allege and prove as a necessary prerequisite to his right to maintain the action that he is president. Tanner v. Ranken, 44 Misc. 488 (1904); Ostrom v. Greene, 161 N. Y. 353 (1900).

The action cannot be maintained against the officer after the association has gone out of existence for the action is in effect one against the association. Peckner v. Webb, 35 Misc. 291 (1901).

As an action in tort may be maintained against an association as such where all the members are charged with committing the wrong through the association, the action is properly brought against the president. Rourke v. Elk Drug Co., 75 A. D. 145 (1902).

Where the officer sued alleges that he ceased to be such for some time prior to the service of the summons upon him and this fact is not disputed, the attempted service must be set aside. Mason v. Holmes, 30 Misc. 719 (1900).

This action does not authorize the maintenance of a mandamus proceeding to compel the reinstatement of a suspended member of the New York Stock Exchange. Matter of Weidenfeld v. Kepler, 84 A. D. 235 (1903), affd. on op. below, 176 N. Y. 562 (1903), and cases therein cited.

Service of Process.

"An order directing the service of a summons upon a defendant, without the state, or by publication, may be made in either of the following cases:

1. Where the defendant to be served is * * * an unincorporated association consisting of seven or more persons, having a president and treasurer, neither of whom is a resident of this State; * * * ." Code Civ. Pro. § 438, as am'd by L. 1909, ch. 492.

Proof must be made by affidavit that the plaintiff has been or will be unable with due diligence to make personal service of the summons. Code Civ. Pro. § 439.

For the purpose of determining the jurisdiction of a County Court the joint stock association is deemed a resident of the county in which its principal place of business is established by the articles of association, or within which it is actually located. Code Civ. Pro. § 341.

Citizenship.

The Federal court has no jurisdiction on the ground of diversity of citizenship where the plaintiff alleges that it is a joint stock company, citizen of a State other than of the defendant. The fact that the company may be authorized by the laws of New York to bring suit in the name of the president cannot give the company power by that name to sue in the Federal court. Chapman v. Barney, 129 U. S. 677 (1889); nor has a stock company citizenship for the purpose of removing actions against it from the State to the Federal courts upon the ground of diversity of citizenship. Saunders v. Adams Express Co., 136 Fed. 494 (1905).

§ 1920. Proceedings in case of death, etc. The death or legal incapacity of a member of the association does not affect an action or special proceeding, brought as prescribed in the last section. If the officer, by or against whom it is brought, dies,

is removed, resigns, or becomes otherwise incapacitated, during the pendency thereof, the court must make an order, directing it to be continued by or against his successor in office, or any other officer, by or against whom it might have been originally commenced.

Code Civ. Pro. § 1920.

§ 1921. Effect of judgment; execution thereupon. In such an action, the officer against whom it is brought cannot be arrested; and a judgment against him does not authorize an execution to be issued against his property, or his person; nor does the docketing thereof bind his real property, or chattels real. Where such a judgment is for a sum of money, an execution issued thereupon must require the sheriff to satisfy the same, out of any personal or real property belonging to the association, or owned, jointly or in common, by all the members thereof.

Code Civ. Pro. § 1921.

The judgment and execution are properly against the president as such and they bind the joint property of the association, not the individual property of the president. National Bank of Schuylerville v. Van Derwerker, 74 N. Y. 234 (1878).

Where the action is brought against the defendant as president of an association, a warrant of attachment issued directing the seizure of the property of the defendant in the county cannot be sustained as the president has no title to any of the property of the association. Mertz v. Fenouillet, 13 A. D. 222 (1897).

§ 1922. Subsequent action against members. Where an action has been brought against an officer, or a counterclaim has been made, in an action brought by an officer, as prescribed in the last three sections, another action, for the same cause, shall not be brought against the members of the association, or any of them, until after final judgment in the first action, and the return, wholly or partly unsatisfied or unexecuted, of an execution issued thereupon. After such a return, the party in whose favor the execution was issued, may maintain an action, as follows:

1. Where he was the plaintiff, or a defendant recovering upon a counterclaim, he may maintain an action against the members of the association, or, in a proper case, against any of them, as if the first action had not been brought, or the counterclaim had not been made, as the case requires; and he may recover therein, as part of his damages, the costs of the first action, or so much thereof, as the sum, collected by virtue of the execution, was insufficient to satisfy.

2. Where he was a defendant, and the case is not within subdivision first of this section, he may maintain an action, to recover the sum remaining uncollected, against the persons who composed the association, when the action against him was commenced, or the survivors of them.

But this section does not affect the right of the person, in whose favor the judgment in the first action was rendered, to enforce a bond or undertaking, given in the course of the proceedings therein.

Code Civ. Pro. § 1922.

An action cannot be brought against the individual members upon a judgment obtained against the association. In addition the plaintiff must allege and prove the issuance and return of execution unsatisfied and such facts as are sufficient to make out the original cause of action against the association. Witherhead v. Allen, 3 Keyes, 562 (1867); Barasch v. Riemer, 59 Misc. 453 (1908).

This section does not prohibit the joining of the president and the members as parties defendant in an action to recover for a conspiracy where the individual defendants are charged with personal wrong doing and a personal judgment is sought. April v. Baird, 32 A. D. 226 (1898).

§ 1923. This article permissive; effect upon statute of limitations. This article does not prevent an action from being brought by or against all the members of an association, except as prescribed in the last section. Where an action is brought against the members of the association, as prescribed in subdivision first of the last section, the time between the commencement of the action by or against the officer, and the return of the first execution issued upon the final judgment rendered therein, is not a part of the time limited by law, for the commencement of the second action.

Code Civ. Prq. § 1923.

The action may be brought against the members without first obtaining judgment against the association. Schwartz v. Wechlar, 2 Misc. 67 (1892) disapproving Flagg v. Swift, 25 Hun 623 (1881); and see concurring opinion in Mertz v. Fenouillet, 13 A. D. 222 (1897).

§ 1924. When objection of misnomer, etc., of parties not available. Section 1813 of this act applies to an action brought, as prescribed in the last section but one, against the members of any association, which keeps a book for the entry of changes in the membership of the association, or the ownership of its property; and to each book so kept.

Code Civ. Pro. § 1924.

GENERAL CONSTRUCTION LAW

Laws of 1909, Chapter 27, Entitled: "An Act Relating to Construction, Constituting Chapter Twenty-two of the Consolidated Laws."

CHAPTER 22 OF THE CONSOLIDATED LAWS

General Construction Law.

Article 1. Short title (§ 1).
2. Meaning of terms (§§ 10–58).
3. Ancient statutes and resolutions (§§ 70–72).
4. References, titles and head notes (§§ 80, 81).
5. Effect of repeals (§§ 90–96).
6. Effect of consolidated laws (§§ 100, 101).
7. Application of chapter (§ 110).
8. Laws repealed; when to take effect (§§ 120, 121).

ARTICLE 1

Short Title

Section 1. Short title.

§ 1. Short title. This chapter shall be known as the "General Construction Law."

Formerly L. 1892, ch. 677, part of § 1.

ARTICLE 2

Meaning of Terms

Section 10. Acknowledge and acknowledgment.
11. Acknowledgment or proof of instrument.
12. Affidavit.
13. Adjournment of meeting.
14. Bond and undertaking.
15. Chattels.
16. Choose.
17. Civil code and criminal code.
18. Consolidated laws.
19. Day, calendar.

*** Chapter 596, Laws of 1909, prescribing rules for the construction of the Consolidated Laws will be found on page 1119.**

SECTION 20. Day, computation.
21. Folio.
22. Gender.
23. Heretofore and hereafter.
24. Holiday and half holiday.
25. Holiday in contractual obligations.
26. Judge.
27. Last, preceding, next and following.
28. Lunatic and lunacy.
29. Men.
30. Month, computation.
31. Month in statute, contract and public or private instrument.
32. Municipal officers.
33. Notice.
34. Now.
35. Number, singular and plural.
36. Oath, affidavit and swear.
37. Person.
38. Property.
39. Property, personal.
40. Property, real.
41. Quorum and majority.
42. Register of county.
43. Seal of court, public officer or corporation.
44. Seal, private.
45. Seal, private as corporate seal.
46. Signature.
47. State.
48. Tense, present.
49. Territory.
50. Time, computation.
51. Time, night.
52. Time, standard.
53. Time, use of standard.
54. Village.
55. Women.
56. Writing and written.
57. Year, common and leap.
58. Year in statute, contract and public or private instrument.

§ 10. Acknowledge and acknowledgment. The terms acknowledge and acknowledgment, when used with reference to the execution of an instrument or writing other than a deed of real property, include a compliance with the provisions of the next section by either such proof or acknowledgment.

Formerly L. 1892, ch. 677, part of § 15.

§ 11. Acknowledgment or proof of instrument. When the execution of any instrument or writing is authorized or required by law to be acknowledged, or to be proven so as to entitle it to

be filed or recorded in a public office, the acknowledgment may be taken or the proof made before any officer then and there authorized to take the acknowledgment or proof of the execution of a deed of real property to entitle it to be recorded in a county clerk's office, and shall be made and certified in the same manner as such acknowledgment or proof of such deed.

Formerly L. 1892, ch. 677, part of § 15.

An incorporator has no power, in his capacity as notary public, to take the acknowledgment of another incorporator to the certificate of incorporation, and an acknowledgment so taken is a nullity. Peo. ex rel. Erie R. R. Co. v. B'd of R. R. Comrs., 105 A. D. 273 (1905). There is also authority for holding that a party to an instrument cannot be a subscribing witness unless expressly authorized by statute. Peo. ex rel. Long Isl. R. R. Co. v. B'd of R. R. Comrs., 75 A. D. 106 (1902).

An acknowledgment to an instrument in which the notary certifies, "Personally appeared before me the within named ....., to me known and acknowledged the above letter of attorney to be his act and deed," is insufficient to entitled it to be recorded because it fails to show that the notary knew the person who so appeared before him to be the person described in and who executed the instrument. Freeman v. Oppenheim, 80 A. D. 487 (1903).

A certificate of authentication in which the clerk of a court in the State in which the acknowledgment was taken, instead of certifying, according to statute, that he is well acquainted with the notary's handwriting, and verily believes his signature is genuine, merely certifies that the notary is "duly commissioned and qualified, and that full faith and credit are due his acts as such," is defective. Freeman v. Oppenheim, 80 A. D. 487 (1903).

A certificate of acknowledgment should not be overthrown upon evidence of a doubtful character, such as the unsupported testimony of interested witnesses, nor upon a bare preponderance of evidence, but only on proof so clear and convincing as to amount to a moral certainty. Albany Co. Sav. Bk. v. McCarty, 149 N. Y. 71; see, also, cases therein cited.

The personal appearance of the party, the recognition of the signature as his, and the acknowledgment of execution are included among the facts of which a certificate of acknowledgment should be regarded as evidence per se, under sections 935 and 936 of the Code of Civil Procedure. Albany Co. Sav. Bk. v. McCarty, 149 N. Y. 71.

An omission in a county clerk's certificate of the name of the person who took an acknowledgment, and his official character, is not a fatal defect, as such omission can be supplied from the certificate of acknowledgment. Thorn v. Mayer, 12 Misc. 487.

The absence of a date will not vitiate such a certificate, as the statute does not require it to be dated. Id.

§ 105-a. Powers of notaries who are stockholders, directors, officers, or employees of banks or other corporations. A notary public, who is a stockholder, director, officer or employee of a bank or other corporation may take the acknowledgment of any party to a written instrument executed to or by such corporation, or administer an oath to any other stockholder, director, officer, employee or agent of such corporation, or protest for nonacceptance or nonpayment, bills of exchange, drafts, checks, notes and other negotiable instruments owned or held for collection by such corporation; but a notary public shall not take the acknowledgment of an instrument by or to a bank

or other corporation of which he is a stockholder, director, officer or employee, if such notary be a party executing such instrument, either individually or as representative of such corporation, or protest any negotiable instrument owned or held for collection by such corporation, if such notary be individually a party to such instrument. All such acknowledgments or proofs of deeds, mortgages or other instruments, relating to real property heretofore taken before the notaries public aforesaid are confirmed. This act shall not affect any action or legal proceeding now pending. Executive Law (L. 1909, ch. 23), § 105-a, added by L. 1913, ch. 334, and thus am'd by L. 1914, ch. 410.

§ 298. **Acknowledgments and proofs within the state.** The acknowledgment or proof of a conveyance of real property within the state may be made at any place within the state, before a justice of the supreme court; or within the district wherein such officer is authorized to perform official duties, before a judge, clerk, deputy clerk, or special deputy clerk of a court, a notary public, or the mayor or recorder of a city, a justice of the peace, surrogate, special surrogate, special county judge, or commissioner of deeds. L. 1909, ch. 52 (Real Property Law), § 298.

§ 299. **Acknowledgments and proofs in other states.** The acknowledgment or proof of a conveyance of real property, within the state, may be made without the state, but within the United States, before any of the following officers acting within his jurisdiction, or of the court to which he belongs:

1. A judge of the supreme court, of the circuit court of appeals, of the circuit court, or of the district court of the United States.
2. A judge of the supreme, superior, or circuit court of a state.
3. A mayor of a city.
4. A commissioner appointed for the purpose by the governor of the state.
5. Any officer of the state or territory in which the acknowledgment is taken authorized by the laws thereof to take the acknowledgment or proof of deeds to be recorded therein.
6. Any officer of the District of Columbia authorized by the laws of the United States to take the acknowledgment or proof of deeds to be recorded in said district. L. 1909, ch. 52 (Real Property Law), § 299.

§ 300. **Acknowledgments and proofs in Porto Rico, the Philippines, Cuba, and elsewhere.** If the party or parties executing such conveyance shall be or reside in Porto Rico, the Philippine Islands, Cuba, or in any other place over which the United States of America at the time has or exercises sovereignty, control, or a protectorate, the same may be acknowledged or proved before:

1. A judge or clerk of a court of record thereof, acting within his jurisdiction;
2. A mayor or other chief officer of a city, acting in such city;
3. A commissioner appointed for the purpose by the governor of this state and acting within his jurisdiction;
4. An officer of the United States regular army or volunteer service of the rank of captain or higher, or an officer of the United States navy of the rank of lieutenant or higher, while on duty at the place where such party or parties are or reside.

The certificate of an acknowledgment taken before any of the officers mentioned in subdivision one, two or three of this section, shall have attached thereto the seal of the court or officer if he have a seal, and if such officer have no seal, then a statement to that effect. The certificate of an acknowledgment taken before an officer of the army or navy mentioned in subdivision four of this section, shall state his rank, the name of the city, or other political division where taken, and the fact that he is on duty there, and shall

be authenticated by the secretary of war or the secretary of the navy, as the case may be, of the United States. L. 1909, ch. 52 (Real Property Law), § 300.

§ 301. **Acknowledgments and proofs in foreign countries.** The acknowledgment, or proof, of a conveyance of real property situated within this state, may be made without the United States before any of the following officers:

1. An ambassador, a minister plenipotentiary, a minister extraordinary, a minister resident, or a chargé d'affaires of the United States, accredited to the country, in which the acknowledgment of proof is taken, and residing therein.

2. A consul-general, vice-consul-general, a deputy consul-general, a consul, a vice-consul, a deputy-consul, a consular agent, a vice-consular agent, a commercial agent, or a vice-commercial agent of the United States, if residing within the country to which he is appointed, or a secretary of legation at the post, port, place or within the limits of his legation.

3. A commissioner appointed for the purpose by the governor, and acting within his own jurisdiction.

4. A person specially authorized for that purpose by a commission, under the seal of the supreme court of this state, issued to a reputable person residing in, or going to, the country where the acknowledgment or proof is to be taken.

5. If within the Dominion of Canada, it may also be made before any judge of a court of record; or before any officer of a province or territory of such Dominion authorized by the laws of such province or Dominion to take the acknowledgment or proof of deeds to be recorded therein.

6. If within the United Kingdom of Great Britain and Ireland, or the dominions thereunto belonging, it may also be made before the mayor, the provost or other chief magistrate of a city or town therein, under his hand and the seal of such city or town.

7. All acts of ambassadors, ministers plenipotentiary, ministers extraordinary, ministers resident, chargés d'affaires and secretaries of legation, in taking the acknowledgment or proof of a conveyance of real property situated within this state, performed before April twenty-ninth, nineteen hundred and four, are hereby confirmed, provided that the certificate of acknowledgment or proof is in the form required by the laws of this state.

8. If within the states comprising the empire of Germany, it may also be made before a judge of a court of record under the seal of such court, or before a notary public under the seal of his office and the seal of the city or town in which the notary resides. L. 1909, ch. 52 (Real Property Law), § 301.

9. If within the empire of Austria, kingdom of Hungary and kingdoms, states, territories and provinces comprising the monarchy of Austria-Hungary, it may also be made before a judge or clerk of a court of record under the seal of such court or before an imperial royal notary or royal notary under the seal of his offices and the seal of the city or town in which such notary resides. Real Property Law, § 301, new subd., added by L. 1912, ch. 70.

§ 302. **Acknowledgments and proofs by married women.** The acknowledgment or proof of a conveyance of real property, within the state, or of any other written instrument, may be made by a married woman the same as if unmarried. L. 1909, ch. 52 (Real Property Law), § 302.

§ 303. **Requisites of acknowledgments.** An acknowledgment must not be taken by any officer unless he knows or has satisfactory evidence, that the person making it is the person described in and who executed such instrument. L. 1909, ch. 52 (Real Property Law), § 303.

§ 304. **Proof by subscribing witness.** When the execution of a conveyance is proved by a subscribing witness, such witness must state his own place of residence, and that he knew the person described in and who executed the conveyance. The proof must not be taken unless the officer is personally acquainted with such witness, or has satisfactory evidence that he is the same person, who was a subscribing witness to the conveyance. L. 1909, ch. 52 (Real Property Law), § 304.

Compelling witness to testify. See L. 1909, ch. 52 (Real Property Law), § 305.

§ 306. **Certificate of acknowledgment or proof.** An officer taking the acknowledgment or proof of a conveyance must indorse thereupon or attach thereto, a certificate, signed by himself, stating all the matters required to be done, known, or proved on the taking of such acknowledgment or proof; together with the name and substance of the testimony of each witness examined before him, and if a subscribing witness, his place of residence.

Any conveyance which has heretofore been recorded, or which may hereafter be recorded, shall be deemed to have been duly acknowledged or proved and properly authenticated, when thirty years have elapsed since such recording; saving, however, the rights of every purchaser in good faith and for a valuable consideration deriving title from the same vendor or grantor, his heirs or devisees, to the same property or any portion thereof, whose conveyance shall have been duly recorded before the said period of thirty years shall have elapsed or before September first, nineteen hundred and five. L. 1909, ch. 52 (Real Property Law), § 306.

§ 307. **When certificate to state time and place.** When the acknowledgment or proof is taken by a commissioner appointed by the governor, for a city or county within the United States, and without the state, the certificate must also state the day on which, and the town and county or the city in which the same was taken. L. 1909, ch. 52 (Real Property Law), § 307.

§ 308. **When certificate must be under seal.** When a certificate of acknowledgment or proof is made by a commissioner appointed by the governor, or by the mayor or other chief magistrate of a city or town without the United States, or by an ambassador, a minister, a chargé d'affaires, a consul-general, a vice-consul-general, a deputy-consul-general, a consul, a vice-consul or a deputy-consul, a consular or a vice-consular agent, a commercial or a vice-commercial agent, or a secretary of legation, of the United States, it must be under his seal of office, or the seal of the consulate or legation to which he is attached.

All acknowledgments or proofs of deeds, mortgages or other instruments relating to real property, the certificates of which were made in the form required by the laws of this state, by a consul-general, a vice-consul-general, a deputy-consul general, a consul, a vice-consul, a deputy-consul, a consular agent, a vice-consular agent, a commercial agent, a vice-commercial agent, or a secretary of legation of the United States prior to April twenty-ninth, nineteen hundred and four, are confirmed, but nothing herein contained shall affect any action or proceeding now pending in any court. L. 1909, ch. 52 (Real Property Law), § 308.

§ 309. **Acknowledgment by corporation and form of certificate.** The acknowledgment of a conveyance or other instrument by a corporation, must be made by some officer thereof authorized to execute the same by the board of directors of said corporation. The certificate of acknowledgment must be in substantially the following form, the blanks being properly filled.

* * * * * * * * * * * * *

For form, see post, Form No. 481.

If such corporation have no seal, that fact must be stated in place of the statements required respecting the seal. L. 1909, ch. 52 (Real Property Law), § 309.

§ 310. **When county clerk's authentication necessary.** A certificate of acknowledgment or proof, made within the state, by a commissioner of deeds, justice of the peace, or, except as otherwise provided by law, by a notary public, does not entitle the conveyance to be read in evidence or recorded, except within the county in which the officer making the same is authorized to act at the time of making such certificate, unless authenticated by a certificate of the clerk of the same county; provided, however, that all certificates of acknowledgments or proof, made by or before a commissioner of deeds of the city of New York residing in any part therein, shall be authenticated by the clerk of any county within said city, in whose office such commissioner of deeds shall have filed a certificate under the hand and seal of the city clerk of said city, showing the appointment and term of office of such commissioner, and no other certificate shall be required, from any other officer to entitle said conveyance to be read in evidence or recorded in any county of the state of New York. But this section does not apply to a conveyance executed by an agent for the Holland Land Company or of the Pulteney estate, lawfully authorized to convey real property. L. 1909, ch. 52 (Real Property Law), § 310, as am'd by L. 1911, ch. 196.

When other authentication necessary. See L. 1909, ch. 52 (Real Property Law), § 311.

Contents of certificate of authentication. See L. 1909, ch. 52 (Real Property Law), § 312.

§ 12. **Affidavit.** When an affidavit is authorized or required it may be sworn to before any officer authorized by law to take the acknowledgment of deeds in this state, unless a particular officer is specified before whom it is to be taken.

Formerly L. 1892, ch. 677, part § 14.

Any verified pleading or other paper is an affidavit within the contemplation of the Code. Code Civ. Pro. § 3343, subd. 11. Relative to the manner of administering oaths see Code Civ. Pro. §§ 842–851.

Where a certificate in regard to the power and authority of an officer who had taken an affidavit in a foreign State simply described him as an acting notary public, duly qualified, as such duly authorized by the laws of the foreign State to take the affidavit, but there was nothing to show whether notaries in such foreign State were authorized by its laws to take and certify the acknowledgment and proof of deeds to be recorded there, such affidavit cannot be used in the State of New York. Stanton v. U. S. Pipe Line Co., 90 Hun 35; see, also, Code Civ. Pro. § 844.

In order that an affidavit, taken without the State of New York, may be used in the State of New York, it must have been taken in the foreign State before an officer authorized by its laws to take and certify the acknowledgment and proof of deeds to be recorded in such State. Stanton v. U. S. Pipe Line Co., 90 Hun 35; see, also, Code Civ. Pro. § 844.

The omission of the venue in an affidavit does not invalidate the oath or render the affidavit a nullity, where it is shown that it was duly administered by a proper officer within his jurisdiction, and the omission of the venue may be supplied by amendment. Babcock v. Kuntzsch, 85 Hun 33.

§ 13. **Adjournment of meeting.** Any meeting referred to in section forty-one of this chapter may be adjourned by a less number than a quorum.

Formerly L. 1892, ch. 677, part § 19.

§ 14. Bond and undertaking. A provision of law authorizing or requiring a bond to be given shall be deemed to have been complied with by the execution of an undertaking to the same effect.

Formerly L. 1892, ch. 677, § 16.

§ 15. Chattels. The term chattels includes goods and chattels.

Formerly L. 1892, ch. 677, part § 4.

§ 16. Choose. The term choose includes elect and appoint.

Formerly L. 1892, ch. 677, § 17.

§ 17. Civil code and criminal code. The term civil code means the code of civil procedure. The term criminal code means the code of criminal procedure.

Formerly L. 1892, ch. 677, § 29.

§ 18. Consolidated laws. The term Consolidated Laws shall mean the compilation of the statutes prepared by the board of statutory consolidation and the amendments thereof.

New section, added by L. 1909, ch. 27.

§ 19. Day, calendar. A calendar day includes the time from midnight to midnight. Sunday or any day of the week specifically mentioned means a calendar day.

Formerly L. 1892, ch. 677, part § 27, as am'd by L. 1894, ch. 447.

§ 20. Day, computation. A number of days specified as a period from a certain day within which or after or before which an act is authorized or required to be done means such number of calendar days exclusive of the calendar day from which the reckoning is made. Sunday or a public holiday, other than a half holiday, must be excluded from the reckoning if it is the last day of any such period, or if it is an intervening day of any such period of two days. In computing any specified period of time from a specified event, the day upon which the event happens is deemed the day from which the reckoning is made. The day from which any specified period of time is reckoned shall be excluded in making the reckoning.

Formerly L. 1892, ch. 677, part § 27, as am'd by L. 1894, ch. 447; L. 1910, ch. 347.

§ 21. Folio. The term folio shall mean one hundred words, counting each figure as a word. When an officer empowered by

law to do so shall order an official advertisement published in a newspaper in display type or to be so displayed as to leave an unusual quantity of blank space in the advertisement, or to contain pictures or diagrams, or where the character of such advertisement requires it, such advertisement shall be paid for by measurement over all of such space necessarily used, two square inches of space to count as one folio. When there are over fifty and under one hundred words, they shall be counted as one folio; but a less number than fifty words shall not be counted, except when the whole statute, notice or order contains less than fifty words.

Thus am'd by L. 1914, ch. 72.
Formerly L. 1892, ch. 677, § 11.

§ 22. Gender. Words of the masculine gender include the feminine and the neuter, and may refer to a corporation, or to a board or other body or assemblage of persons; and, when the sense so indicates, words of the neuter gender may refer to any gender.

Formerly L. 1892, ch. 677, part § 8.

§ 23. Heretofore and hereafter. Each of the terms, heretofore, and hereafter, in any provision of a statute, relates to the time such provision takes effect.

Formerly L. 1892, ch. 677, part § 9.

§ 24. Holidays; half-holiday. The term holiday includes the following days in each year: the first day of January known as New Year's day; the twelfth day of February, known as Lincoln's birthday; the twenty-second day of February, known as Washington's birthday; the thirtieth day of May, known as memorial day; the fourth day of July, known as independence day; the first Monday of September, known as labor day; the twelfth day of October, known as Columbus day, and the twenty-fifth day of December, known as Christmas day, and if either of such days is Sunday, the next day thereafter; each general election day and each day appointed by the president of the United States or by the governor of this state as a day of general thanksgiving, general fasting and prayer, or other general religious observances. The term a half-holiday includes the period from noon to midnight of each Saturday which is not a holiday.

Formerly L. 1892, ch. 677, part § 24, as am'd by L. 1902, ch. 39; L. 1909, ch. 112.
Columbus Day was added by L. 1909, ch. 112.

§ 25. Holiday in contractul obligations. Where a contract by its terms requires the payment of money or the performance of a condition on a public holiday, such payment may be made or condition performed on the next business day succeeding such holiday, with the same force and effect as if made or performed in accordance with the terms of the contract.

Formerly L. 1892, ch. 677, part § 24, as am'd by L. 1897, ch. 614; L. 1902, ch. 39.

The Code Civ. Pro. § 3343, subd. 3, which has not been repealed, gives the following definition, to wit:

The word "judge," includes a justice, surrogate, recorder, justice of the peace, or other judicial officer, authorized or required to act, or prohibited from acting, in or with respect to the matter or thing, referred to in the provision wherein that word is used.

Prior to the amendment of 1902, an option expiring on a holiday was not extended until the succeeding business day. Page v. Shainwald, 169 N. Y. 246 (1901).

§ 26. Judge. The term judge includes every judicial officer authorized, alone or with others, to hold or preside over a court of record.

Formerly L. 1892, ch. 677, § 6.

§ 27. Last, preceding, next and following. A reference to the last preceding section, or other provision of a statute, means the section or other division immediately preceding, and a reference to the next or following section or other division of a statute means the section or other division immediately following.

Formerly L. 1892, ch. 677, § 10.

§ 28. Lunatic and lunacy. The terms lunatic and lunacy include every kind of unsoundness of mind except idiocy.

Formerly L. 1892, ch. 677, § 7.

§ 29. Men. The term includes boys.

Formerly L. 1892, ch. 677, part § 8.

Where the Legislature, having used the plural number generally in an act, changes the mode of expression and uses the singular number with reference to an express provision, and it can be seen that the use of the singular only was necessary to carry out its intention, the rule established by the Statutory Construction Law, that words in the singular number include the plural, and those in the plural include the singular, has no application. Beekman v. Third Ave. R. R. Co., 13 A. D. 279.

§ 30. Month, computation. A number of months after or before a certain day shall be computed by counting such number

of calendar months from such day, exclusive of the calendar month in which such day occurs, and shall include the day of the month in the last month so counted having the same numerical order in days of the month as the day from which the computation is made, unless there be not so many days in the last month so counted, in which case the period computed shall expire with the last day of the month so counted.

Formerly L. 1892, ch. 677, part § 26.

§ 31. Month in statute, contract and public or private instrument. In a statute, contract or public or private instrument, unless otherwise provided in such contract or instrument or by law, the term month means a calendar month and not a lunar month.

Formerly L. 1892, ch. 677, § 26, in part.

§ 32. Municipal officers. A reference to several officers of a municipal corporation holding the same office, or to a board of such officers, shall be deemed to refer to the single officer holding such office, when but one person is chosen to fill such office in pursuance of law.

Formerly L. 1892, ch. 677, § 18.

§ 33. Notice. When a notice is required to be given to a board or body, service of such notice upon the clerk or chairman thereof shall be sufficient.

Formerly L. 1892, ch. 677, § 20.

§ 34. Now. The term now in any provision of a statute referring to other laws in force, or to persons in office, or to any facts or circumstances as existing, relates to the laws in force, or to the person in office, or to the facts or circumstances existing, respectively, immediately before the taking effect of such provision.

Formerly L. 1892, ch. 677, § 9, in part.

§ 35. Number, singular and plural. Words in the singular number include the plural, and in the plural number include the singular.

Formerly L. 1892, ch. 677, § 8, in part.

Where the Legislature, having used the plural number generally in an act, changes the mode of expression and uses the singular number with reference to an express provision, and it can be seen that the use of the singular only was necessary to carry out its intention, the rule established by the Statutory

Construction Law, that words in the singular number include the plural, and those in the plural include the singular, has no application. Beekman v. Third Ave. R. R. Co., 13 A. D. 279.

§ 36. Oath, affidavit and swear. The terms oath and affidavit include every mode authorized by law of attesting the truth of that which is stated. The term swear includes every mode authorized by law for administering an oath.

Formerly L. 1892, ch. 677, § 14, in part.
See cases cited under section 12.

§ 37. Person. The term person includes a corporation and a joint-stock association. When used to designate a party whose property may be the subject of any offense, the term person also includes the state, or any other state, government or country which may lawfully own property in the state.

Formerly L. 1892, ch. 677, § 5, in part.

§ 38. Property. The term property includes real and personal property.

Formerly L. 1892, ch. 677, § 2.

§ 39. Property, personal. The term personal property includes chattels, money, things in action, and all written instruments themselves, as distinguished from the rights or interests to which they relate, by which any right, interest, lien or incumbrance in, to or upon property, or any debt or financial obligation is created, acknowledged, evidenced, transferred, discharged or defeated, wholly or in part, and everything, except real property, which may be the subject of ownership.

Oil wells and all fixtures connected therewith, situate on lands leased for oil purposes and oil interests, and rights held under and by virtue of any lease or contract or other right or license to operate for or produce petroleum oil, shall be deemed personal property for all purposes except taxation.

Formerly L. 1892, ch. 677, § 4, in part, with L. 1883, ch. 372, § 1, embodied therein.

Estates for years have always been classified as chattel interests, and properly fall under any definition of personal property. State Trust Co. v. Casino Co., 18 Misc. 327; Despard v. Churchill, 53 N. Y. 199.

§ 40. Property, real. The term real property includes real estate, lands, tenements and hereditaments, corporeal and incorporeal.

Formerly L. 1892, ch. 677, § 3.

§ 41. Quorum and majority. Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of all such persons or officers at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board or body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, may perform and exercise such power, authority or duty, and if one or more of such persons or officers shall have died or have become mentally incapable of acting, or shall refuse or neglect to attend any such meeting, a majority of the whole number of such persons or officers shall be a quorum of such board or body, and a majority of a quorum, if not less than a majority of the whole number of such persons or officers may perform and exercise any such power, authority or duty.

Formerly L. 1892, ch. 677, § 19, in part.
See, also, section 13 which refers to this section.

§ 931b. Recital in order, resolution or record of public officers, board or body presumptive evidence of certain facts. A recital in any order, resolution or other record of any proceeding of a meeting referred to in section forty-one of the general construction law that such meeting had been held or adjourned as provided in said section or that it had been held upon notice to the members, as therein provided, shall be presumptive evidence thereof. Code Civ. Pro. § 931b, added by L. 1909, ch. 65.

§ 42. Register of county. Any act done in pursuance of law by the register of a county shall be deemed to be a compliance with any provision of law authorizing or requiring such act to be done by the county clerk of such county, and any instrument or writing filed, entered or recorded in pursuance of law in the office of a register of a county, shall be deemed to be a compliance with any provision of law authorizing or requiring such paper to be filed, entered or recorded, as the case may be, in the office of the clerk of such county. The term county clerk when used in relation to conveyances of real property or the filing or recording of instruments which are or may be filed in the office of the register of a county, shall include the register of each county in which there is a register.

Formerly L. 1892, ch. 677, § 21, as am'd by L. 1907, ch. 300.

§ 43. Seal of court, public officer or corporation. A seal of a court, public officer or corporation may be impressed directly upon the instrument or writing to be sealed, or upon wafer, wax or other adhesive substance affixed thereto, or upon paper, or other similar substance affixed thereto by mucilage or other adhesive substance.

Formerly L. 1892, ch. 677, § 13, in part.

Prior to the enactment of the foregoing provision, it was held that when the common law seal was omitted, equity would regard the letters L. S. in brackets as a sufficient seal. Barnard v. Gantz, 140 N. Y. 249; Town of Solon v. Williamsburgh Sav. Bk., 114 N. Y. 134.

Where a contract recited "In witness whereof (the parties) have hereunto set their hands and seals," and was signed, "Union Pipe & Construction Co., by Calvin Detrick, Pres't, Jos. L. Rusling," and opposite the name of Rusling only there was a seal, it was held that the seal would be presumed to be the seal of both parties. Rusling v. Union Pipe & Construction Co., 5 A. D. 448.

§ 44. Seal, private. The private seal of a person, other than a corporation, to any instrument or writing shall consist of a wafer, wax or other similar adhesive substance affixed thereto, or of paper or other similar substance affixed thereto, by mucilage or other adhesive substance, or of the word "seal," or the letters "L. S.," opposite the signature.

Formerly L. 1892, ch. 677, § 13, in part.

§ 45. Seal, private as corporate seal. An instrument or writing duly executed, in the corporate name of a corporation, which shall not have adopted a corporate seal, by the proper officers of the corporation under their private seals, shall be deemed to have been executed under the corporate seal.

Formerly L. 1892, ch. 677, § 13, in part.

§ 46. Signature. The term signature includes any memorandum, mark or sign, written or placed upon any instrument or writing with intent to execute or authenticate such instrument or writing.

Formerly L. 1892, ch. 677, § 12, in part.

§ 47. State. The term state, when used generally to include every state of the United States, includes also every territory of the United States and the District of Columbia.

Formerly L. 1892, ch. 677, § 23, in part.

§ 48. Tense, present. Words in the present tense include the future.

Formerly L. 1892, ch. 677, § 8, in part.

§ 49. Territory. The term territory when used generally to include every territory of the United States, includes also the District of Columbia.

Formerly L. 1892, ch. 677, § 23, in part.

§ 50. Time, computation. Time shall continue to be computed in this state according to the Gregorian or new style. The first day of each year after the year seventeen hundred and fifty-two is the first day of January, according to such style.

Formerly L. 1892, ch. 677, § 25, in part.

In computing time by years, a different rule obtains from that which obtains in computing time by days, weeks and months, as in the latter case, section 27 of the Statutory Construction Law, as amended by chapter 447 of the Laws of 1894, changes the general rule and provides that the day from which the computation is to be made shall be exclusive of such day, whereas section 25 of the Statutory Construction Law, relative to the computation of time by years, contains no such provision. Aultman & Taylor Co. v. Syme, 91 Hun 632.

As to a transaction when the Revised Statutes were in force, a year was held to consist of 365 days. Hall v. Brennan, 140 N. Y. 409.

§ 51. Time, night. Night time includes the time from sunset to sunrise.

Formerly L. 1892, ch. 677, § 27, in part, as am'd by L. 1894, ch. 447.

§ 52. Time, standard. The standard time throughout this state is that of the seventy-fifth meridian of longitude west from Greenwich, and all courts and public officers, and legal and official proceedings, shall be regulated thereby.

Formerly L. 1892, ch. 677, § 28, in part.

§ 53. Time, use of standard. Any act required by or in pursuance of law to be performed at or within a prescribed time, shall be performed according to the standard time.

Formerly L. 1892, ch. 677, § 28, in part.

§ 54. Village. The term village means an incorporated village.

Formerly L. 1892, ch. 677, § 22.

§ 55. Women. The term women includes girls.

Formerly L. 1892, ch. 677, § 8, in part.

§ 56. Writing and written. The terms writing and written include every legible representation of letters upon a material substance, except when applied to the signature of an instrument.

Formerly L. 1892, ch. 677, § 12, in part.

§ 57. Year, common and leap. For the purpose of computing and reckoning the days of the year in the same regular course in the future, every year, the number of which in the Christian era is a multiple of four, is a bissextile or leap year consisting of three hundred and sixty-six days, unless such number of the year is a multiple of one hundred and the first two figures thereof treated as a separate number is not a multiple of four, and every year which is not a leap year is a common year consisting of three hundred and sixty-five days.

Formerly L. 1892, ch. 677, § 25, in part.

§ 58. Year in statute, contract and public or private instrument. The term year in a statute, contract, or any public or private instrument, means three hundred and sixty-five days, but the added day of a leap year and the day immediately preceding shall for the purpose of such computation be counted as one day. In a statute, contract or public or private instrument, the term year means twelve months, the term half year, six months, and the term a quarter of a year, three months.

Formerly L. 1892, ch. 677, § 25, in part.

ARTICLE 3

Ancient Statutes and Resolutions

SECTION 70. Statutes of England and Great Britain inoperative in this state.
71. Acts of the legislature of the colony of New York inoperative.
72. Resolutions of the congress of the colony and the convention of New York inoperative.

§ 70. Statutes of England and Great Britain inoperative in this state. A statute of England or Great Britain shall not be deemed to have had any force or effect in this state since May first, seventeen hundred and eighty-eight.

Formerly L. 1892, ch. 677, § 30, in part.

§ 71. Acts of the legislature of the colony of New York inoperative. Acts of the legislature of the colony of New York shall not be deemed to have had any force or effect in this state since December twenty-ninth, eighteen hundred and twenty-eight.

Formerly L. 1892, ch. 677, § 30, in part.

§ 72. Resolutions of the congress of the colony and the convention of New York inoperative. The resolutions of the congress of the colony of New York and of the convention of the state of New York, shall not be deemed to be the laws of this state hereafter.

Formerly L. 1892, ch. 677, § 30, in part.

ARTICLE 4

References, Titles and Head Notes

SECTION 80. References to repealed provisions.
81. Titles and head notes.

§ 80. References to repealed provisions. If any provision of a law be repealed and, in substance, re-enacted, a reference in any law to such repealed provision shall be deemed a reference to such re-enacted provision.

Formerly L. 1892, ch. 677, § 32, in part, as am'd by L. 1894, ch. 448.

A clerical error in citing a former statute in a later one will be disregarded. People ex rel. Fitch v. Lord, 9 A. D. 458.

§ 81. Titles and head notes. If the title of any article or other division of a statute, or the head note of a section shall be amended or repealed in the body of the statute, or if a new article or other division having a title, or a new section having a new head note be added to a statute, the corresponding title or head note, if any, in an abstract of contents at the beginning of the article or other division of the statute shall be deemed to be correspondingly amended or repealed, although there be no express reference thereto.

Formerly L. 1892, ch. 677, § 34.

ARTICLE 5

Effect of Repeals

SECTION 90. Effect of the repeal of a repealing statute.
91. Effect of the repeal of a statute upon amendments thereof.
92. Effect of the repeal of an amending statute.
93. Effect of repealing statute upon existing rights.
94. Effect of repealing statute upon pending actions and proceedings.
95. Effect of the repeal of a statute by another statute substantially re-enacting the former.
96. Effect of hyphen in schedule of repeals.

§ 90. Effect of the repeal of a repealing statute. The repeal hereafter or by this chapter of any provision of a statute, which repeals any provision of a prior statute, does not revive such prior provision.

Formerly L. 1892, ch. 677, § 31, in part.

A legislative intent to revive a law which has, by legislative action, already been wholly annihilated, is not alone sufficient to accomplish such revival; there must be some legislative expression using language equivalent to a re-enactment; therefore, legislative action upon a separate subject grounded upon an assumed revivor of the original act, does not accomplish this, in the absence of language equivalent to a re-enactment. People v. Wilmerding, 136 N. Y. 363; Bank of Metropolis v. Faber, 150 N. Y. 200, affg. 1 A. D. 341; see, also, White v. Inebriates' Home, 141 N. Y. 127.

Prior to the enactment of the foregoing section it was held in Chard v. Holt, 136 N. Y. 30, that the repeal of a repealing act revived the act repealed, and this rule was followed in Ottman v. Hoffman, 7 Misc. 714, in which it was held that the omission in the repealing of the General Corporation Law of 1892, ch. 687, of a statute included in the repealing schedule of the Stock Corporation Law of 1890, ch. 564, revived the statute so omitted, the repeal of which was thereby repealed. The doctrine of this decision is that because the Statutory Construction Law was passed at the same session as the repealing act of 1892, section 33 (now § 100), precludes section 31 (now § 90) of the Statutory Construction Law from affecting other statutes passed at the same session.

§ 91. Effect of the repeal of a statute upon amendments thereof. The repeal by the Consolidated Laws of a statute includes a statute amendatory of the statute repealed.

New, added by L. 1909, ch. 27.

§ 92. Effect of the repeal of an amending statute. The repeal hereafter or by this chapter of any provision of a statute, which amends a provision of a prior statute, leaves such prior provision in force unless the amendatory statute be a substantial re-enactment of the statute amended.

Formerly L. 1892, ch. 677, § 31 in part.

The effect upon a prior statute of a subsequent amendment "so as to read as follows," is not to be determined in all cases by any fixed and absolute rule, but frequently becomes a question of legislative intent to be determined from the nature and language of the amendment and from all the circumstances of the case. The duty of the courts is to give effect to the legislative intent rather than the literal terms of the act. Bank of the Metropolis v. Faber, 150 N. Y. 200; In re Rochester Water Comrs., 66 N. Y. 415; People v. Clute, 50 N. Y. 451.

A statute which is amended and re-enacted so as to read as prescribed in the amendatory statute is thereby wholly annulled as to all future cases, and, except as to rights and duties already existing, becomes merged and incorporated in the later statute. People v. Wilmerding, 136 N. Y. 363 distg. In re Prime, 136 N. Y. 347. In case the amendatory act is repealed, this does not revive the original act, but both fall by virtue of the repeal. Id.

Where a later act covers the whole subject of earlier acts, together with new provisions, and plainly shows that it was intended not only as a substitute for the earlier acts but to cover the whole subject then considered by the Legislature, and to prescribe the only rules in respect thereto, it will operate as a repeal of all former statutes relating to such subject-matter even if such former acts are not in all respects repugnant to the new act. City of Buffalo v. Lewis, 192 N. Y. 193 (1908), affg. 123 A. D. 163. See, also, Peo. ex rel. Roosevelt Hospital v. Raymond, 194 N. Y. 189 (1909), revsg. 126 A. D. 720.

A statute which amends a former statute "so as to read as follows," operates as a repeal by implication of provisions in the former law inconsistent with the latter law and of provisions in the former law omitted therefrom. Davidson v. Witthaus, 106 A. D. 182 (1905).

§ 93. Effect of repealing statute upon existing rights. The repeal of a statute or part thereof shall not affect or impair any act done, offense committed or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time such repeal takes effect, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if such repeal had not been effected.

Formerly L. 1892, ch. 677, § 31, in part.

§ 94. Effect of repealing statute upon pending actions and proceedings. Unless otherwise specially provided by law, all actions and proceedings, civil or criminal, commenced under or by virtue of any provision of a statute so repealed, and pending immediately prior to the taking effect of such repeal, may be prosecuted and defended to final effect in the same manner as they might if such provisions were not so repealed.

Formerly L. 1892, ch. 677, § 31, in part.

§ 95. Effect of the repeal of a statute by another statute substantially re-enacting the former. The provisions of a law repealing a prior law, which are substantial re-enactments of provisions of the prior law, shall be construed as a continuation of such provisions of such prior law, modified or amended according to the language employed, and not as new enactments.

Formerly L. 1892, ch. 677, § 32, in part, as am'd by L. 1894, ch. 448.

§ 96. Effect of hyphen in schedule of repeals. When two numbers in a schedule of repeals of the consolidated laws are connected by a hyphen both such numbers are included as well as all intermediate numbers.

New, added by L. 1909, ch. 27.

ARTICLE 6

Effect of Consolidated Laws

SECTION 100. Effect of consolidation upon laws passed at same session or before consolidation takes effect.
101. Effect of consolidated laws on penal law and civil and criminal codes.

§ 100. Effect of consolidation upon laws passed at same session or before consolidation takes effect. No provision of any chapter of the consolidation of the general laws, of which this chapter is a part, shall supersede or repeal by implication any law passed at the same session of the legislature at which any such chapter was enacted, or passed after the enactment of any such chapter and before it shall have taken effect; and an amendatory law passed at such session or at any subsequent session begun before any such chapter takes effect, shall not be deemed repealed, unless specifically designated in the repealing schedule of such chapter.

Formerly L. 1892, ch. 677, § 33.

Chapters 677 to 691, inclusive. Laws of 1892, all passed at the same session of the Legislature, all approved by the Governor on the same day, are all part of the system of statutory revision, and are not to be treated as independent enactments having no special relation to each other, but, for the purpose of ascertaining the legislative intent, are to be regarded rather as a single act. Bank of Metropolis v. Faber, 1 A. D. 341, affd., 150 N. Y. 200.

The foregoing section means, that in accepting and enacting in bulk the general body of the revision, the Legislature desired to make sure of the retention of all the special laws on cognate subjects which had been passed before the revision went into effect, and which had not been expressly repealed. It had no reference to the general laws embodied in the revision itself. Bank of Metropolis v. Faber, 1 A. D. 341, disapproving Ottman v. Hoffman, 7 Misc. 714. See, also, 150 N. Y. 200, affg. 1 A. D. 341, supra.

In the absence of evidence as to the precise time of day it was approved by the Governor, an act which contains a provision that it shall take effect immediately operates during the entire day of its approval. Croveno v. Atlantic Ave. R. R. Co., 150 N. Y. 225; Niendorff v. Manhattan Ry. Co., 150 N. Y. 276.

When a statutory enactment is modified by engrafting upon it a new provision, by way of amendment, providing conditionally for a new case, such modification is in the nature of a proviso. Rowell v. Janvrin, 151 N. Y. 60.

§ 101. Effect of consolidated laws on penal law and civil and criminal codes. The Consolidated Laws shall not be construed to amend, repeal or otherwise affect any provision of the penal law, code of civil procedure or code of criminal procedure unless expressly so stated.

New, added by L. 1909, ch. 27.

ARTICLE 7

Application of Chapter

SECTION 110. Application of chapter.

§ 110. Application of chapter. This chapter is applicable to every statute unless its general object, or the context of the language construed, or other provisions of law indicate that a different meaning or application was intended from that required to be given by this chapter.

Formerly L. 1892, ch. 677, § 1, in part.

ARTICLE 8

Laws Repealed; When to Take Effect

SECTION 120. Laws repealed.
121. When to take effect.

§ 120. Laws repealed. Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

Formerly L. 1892, ch. 677, § 35.

§ 121. When to take effect. This chapter shall take effect immediately.

Formerly L. 1892, ch. 677, § 36.

SCHEDULE OF LAWS REPEALED.

Revised Statutes..	Part 1, chapter 8, title 8, section	16
Revised Statutes..	Part 1, chapter 19, title 1, sections	1–5
Revised Statutes..	Part 2, chapter 4, title 2, section	3
Revised Statutes..	Part 2, chapter 4, title 3, section	9
Revised Statutes..	Part 3, chapter 3, title 1, section	10
Revised Statutes..	Part 3, chapter 7, title 3, article 7, sections ...	61, 62
Revised Statutes..	Part 3, chapter 8, title 17, section	27
Revised Statutes..	Part 3, chapter 10, title 4, section.....	4
Revised Statutes..	Part 4, chapter 2, title 8, section	16

Laws of	Chapter.	Section.
1788....	46....	37
1801....	90....	28
R. L. 1813	56....	30, second sentence
1828....	20....	9–11 (2d Meet.)
1828....	21....	2–15 (2d Meet.)
1830....	320....	65–67
1848....	197....	1
1849....	261....	All
1857....	536....	3
1865....	146....	All
1870....	370....	All
1872....	544....	All
1873....	577....	All
1873....	639....	All
1874....	321....	All

General Construction Law.

Laws of	Chapter.	Section.
1875....	27....	All
1876....	448....	29, 788, 960
1877....	416....	1, ¶¶ 176, 214
1877....	466....	27
1880....	178....	1, pt. adding § 3343, subds. 6–8, 15, 17, 21–24 to L. 1876, ch. 448
1881....	30....	All
1881....	442....	955–957
1881....	676....	261, 500, 718, subds. 9–15
1882....	384....	1, pt. amending L. 1881, ch. 676, § 718, subds. 9–15
1883....	372....	All
1884....	14....	All
1886....	21 ...	20
1887....	289....	All
1892....	677....	All, except last sentence of § 24
1894....	447....	All
1894....	448....	All
1895.. .	603....	All
1897....	614....	1, except part providing that public offices shall be kept open on all week days; 2, 3
1902....	39....	1. except part providing that public offices shall be kept open on all week days.
1907....	300....	All

CONSTRUCTION OF CONSOLIDATED LAWS

Laws of 1909, Chapter 596, Entitled: "An Act to Prescribe the Rules for the Construction of the Consolidated Laws and Code Amendments Reported to the Legislature under and in Pursuance to the Provisions of Chapter Six Hundred and Sixty-four of the Laws of Nineteen Hundred and Four, and also for the Construction of Chapter Two Hundred and Forty of the Laws of Nineteen Hundred and Nine."

Became a law May 29, 1909.

§ 1. In construing the consolidated laws and the amendments to the code of civil procedure and the code of criminal procedure reported to the legislature by the board of statutory consolidation constituted under the provisions of chapter six hundred and sixty-four of the laws of nineteen hundred and four, entitled "An act to provide for the consolidation of the statutes of the state," and enacted by the legislature of nineteen hundred and nine, and in construing the act amendatory thereof, known as chapter two hundred and forty of the laws of nineteen hundred and nine, for the purpose of determining the effect of any of the provisions or sections thereof on any other provision or section thereof, or on any special law theretofore enacted, the several provisions and sections of such laws and code amendments and said act amendatory thereof shall not be considered as having been enacted or re-enacted by the legislature at the time of the passage of the consolidated laws or such code amendments or said act amendatory thereof but as having been enacted as of the various times when such provisions and sections first became laws by any earlier statutes, provided, however, that when any provision of law after its first enactment by the legislature has been amended or re-enacted, then for the purpose of its construction for the determination of its effect on other sections or provisions of the consolidated laws, it shall be considered as having been enacted at the date of such amendment or re-enactment. If in any such consolidated law and such amendments to

the code of civil procedure and the code of criminal procedure as enacted by the legislature of nineteen hundred and nine or said act amendatory thereof there shall have been incorporated any provisions of law that have heretofore been superseded or impliedly repealed, the incorporation of any such provisions shall not be construed as a legislative intent to revive such superseded or repealed provisions, nor shall such incorporation in such consolidated laws be construed to indicate any legislative determination that such provisions had not been theretofore so superseded or repealed. The true purpose and intent of this act is to prescribe that the statute law of the state, so far as it has been reproduced in such consolidated laws and in such amendments to the code of civil procedure and in the code of criminal procedure, and in said chapter two hundred and forty of the laws of nineteen hundred and nine, and all special laws in force at the time of the enactment of such consolidated laws, shall be of the same force and effect as they were before the enactment of such consolidated laws or code amendments or said act amendatory thereof.

§ 2. This act shall take effect immediately.

PENAL LAW PROVISIONS

Being Part of Laws of 1909, Chapter 88, Entitled: "An Act for the Punishment of Crime, Constituting Chapter Forty of the Consolidated Laws," as Amended.

Numerical Arrangement of Sections Relating to Stock Corporations.

ARTICLE 32

Bills of Lading, Receipts and Vouchers

SECTION 360. Fictitious bills of lading, receipts and vouchers.
361. Offenses by pipe-line corporations.
362. Erroneous bills of lading or receipts, issued in good faith, excepted.
363. Duplicate receipts must be marked "duplicate."
364. Selling, hypothecating or pledging property received for transportation or storage.
365. Bill of lading or receipt issued by warehouseman must be canceled on redelivery of the property.
366. Property demanded by process of law.
367. Penalty for failure to issue bill of lading.

ARTICLE 36

Bucket Shops

SECTION 390. Acts prohibited; penalty for violation.
391. Exhibiting quotations; penalty for violation.
392. Written statement to be furnished; presumption.
393. Corporations; additional penalty for second offense.
394. Definitions.

ARTICLE 40

Business and Trade

SECTION 440. Conducting business under assumed name.

ARTICLE 44

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SECTION 488. Sending messenger boys to certain places.

ARTICLE 50

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SECTION 552. Divulging contents of telegraphic or telephonic messages.
553. Opening or publishing a letter, telegram or private paper.

ARTICLE 64

Corporations

SECTION 280. Corporations not to practice law.
660. Frauds in the organization of corporations.
661. Frauds in procuring organization of corporations.
662. Fraudulent issue of stocks and bonds.
663. Acting for foreign corporations not authorized to do business in this state.
664. Misconduct of officers and directors of stock corporations.
665. Misconduct of directors, officers, agents and employees of corporations.
666. Unlawful use of certain titles in connection with corporate name.
667. Presumption of knowledge of corporate condition and business and of assent thereto by directors; definitions.
668. Misconduct at corporate elections.
669. Misconduct of officers and agents of pipe-line corporations.

ARTICLE 74

Elective Franchise

SECTION 759. Refusal to permit employees to attend election.

ARTICLE 82

Ferries

SECTION 870. Ferries.
871. Penalty for neglect to post schedule of ferry rates.

ARTICLE 84

Forgery

SECTION 880. Definitions.
882. Falsely indicating person as corporate officer.
884. Forgery in first degree.
885. False certificate to certain instruments is forgery.
887. Forgery in second degree.
889. Forgery in third degree.
890. Officer of corporation selling fraudulent shares.
891. Forging passage tickets.

ARTICLE 86

Frauds and Cheats

SECTION 926. False rumors as to stocks, bonds or public funds.
948. Unlawful use of name of benevolent, humane or charitable corporation.

ARTICLE 120

Labor

SECTION 1271. Hours of labor to be required.
1272. Payment of wages.

ARTICLE 134

Malicious Mischief

SECTION 1423. Injuring highway boundary, pier, sea-wall, dock, rock, buoy, landmark, mile-board, pipe, main, sewer, machine, telegraph, or other property.

1431. Interference with gas or electric meters or steam valves.

1432. Unlawful interference with water meters, water service pipes and their connections.

ARTICLE 142

Military

SECTION 1486. Unlawfully exacting toll of a member of the national guard.

ARTICLE 152

Passage Tickets

SECTION 1560. Company defined.

1561. Certain sales and exchanges of passage tickets prohibited.

1562. Redemption of unused passage tickets.

1563. Advertising as agent, without written authorization; false or misleading information.

1564. Issuance of order or other instrument securing passage by vessel from foreign port to this state; what to contain.

*1665. Punishment for violation of two preceding sections.

1566. Street surface railroad transfer tickets not to be given away or sold.

1567. Offices kept for unlawful sale of passage tickets declared disorderly houses.

1568. Owners, pursers and clerks allowed to sell tickets.

1569. Station masters, conductors and agents allowed to sell tickets.

1570. What must be stated in passage ticket.

1571. Sale of tickets not filled out, a misdemeanor.

ARTICLE 178

Railroads

SECTION 1980. Unlawful acts of and neglect of duty by railroad officials.

1981. Misconduct of public service commissioners and their employees.

1982. Person unable to read not to act or be employed as engineer; telegraph operators.

1983. Misconduct of officials or employees on elevated railroads.

1984. Intoxication or other misconduct of railroad or steamboat employees.

1985. Ringing bells and blowing whistles at crossings; obstructing highways.

1986. Placing passenger cars in front of other cars.

1987. Platforms and heating apparatus of passenger cars.

1988. Guard posts; automatic couplers.

1989. Inciting railroad employees not to wear uniform; unauthorized wearing of uniform.

1990. Riding on freight trains; boarding cars in motion; obstructing passage of car.

1991. Injuring railroad property and appurtenances; obstructing tracks.

* So in the original.

ARTICLE 22

Bills of Lading, Receipts, Etc.

§ 360. Fictitious bills of lading, receipts and vouchers. A person who:

Being the master, owner or agent of any vessel, or officer or agent of any railway, express or transportation company, or otherwise being or representing any carrier, delivers any bill of lading, receipt or other voucher, by which it appears that merchandise of any kind has been shipped on board a vessel, or delivered to a railway, express or transportation company, or other carrier, unless the same has been so shipped or delivered and is at the time actually under the control of such carrier, or the master, owner or agent of such vessel, or of some officer or agent of such company, to be forwarded as expressed in such bill of lading, receipt or voucher,

Is guilty of a misdemeanor, punishable by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

Formerly Penal Code, § 629, as am'd by L. 1892, ch. 692.

§ 361. Offenses by pipe-line corporations. A pipe-line corporation, or a person being the officer, agent, manager or representative thereof, who:

1. Accepts, makes or issues any receipt, certificate or order of any kind for any commodity, unless the commodity represented is actually at the time in the possession of the corporation; or,

2. Delivers to any person any petroleum or other commodity received for transportation by such corporation without the presentation and surrender of all vouchers, receipts, orders or certificates that have been issued or accepted for the same; or,

3. Having parted with the possession of any commodity and having received therefor an order, voucher, receipt or certificate, shall reissue the same, or shall not cause it to be canceled by the word "canceled" stamped or printed legibly across the face thereof, and to be filed and recorded by such corporation, as provided by law,

Is guilty of a misdemeanor.

Formerly Penal Code, § 628, as am'd by L. 1892, ch. 692.

§ 362. Erroneous bills of lading or receipts, issued in good faith, excepted. No person can be convicted of an offense under the last two sections, for the reason that the contents of any barrel, box, case, cask or other vessel or package mentioned in the bill of lading, receipt or other voucher did not correspond with the description given in such instrument of the merchandise received, if such description corresponds substantially with the marks, labels or brands upon the outside of such vessel or package, unless it appears that the defendant knew that such marks, labels or brands were untrue.

Formerly Penal Code, § 630.

§ 363. Duplicate receipts must be marked "duplicate." A person mentioned in sections three hundred and sixty and three hundred and sixty-one, who issues any second or duplicate receipt or voucher, of a kind specified in those sections, at a time while a former receipt or voucher for the merchandise specified in such second receipt is outstanding and uncanceled, without writing across the face of the same the word "duplicate," in a plain and legible manner, is punishable by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

Formerly Penal Code, § 631.

§ 364. Selling, hypothecating or pledging property received for transportation or storage. A person mentioned in sections three hundred and sixty and three hundred and sixty-one, who sells or pledges any merchandise for which a bill of lading, receipt or voucher has been issued by him, without the consent in writing thereto of the person holding such bill, receipt or voucher, is punishable by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

Formerly Penal Code, § 632.

§ 365. Bill of lading or receipt issued by warehouseman must be canceled on redelivery of the property. A person mentioned in section three hundred and sixty, who delivers to another any merchandise for which a bill of lading, receipt or voucher has been issued, unless such receipt or voucher bears upon its face the words, "not negotiable," plainly written or stamped, or unless such receipt is surrendered to be canceled at the time of such delivery, or unless, in the case of a partial delivery, a memorandum

thereof is indorsed upon such receipt or voucher, is punishable by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

Formerly Penal Code, § 633.

§ 366. **Property demanded by process of law.** The last two sections do not apply to any case where property is demanded by virtue of legal process.

Formerly Penal Code, § 634.

§ 367. **Penalty for failure to issue bill of lading.** Any person who, being the owner, master or agent of any vessel transporting merchandise or property between ports of this state, departs with such vessel or causes such vessel to depart from the port where such merchandise or property is taken on board, without giving or tendering to the shipper of such merchandise or property, if a bill of lading be demanded by such shipper, a bill of lading or shipping document as provided by section three hundred and ninety-eight of the general business law, is guilty of a misdemeanor.

Formerly Penal Code, § 634-a, added by L. 1898, ch. 156.

ARTICLE 36

Bucket Shops

§ 390. **Acts prohibited; penalty for violation.** Any person, copartnership, firm, association or corporation, whether acting in his, their or its own right, or as the officer, agent, servant, correspondent or representative of another, who shall,

1. Make or offer to make, or assist in making or offering to make any contract respecting the purchase or sale, either upon credit or margin, of any securities or commodities, including all evidences of debt or property and options for the purchase thereof, shares in any corporation or association, bonds, coupons, scrip, rights, choses in action and other evidences of debt or property and options for the purchase thereof or anything movable that is bought and sold, intending that such contract shall be terminated, closed or settled according to, or upon the basis of the public market quotations of prices made on any board of trade or exchange upon which such commodities or securities are dealt in, and without intending a bona fide purchase or sale of the same; or,

2. Makes or offers to make or assists in making or offering to make any contract respecting the purchase or sale, either upon credit or margin, of any such securities or commodities, intending that such contract shall be deemed terminated, closed and settled when such market quotations of prices for such securities or commodities named in such contract shall reach a certain figure, without intending a bona fide purchase or sale of the same; or,

3. Makes or offers to make, or assists in making or offering to make any contract respecting the purchase or sale, either upon credit or margin of any such securities or commodities, not intending the actual bona fide receipt or delivery of any such securities or commodities, but intending a settlement of such contract based upon the difference in such public market quotations of prices at which said securities or commodities are, or are asserted to be, bought or sold; or,

4. Shall, as owner, keeper, proprietor or person in charge of, or as officer, director, stockholder, agent, servant, correspondent or representative of such owner, keeper, proprietor or person in charge, or of any other person, keep, conduct or operate any bucket shop, as hereafter defined; or knowingly permit or allow or induce any person, copartnership, firm, association or corporation whether acting in his, their or its own right, or as the officer, agent, servant, correspondent or representative of another to make or offer to make therein, or to assist in making therein, or in offering to make therein, any of the contracts specified in any of the three preceding subdivisions of this section,

Shall be guilty of a felony and on conviction thereof shall, if a corporation, be punished by a fine of not more than five thousand dollars for each offense and all other persons so convicted shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than five years, or by both such fine and imprisonment. The prosecution, conviction and punishment of a corporation hereunder shall not be deemed to be a prosecution, conviction or punishment of any of its officers, directors or stockholders.

Formerly Penal Code, § 343, as am'd by L. 1895, ch. 571; L. 1913, ch. 236.

§ 391. Exhibiting quotations; penalty for violation. Any person, firm, copartnership, association or corporation receiving,

communicating, exhibiting or displaying in any manner any statement of quotations of prices of any such securities or commodities with an intent to make or offer to make or to assist in making or offering to make any contract prohibited in this article shall be guilty of a felony and on conviction thereof shall be punished as provided in section three hundred and ninety of this chapter.

§ 392. Written statement to be furnished; presumption. Every person, firm, association, copartnership or corporation shall furnish upon written demand to any customer, or principal for whom such person has executed an order for the actual purchase or sale of any such securities or commodities, either for immediate or future delivery, a written statement containing the names of the persons from whom such property was bought, or to whom it has been sold, as the case may be, the time when, place where, the amount of and the price at which the same was either bought or sold; and if such person, firm, association, copartnership or corporation shall refuse or neglect to furnish such statement within forty-eight hours after such demand, such refusal shall be prima facie evidence that such purchase or sale was made in violation of this article.

§ 393. Corporations; additional penalty for second offense. If a domestic corporation shall be convicted of a second offense hereunder the supreme court shall have jurisdiction upon an action brought by the attorney-general, in the name of the people, for that purpose, to dissolve such corporation; and if a foreign corporation shall be convicted of a second offense, such court shall have jurisdiction in an action brought in like manner to restrain such corporation from doing business in this state.

§ 394. Definitions. "Bucket shop" shall mean any building or any room, apartment, booth, office or store therein or any other place where any contract prohibited by this article is made or offered to be made.

ARTICLE 40, § 440.

Conducting Business Under Assumed Name

§ 440. Conducting business under assumed name. 1. No person or persons shall hereafter carry on or conduct or transact business in this state under any assumed name or under any designation, name or style, corporate or otherwise, other than the real name or names of the individual or individuals conducting or transacting such business, unless such person or persons shall file in the office of the clerk of the county or counties in which such person or persons conduct, or transact or intend to conduct or transact such business, a certificate setting forth the name under which such business is, or is to be, conducted or transacted, and the true or real full name or names of the person or persons conducting or transacting the same, with the post-office address or addresses of said person or persons. Said certificate shall be executed and duly acknowledged by the person or persons so conducting, or intending to conduct such business.

2. Persons conducting such business under an assumed name, or under any such designation referred to in subdivision one, on September first, nineteen hundred, shall file such certificate as hereinbefore prescribed, within thirty days after that date, and persons thereafter conducting or transacting business as aforesaid shall, before commencing said business, file such certificate in the manner hereinbefore prescribed.

3. The several county clerks of this state shall keep an alphabetical index of all persons filing certificates, provided for herein, and for the indexing and filing of such certificates, they shall receive a fee of twenty-five cents. A copy of such certificate duly certified to by the county clerk in whose office the same shall be filed shall be presumptive evidence in all courts of law in this state of the facts therein contained.

4. This section shall in no way affect or apply to any corporation duly organized under the laws of this state, or to any corporation organized under the laws of any other state and lawfully doing business in this state, nor shall this section be deemed or construed to prevent the lawful use of partnership name or designation, provided that such partnership name or designation shall include the true or real name of at least one of such persons transacting such business.

5. Any person or persons carrying on, conducting or transacting business as aforesaid, who shall fail to comply with the provisions of this section shall be guilty of a misdemeanor.

Formerly Penal Code, § 363-b, added by L. 1900, ch. 216.

For form of certificate under this section, see post, Form No. 479.

Application of Section.

Transacting business implies continuity of conduct in that respect, and the section does not apply where only a single sale has been made under an assumed name. Peo. ex rel. Allen v. Whiting, 68 Misc. 306 (1910).

ARTICLE 44, § 488

Sending Messenger Boys to Certain Places

§ 488. Sending messenger boys to certain places. A corporation or person employing messenger boys who:

1. Knowingly places or permits to remain in a disorderly house, or in an unlicensed saloon, inn, tavern or other unlicensed place where malt or spirituous liquors or wines are sold, any instrument or device by which communication may be had between such disorderly house, saloon, inn, tavern or unlicensed place, and any office or place of business of such corporation or person; or,

2. Knowingly sends or permits any person to send any messenger boy to any disorderly house, unlicensed saloon, inn, tavern, or other unlicensed place, where malt or spirituous liquors or wines are sold, on any errand or business whatsoever except to deliver telegrams at the door of such house,

Is guilty of a misdemeanor, and incurs a penalty of fifty dollars to be recovered by the district attorney.

Formerly Penal Code, § 292-a, added by L. 1893, ch. 692.

ARTICLE 50

Divulging Contents of Messages, Etc.

§ 552. Divulging contents of telegraphic or telephonic messages. A person who:

1. Wrongfully obtains, or attempts to obtain, any knowledge of a telegraphic or a telephonic message by connivance with a clerk, operator, messenger, or other employee of a telegraph or telephone company; or,

2. Being such clerk, operator, messenger or other employee, wilfully divulges to anyone but the persons for whom it was intended, the contents or the nature thereof of a telegraphic or tele-

phonic message or dispatch intrusted to him for the transmission or delivery, or of which contents he may in any manner become possessed, or occupying such position in a telegraph office shall wilfully refuse or neglect duly to transmit or deliver messages received at such office, except when such telegraphic or telephonic message or dispatch is in aid of or used to abet or carry on any unlawful business or traffic, or to perpetrate any criminal offense, and when it shall appear that any offense at law or unlawful business or traffic is being carried on or conducted in whole or in part by means of a telegraphic or telephonic message or dispatch, it shall be the duty of any corporation or employee having knowledge of the same, to withhold such dispatch from delivery, and to further furnish to any public officer whose duty it is to prosecute any offense at law so aided and abetted, all information in their possession, relating to said unlawful business or traffic; and to further assist in the identification of any person aiding or abetting in or conducting any such unlawful business or traffic; and any violation of this section, or refusal or neglect to furnish information as provided hereinbefore, is punishable by a fine of not more than one thousand dollars or by imprisonment for not more than two years, or by both such fine and imprisonment.

Formerly Penal Code, § 641, as am'd by L. 1895, ch. 727; L. 1901, ch. 661.

§ 553. Opening or publishing a letter, telegram or private paper. A person who wilfully, and without authority:

1. Opens or reads, or causes to be opened or read, a sealed letter, telegram, or private paper; or,

2. Publishes the whole or any portion of such a letter, or telegram, or private paper, knowing it to have been opened or read without authority; or,

3. Takes a letter, telegram or private paper, belonging to another, or a copy thereof, and publishes the whole or any portion thereof; or,

4. Publishes the whole or any portion of such letter, telegram, or private paper, knowing it to have been taken or copied without authority; or,

5. Publishes or causes to be published, or connives at the publication of any letter, telegram, or private paper or of any portion of any letter, telegram, or private paper found on, or among the effects of, any person who has been dangerously wounded, or who

has committed suicide, or who has died suddenly, or who has been found dead, unless such letter, telegram, or private paper shall have been produced pursuant to law before a coroner at an inquest, and the publication of such letter, telegram, or private paper, or of such portion of such letter, telegram, or private paper shall have been declared by that coroner in writing to be necessary to aid in the discovery of a crime, or of the identity of the wounded or deceased person; or,

6. Any person having or obtaining access, either with or without the consent of the lawful owner, to any original list, compilation or other collection of the names of customers or subscribers not less than five hundred in number, or to any other original list, compilation or other collection of names not less than five hundred in number, used in connection with any lawful business or occupation whatsoever, and who, without the consent of such lawful owner, shall take possession of any such original list, compilation, or other collection, or any part thereof, or shall make or cause to be made, or take possession of, a copy or duplication thereof, or of any part thereof, or who shall aid, abet or incite any other person to take or to copy or to cause to be copied or taken, any such list, compilation or collection, or any part thereof; or,

7. Any person who may have heretofore obtained or may hereafter obtain any such list, compilation or other collection specified in subdivision six hereof, or any part thereof, or any copy or duplication of such list, compilation or collection or any part thereof, or the information contained in any such list, compilation, collection or any part thereof, and who, without the consent of the lawful owner of the original of any such list, compilation or collection, and with notice or knowledge of his rights, may at any time hereafter, make use of or attempt to make use of any such list, compilation or collection, or any part thereof, or of any copy or duplication of the whole or any part thereof, or of the information contained in any such list, compilation, collection or copy or duplication or any part thereof, for his own benefit or advantage, or that of any person other than said lawful owner,

Is guilty of a misdemeanor.

Formerly Penal Code, § 642, as am'd by L. 1895, ch. 287; L. 1900, ch. 588; 1905, ch. 441.

ARTICLE 64

Corporations

§ 280. **Corporations not to practice law.** [This section can apply only to business corporations, and it is, therefore, printed in full in the Business Corporations Law, page 562.]

§ 660. Frauds in the organization of corporations. A person who:

1. Without authority subscribes the name of another to or inserts the name of another in any prospectus, circular or other advertisement or announcement of any corporation or joint-stock association existing or intended to be formed, with intent to permit the same to be published, and thereby to lead persons to believe that the person whose name is so subscribed is an officer, agent, member or promoter of such corporation or association; or,

2. Signs the name of a fictitious person to any subscription for or agreement to take stock in any corporation, existing or proposed; or,

3. Signs to any such subscription or agreement the name of any person, knowing that such person does not intend in good faith to comply with the terms thereof, or under any understanding or agreement, that the terms of such subscription or agreement are not to be complied with or enforced,

Is guilty of a misdemeanor.

Formerly Penal Code, § 590, as am'd by L. 1892, ch. 692.

§ 661. Frauds in procuring organization of corporations. An officer, agent or clerk of a corporation, or of persons proposing to organize a corporation, or to increase the capital stock of a corporation, who knowingly exhibits a false, forged or altered book, paper, voucher, security or other instrument of evidence to any public officer or board authorized by law to examine the organization of such corporation, or to investigate its affairs, or to allow an increase of its capital, with intent to deceive such officer or board in respect thereto, is punishable by imprisonment in a state prison not exceeding ten years.

Formerly Penal Code, § 592, as am'd by L. 1892, ch. 662.

§ 662. Fraudulent issue of stocks and bonds. An officer, agent or other person in the service of any joint-stock company or corporation formed or existing under the laws of this state, or of

the United States or of any state or territory thereof, or of any foreign government or country, who wilfully and knowingly, with intent to defraud:

1. Sells, pledges or issues, or causes to be sold, pledged or issued, or signs or executes, or causes to be signed or executed with intent to sell, pledge or issue, or causes to be sold, pledged or issued, any certificate or instrument purporting to be a certificate or evidence of the ownership of any share or shares of such company or corporation, or any bond or evidence of debt, or writing purporting to be a bond or evidence of debt of such company or corporation, without being first thereto duly authorized by such company or corporation, or contrary to the charter or laws under which such corporation or company exists, or in excess of the power of such company or corporation or of the limit imposed by law or otherwise upon its power to create or issue stock or evidences of debt; or,

2. Reissues, sells, pledges or disposes of, or causes to be reissued, sold, pledged or disposed of, any surrendered or canceled certificates, or other evidence of the transfer or ownership of any such share or shares,

Is punishable by imprisonment for a term not exceeding seven years, or by a fine not exceeding three thousand dollars, or by both.

Formerly Penal Code, § 591, as am'd by L. 1892, ch. 662.

§ 663. Acting for foreign corporations not authorized to do business in this state. Any person, or corporation, who:

1. Acts as agent or representative of any mortgage, loan or investment corporation or building and mutual loan corporation or association or co-operative savings and loan association organized outside of this state, while such mortgage, loan or investment corporation or building and mutual loan corporation or association or co-operative savings and loan association shall not be authorized under a license of the superintendent of banks to do business in this state; or,

2. Acts as agent or representative in this state of a foreign corporation, other than a moneyed corporation, with the words "trust," "bank," "banking," "insurance," "assurance," "indemnity," "guarantee," "guaranty," "savings," "investment," "loan," "benefit," or any other words or terms indicating, representing or holding out such company to be a moneyed corporation

as a part of its name or corporate title, or who, in connection with such corporation or otherwise, shall put forth any sign containing said name, or who shall advertise or publish the said company as doing business in this state, directly or indirectly, through agents or otherwise, while such company shall not be authorized under a certificate procured from the secretary of state pursuant to section fifteen of the general corporation law to do business in this state,

Is guilty of a misdemeanor.

Formerly Penal Code, § 593, as am'd by L. 1892, ch. 692; L. 1904, ch. 489.

§ 664. Misconduct of officers and directors of stock corporations. A director of a stock corporation, who concurs in any vote or act of the directors of such corporation, or any of them, by which it is intended:

1. To make a dividend, except from the surplus profits arising from the business of the corporation, and in the cases and manner allowed by law; or,

2. To divide, withdraw, or in any manner pay to the stockholders, or any of them, any part of the capital stock of the corporation; or to reduce such capital stock without the consent of the legislature; or,

3. To discount or receive any note or other evidence of debt in payment of an instalment of capital stock actually called in, and required to be paid, or with intent to provide the means of making such payment; or,

4. To receive or discount any note or other evidence of debt with intent to enable any stockholder to withdraw any part of the money paid in by him on his stock; or,

5. To apply any portion of the funds of such corporation, except surplus profits, directly or indirectly, to the purchase of shares of its own stock,

Is guilty of a misdemeanor.

An officer or director of a stock corporation who:

6. Issues, participates in issuing, or concurs in a vote to issue any increase of its capital stock beyond the amount of the capital stock thereof, duly authorized by or in pursuance of law; or,

7. Sells, or agrees to sell, or is directly or indirectly interested in the sale of any share of stock of such corporation, or in any agreement to sell the same, unless at the time of such sale or agreement he is an actual owner of such share,

Is guilty of a misdemeanor, punishable by imprisonment for not less than six months, or by a fine not exceeding five thousand dollars, or by both.

Formerly Penal Code, §§ 594 and 610, as am'd by L. 1892, ch. 692.

Pleading Violation of this Section as a Defense.

In an action upon a contract whereby a corporation agreed to repurchase its own stock, the burden of showing that there are no surplus profits falls upon the corporation when it interposes a defense that the contract is not enforcible by reason of the provisions of this section. Richards v. Wiener Co., 207 N. Y. 59 (1912), affg. 145 A. D. 353; Strodl v. Farrish-Stafford Co., 145 A. D. 406 (1911).

Rights of Creditors Upon Violation of This Section.

If a stockholder sells his stock to the corporation which issued it, he sells at his peril and assumes the risk of consummation of the transaction without encroachment upon the funds which belong to the corporation in trust for the payment of its creditors. The right of creditors cannot be defeated by the fact that at the time of the transaction the seller of the stock and the corporate officers who purchased it were acting in good faith and supposed that the corporation was solvent. In re Fechheimer Fishel Co., 212 Fed. 357 (1914).

Agreement by Corporation to Repurchase its Stock, When Unenforcible.

An agreement by a corporation to take back its stock at cost at the expiration of two years if the purchaser so wished becomes invalid and unenforcible if the corporation becomes insolvent at or before the time for the purchaser to exercise his option. In re Fechheimer Fishel Co., 212 Fed. 357, 365 (1914).

Note of Corporation Given in Payment of its Own Stock.

A note given by a corporation in payment of its own stock, in good faith and at a time when the corporation was solvent, cannot be enforced as against the corporation where the corporation was insolvent at maturity; the note being in effect a promise to pay out of surplus profits if payment could be made without prejudice to creditors. In re Fechheimer Fishel Co., 212 Fed. 357 (1914).

§ 665. Misconduct of directors, officers, agents and employees of corporations. A director, officer, agent or employee of any corporation or joint-stock association who:

1. Knowingly receives or possesses himself of any of its property otherwise than in payment for a just demand, and with intent to defraud, omits to make or to cause or direct to be made a full and true entry thereof in its books and accounts; or,

2. Makes or concurs in making any false entry, or concurs in omitting to make any material entry in its books or accounts; or,

3. Knowingly (a), concurs in making or publishing any written

report, exhibit or statement of its affairs or pecuniary condition containing any material statement which is false, or (b), omits or concurs in omitting any statement required by law to be contained therein; or,

4. Having the custody or control of its books, wilfully refuses or neglects to make any proper entry in the stock book of such corporation as required by law, or to exhibit or allow the same to be inspected, and extracts to be taken therefrom by any person entitled by law to inspect the same, or take extracts therefrom; or,

5. If a notice of an application for an injunction affecting the property or business of such joint-stock association or corporation is served upon him, omits to disclose the fact of such service and the time and place of such application to the other directors, officers and managers thereof; or,

6. Refuses or neglects to make any report or statement lawfully required by a public officer,

Is guilty of a misdemeanor.

Formerly Penal Code, § 611, as am'd by L. 1892, ch. 692; L. 1893, ch. 692; L. 1906, ch. 286.

False Statement.

In an action brought under the Stock Corporation Law, section 35, by one who purchased stock upon the faith of false statements published by the defendants as to the financial condition of the corporation, defendant may serve an unverified answer although the complaint alleging the fraud was verified. Since the allegations of the complaint constitute a misdemeanor under this section, and since a verified pleading is an affidavit, and hence testimony, the defendants cannot be compelled to verify an answer which tends to incriminate them. Thompson v. McLaughlin, 138 A. D. 711 (1910).

§ 666. Unlawful use of certain titles in connection with corporate name. Any person, association or corporation, other than a moneyed corporation, who shall within this state directly or indirectly, or through agents or representatives transact business under, or in anywise use a corporate name or a corporate title with the words "trust," "bank," "banking," "insurance," "assurance," "indemnity," "guarantee," "guaranty," "savings," "investment," "loan," "benefit," as a part of such name or title, is guilty of a misdemeanor; provided, however, that any domestic corporation, other than a moneyed corporation, heretofore duly organized and heretofore duly authorized by law to use and on April twenty-ninth, nineteen hundred and four, lawfully using

either or any of such words as a part of its lawful corporate title, may lawfully continue to use such corporate title, provided and if it, being a corporation other than a moneyed corporation, shall, wherever the name shall be printed, written, engraved or displayed, add, in legible English characters, of substantially the same size and style as the name, directly under the said name or immediately in connection therewith, wherever so used, the words "not a moneyed corporation."

Formerly Penal Code, § 608, added by L. 1904, ch. 489.

§ 667. Presumption of knowledge of corporate condition and business and of assent thereto by directors; definitions. It is no defense to a prosecution for a violation of the provisions of this article and article twenty-six, that the corporation is a foreign corporation, if it carries on business or keeps an office therefor in this state.

The term "director" as used in this article and article twenty-six includes any of the persons having, by law, the direction or management of the affairs of a corporation, by whatever name described.

A director of a corporation or joint-stock association is deemed to have such a knowledge of the affairs of the corporation or association as to enable him to determine whether any act, proceeding or omission of its directors is a violation of this article and article twenty-six. If present at a meeting of the directors at which any act, proceeding or omission of such directors in violation of this article and article twenty-six occurs, he must be deemed to have concurred therein, unless he at the time causes or in writing requires his dissent therefrom to be entered on the minutes of the directors. If absent from such meeting, he must be deemed to have concurred in any such violation, if the facts constituting such violation appear on the record or minutes of the proceedings of the board of directors, and he remains a director of the corporation for six months thereafter without causing or in writing requiring his dissent from such violation to be entered on such record of minutes.

Formerly Penal Code, § 614, as am'd by L. 1892, ch. 692.

§ 668. Misconduct at corporate elections. Any person who:

1. Being entitled to vote at any meeting of the stockholders or bondholders or both of a stock corporation, sells his vote, or who

issues a proxy to vote to any person for any sum of money or thing of value, except as expressly authorized by law; or,

2. Acts as an inspector of election at any such meeting and violates an oath taken by him in pursuance of law as such inspector, or violates the provisions of an oath required by law to be taken by him as such inspector, or is guilty of any dishonest or corrupt conduct as such inspector,

Is guilty of a misdemeanor.

Formerly Penal Code, § 613, as am'd by L. 1892, ch. 692; L. 1901, ch. 588.

§ 669. Misconduct of officers and agents of pipe-line corporations. Any officer, agent or manager of a pipe-line corporation who:

1. Neglects or refuses to transport any product delivered for transportation, or to accept and allow a delivery thereof in the order of application, according to the general rules of the corporation, as provided by law; or,

2. Charges, accepts or agrees to accept for such receipt, transportation and delivery, a sum different from the amount fixed by such regulations; or,

3. Allows or pays, or agrees to allow or pay, or suffers to be allowed or paid or repaid, any draw-back, rebate or allowance, so that any person shall, by any device, have or procure any transportation of products over such pipe-line at a less rate or charge than is fixed in such regulations,

Is guilty of a misdemeanor, punishable by a fine not exceeding one thousand dollars, or by imprisonment not exceeding six months, or by both.

Formerly Penal Code, § 612, as am'd by L. 1892, ch. 692.

ARTICLE 74

Elective Franchise

§ 759. Refusal to permit employees to attend election. A person or corporation who refuses to an employee entitled to vote at an election or town meeting, the privilege of attending thereat, as provided by the election law, or subjects such employee to a penalty or reduction of wages because of the exercise of such privilege, is guilty of a misdemeanor.

Formerly Penal Code, § 41f, added by L. 1890, ch. 94, am'd by L. 1892, ch. 693.

ARTICLE 82

Ferries

§ 870. Ferries. A person who:

1. Maintains a ferry for profit or hire upon any of the waters of this state without authority of law; or,

2. Having entered into a recognizance to keep or maintain a ferry, violates the condition of such recognizance,

Is guilty of a misdemeanor.

Where such ferry is upon waters dividing two counties, the offender may be prosecuted in either county.

Formerly Penal Code, § 415, as am'd by L. 1892, ch. 692.

§ 871. Penalty for neglect to post schedule of ferry rates. A person, corporation or association operating any ferry in this state, or between this state and any other state, operating from or to a city of five hundred thousand inhabitants or over, posting a false schedule of ferry rates, or neglecting to post in a conspicuous and accessible place in each of its ferry-houses, in plain view of the passengers, a schedule, plainly printed in the English language, of the rates of ferriage charged thereon and authorized by law to be charged for ferriage over such ferry, is guilty of a misdemeanor.

Formerly Penal Code, § 415a, added by L. 1893, ch. 692.

ARTICLE 84

Forgery

§ 880. Definitions. Terms forge, forged and forging.— The expressions "forge," "forged" and "forging," as used in this article, include false making, counterfeiting and the alteration, erasure, or obliteration of a genuine instrument, in whole or in part, the false making or counterfeiting of the signature, of a party or witness, and the placing or connecting together with intent to defraud different parts of several genuine instruments.

Definition of written instrument.—An instrument partly written and partly printed, or wholly printed with a written signature thereto, and any signature or writing purporting to be a signature of, or intended to bind an individual, a partnership, a corporation or association or an officer thereof, is a written instrument or a writing, within the provisions of this article.

Formerly Penal Code, §§ 520, 513.

§ 882. Falsely indicating person as corporate officer. The false making or forging of an instrument or writing, purporting to have been issued by or in behalf of a corporation or association, state or government, and bearing the pretended signature of any person, therein falsely indicated as an agent or officer of such corporation, is forgery in the same degree, as if that person were in truth such officer or agent of the corporation or association, state or government.

Formerly Penal Code, § 522.

§ 884. Forgery in first degree. A person is guilty of forgery in the first degree who with intent to defraud, forges:

* * * * * *

2. A certificate of the acknowledgment or proof of a will, codicil, deed, or other instrument, which by law may be recorded or given in evidence when duly proved or acknowledged, made or purporting to have been made by a court or officer duly authorized to make such a certificate; or,

3. A certificate, bond, paper writing, or other public security, issued or purporting to have been issued by or under the authority of this state, or of the United States, or of any other state or territory of the United States, or of any foreign government, country or state, or by any officer thereof in his official capacity, by which the payment of money is promised absolutely or upon any contingency, or the receipt of any money or property is acknowledged, or being or purporting to be evidence of any debt or liability, either absolute or contingent, issued or purporting to have been issued by lawful authority; or,

4. An indorsement or other instrument, transferring or purporting to transfer the right or interest of any holder of such a certificate, obligation, public security, evidence of debt or liability, or of any person entitled to such right or interest; or,

5. A certificate of stock, bond or other writing, bank note, bill of exchange, draft, check, certificate of deposit, or other obligation or evidence of debt, issued or purporting to be issued by any bank, banking association or body corporate existing under the laws of this state, or of the United States, or of any other state, government, or country, declaring or purporting to declare any right, title or interest of any person in any portion of the capital

stock, or property of such a body corporate, or promising or purporting to promise or agree to the payment of money, or the performance of any act, duty, or obligation; or,

6. An indorsement or other writing, transferring or purporting to transfer the right or interest of any holder of such a certificate, bond, or writing obligatory, or of any person entitled to such right or interest.

Formerly Penal Code, § 509.

§ 885. False certificate to certain instruments is forgery. An officer authorized to take the proof or acknowledgment of an instrument which by law may be recorded, who wilfully certifies falsely that the execution of such an instrument was acknowledged by any party thereto, or that the execution of any such instrument was proved, is guilty of forgery in the first degree.

Formerly Penal Code, § 510.

§ 887. Forgery in second degree. A person is guilty of forgery in the second degree who, with intent to defraud:

1. Forges the great or privy seal of this state, the seal of any court of record, or of any public office or officer authorized by law, or of any body corporate created by or existing under the laws of this state, or of the United States, or of any other state or any territory of the United States, or of any other state, government, or country, or any impression of such a seal; or any gold or silver coin, whether of the United States, or of any foreign state, government or country; or,

2. Forges a record of a will, conveyance, or instrument of any kind, the record of which is by the law of this state made evidence, or of any judgment, order, or decree of any court or officer, or a certified or authenticated copy thereof; or,

* * * * * * * * * *

Formerly Penal Code, §§ 511, 512.

§ 889. Forgery in third degree. A person who:

1. Being an officer or in the employment of a corporation, association, partnership or individual falsifies, or unlawfully and corruptly alters, erases, obliterates or destroys any accounts, books of accounts, records, or other writing, belonging to or appertaining to the business of the corporation, association or partnership or individuals; or,

4. With intent to defraud, shall forge, counterfeit or falsely alter and wrongfully utter any ticket, contract or other paper, or writing entitling, or purporting to entitle, the person whose name appears therein, or the holder or bearer thereof, to entrance upon the grounds or premises of any membership corporation, or being thereupon, to remain upon such grounds or premises; or, with like intent, shall use any such ticket, contract or other paper or writing, to effect an entrance or as evidence of his right to remain upon such grounds or premises; or, with like intent, shall sell, exchange or deliver, or keep or offer for sale, exchange or delivery, or receive upon any purchase, exchange or delivery, any such ticket, contract or other paper or writing, knowing the same to have been forged, counterfeited or falsely altered.

Is guilty of forgery in the third degree.

A person who, with intent to defraud or to conceal any larceny or misappropriation by any person of any money or property:

1. Alters, erases, obliterates, or destroys an account, book of accounts, record, or writing, belonging to, or appertaining to the business of, a corporation, association, public office or officer, partnership, or individual; or,

2. Makes a false entry in any such account or book of accounts; or,

3. Wilfully omits to make true entry of any material particular in any such account or book of accounts, made, written, or kept by him or under his direction,

Is guilty of forgery in the third degree.

4. The altering, erasing, obliterating, or destruction of any account, book of account, record, or writing, or the making of a false entry in an account, statement of financial condition, or book of accounts, or the willful omission of material entries in such account, statement or books of account, by any person whether by his own hand or the hand of another, if made with intend to defraud creditors or to conceal a crime, or to conceal from creditors or stockholders or other persons interested matters materially affecting the financial condition of any individual, corporation, association, or partnership; or to provide a basis for the obtaining of credit or property by or for such individual, corporation, association, or partnership, shall render such person guilty of forgery in the third degree, within the meaning of this

section; but this provision shall not apply to any clerk, bookkeeper, or other employee, who, without personal profit or gain, merely executes the orders of his employer.

Formerly Penal Code, § 514, as am'd by L. 1884, ch. 378; L. 1892, ch. 692; L. 1909, ch. 88; L. 1912, ch. 342.

§ 890. Officer of corporation selling fraudulent shares. An officer, agent or other person employed by any company or corporation existing under the laws of this state, or of any other state or territory of the United States, or of any foreign government, who wilfully and with a design to defraud, sells, pledges or issues, or causes to be sold, pledged or issued, or signs or procures to be signed with intent to sell, pledge or issue, or to be sold, pledged or issued, a false, forged or fraudulent paper, writing or instrument, being or purporting to be a scrip, certificate or other evidence of the ownership or transfer of any share or shares of the capital stock of such company or corporation, or a bond or other evidence of debt of such company or corporation, or a certificate or other evidence of the ownership or of the transfer of any such bond or other evidence of debt, is guilty of forgery in the third degree, and upon conviction, in addition to the punishment prescribed in section eight hundred and ninety-three of this chapter for that offense, may also be sentenced to pay a fine not exceeding three thousand dollars.

Formerly Penal Code, § 518.

§ 891. Forging passage tickets. A person who, with intent to defraud, forges, counterfeits, or falsely alters any ticket, check or other paper or writing, entitling or purporting to entitle the holder or proprietor thereof to a passage upon any railway or in any vessel or other public conveyance; and a person who, with like intent, sells, exchanges or delivers, or keeps or offers for sale, exchange or delivery, or receives upon any purchase, exchange or delivery, any such ticket, knowing the same to have been forged, counterfeited or falsely altered, is guilty of forgery in the third degree.

Formerly Penal Code, § 516.

ARTICLE 86

Frauds and Cheats

§ 926. False rumors as to stocks, bonds or public funds. A person, who, with intent to affect the market price of the public funds of this state or of the United States, or of any state or territory thereof, or of a foreign country or government, or of the stocks, bonds, or other evidences of debt of a corporation or association, or the market price of gold or silver coin or bullion, or any merchandise or commodity whatever:

1. Without lawful authority, falsely signs the name of an officer of a corporation, or of any other person to a letter, message, or other paper; or,

2. Utters or circulates such a letter, message, or paper, knowing that the same has been so falsely signed; or,

3. Knowingly circulates any false statement, rumor, or intelligence,

Is punishable by a fine of not more than five thousand dollars, or by imprisonment for not more than three years, or both.

Formerly Penal Code, § 435.

§ 948. Unlawful use of name of benevolent, humane or charitable corporation. No person, society or corporation shall, with intent to acquire or obtain for personal or business purposes a benefit or advantage, assume, adopt or use the name of a benevolent, humane or charitable organization incorporated under the laws of this state, or a name so nearly resembling it as to be calculated to deceive the public with respect to any such corporation. A violation of this section shall be a misdemeanor. Whenever there shall be an actual or threatened violation of this section, an application may be made to a court or justice having jurisdiction to issue an injunction, upon notice to the defendant of not less than five days, for an injunction to enjoin and restrain said actual or threatened violation; and if it shall appear to the satisfaction of the court or justice that the defendant is in fact using the name of a benevolent, humane or charitable organization, incorporated as aforesaid, or a name so nearly resembling it as to be calculated to deceive the public, an injunction may be issued by said court or justice, enjoining and restraining such actual or threatened violation, without requiring proof that any person has in fact been misled or deceived thereby.

Formerly L. 1908, ch. 449.

§ 952. False statement or advertisement as to securities. Any person, who, with intent to deceive, makes, issues or publishes, or causes to be made, issued or published, any statement or advertisement as to the value or as to facts affecting the value of the stocks, bonds or other evidences of debt of a corporation, company or association, or as to the financial condition of facts affecting the financial condition of any corporation, company or association which has issued, is issuing or is about to issue stocks, bonds or other evidences of debt, and who knows, or has reasonable ground to believe that any material representation, prediction or promise made in such statement or advertisement is false, is guilty of a felony, punishable by a fine of not more than five thousand dollars, or by imprisonment for not more than three years, or by both.

Added by L. 1913, ch. 475, in effect May 9, 1913.

ARTICLE 120

Labor

§ 1271. Hours of labor to be required. Any person or corporation:

1. Who, contracting with the state or a municipal corporation, shall require more than eight hours work for a day's labor; or,

2. Who shall require more than ten hours' labor, including one-half hour for dinner, to be performed within twelve consecutive hours, by the employees of a street surface and elevated railway owned or operated by corporations whose main line of travel or routes lie principally within the corporate limits of cities of more than one hundred thousand inhabitants; or,

3. Who shall require the employees of a corporation owning or operating a brickyard to work contrary to the requirements of section five of the labor law; or,

4. Who shall require or permit any employee engaged in or connected with the movement of any train of a corporation operating a line of railroad of thirty miles in length, or over, in whole or in part within this state, to remain on duty more than sixteen consecutive hours; or to require or permit any such employee who has been on duty sixteen consecutive hours to go on duty without having had at least ten hours off duty; or to require or permit any such employee who has been on duty sixteen hours in the aggregate in any twenty-four hour period, to continue on duty

or to go on duty without having had at least eight hours off duty within such twenty-four hour period; except when by casualty occurring after such employee has started on his trip, or by unknown casualty occurring before he started on his trip, and except when by accident or unexpected delay of trains scheduled to make connection with the train on which such employee is serving, he is prevented from reaching his terminal;

Is guilty of a misdemeanor, and on conviction therefor shall be punished by a fine of not less than five hundred nor more than one thousand dollars for each offense.

If any contractor with the state or a municipal corporation shall require more than eight hours for a day's labor, upon conviction therefor in addition to such fine, the contract shall be forfeited at the option of the municipal corporation.

Formerly Penal Code, § 384h, added by L. 1897, ch. 416, am'd by L. 1907, ch. 506.

§ 1272. Payment of wages. A corporation or joint stock association or person carrying on the business thereof, by lease or otherwise, who does not pay the wages of all his employees in accordance with the provisions of the labor law, is guilty of a misdemeanor, and upon conviction therefor, shall be fined not less than one hundred nor more than ten thousand dollars for each offense. An indictment of a person or corporation operating a steam surface railroad for an offense specified in this section may be found and tried in any county within the state in which such railroad ran at the time of such offense.

L. 1909, ch. 88 (Consolidated Laws, ch. 40), as am'd by L. 1909, ch. 205. Formerly Penal Code, § 384i. added by L. 1897, ch. 416, § 3.

ARTICLE 134

Malicious Mischief

§ 1423. Injuring highway boundary, pier, sea-wall, dock, rock, buoy, landmark, mile-board, pipe, main, sewer, machine, telegraph, or other property. A person who wilfully or maliciously displaces, removes, injures, or destroys:

1. A public highway or bridge, or a private way laid out by authority of law, or a bridge upon such public or private way; or,

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7. A line of telegraph or telephone, wire or cable, pier or abutment, or the material or property belonging thereto, without lawful authority, or who shall unlawfully and wilfully cut, break, tap, or make connection with any telegraph or telephone line, wire, cable or instrument, or read or copy in any unauthorized manner any message, communication or report passing over it, in this state; or who shall wilfully prevent, obstruct or delay, by any means or contrivance whatsoever, the sending, transmission, conveyance or delivery, in this state, of any authorized message, communication or report by or through any telegraph or telephone line, wire or cable, under the control of any telegraph or telephone company doing business in this state; or who shall aid, agree with, employ or conspire with any person or persons to unlawfully do, or permit or cause to be done, any of the acts hereinbefore mentioned, or who shall occupy, use a line, or shall knowingly permit another to occupy, use a line, a room, table, establishment or apparatus to unlawfully do or cause to be done any of the acts hereinbefore mentioned; or,

8. A pipe or main for conducting gas or water, or any works erected for supplying buildings with gas or water, or any appurtenance or appendage connected therewith; or,

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Is punishable by imprisonment for not more than two years.

Formerly Penal Code, § 639; subd. 7, am'd by L. 1892, ch. 372.
Further am'd by L. 1911, ch. 316, without affecting the foregoing provisions.

§ 1431. Interference with gas or electric meters or steam valves. A person who wilfully with intent to injure or defraud:

1. Connects a tube, pipe, wire or other instrument or contrivance with a pipe or wire used for the conducting or supplying illuminating gas, fuel, natural gas or electricity in such a manner as to supply such gas or electricity to any burner, orifice, lamp or motor where the same is or can be burned or used without passing through the meter or instrument provided for registering the quantity consumed, or uses such gas or electricity obtained by reason of the making of such connection; or,

2. Obstructs, alters, injures or prevents the action of a meter or other instrument used to measure or register the quantity of illuminating fuel, natural gas or electricity consumed in a house

or apartment, or at an orifice or burner, lamp or motor, or by a consumer or other person or a person other than a state inspector or deputy inspector of gas meters or an employee of the company owning any gas or electric meter, who wilfully shall detach or disconnect such meter, or make or report any test of, or examine for the purpose of testing any such meter so detached or disconnected; or,

3. In any manner whatever, changes, extends or alters any service or other pipe, wire or attachment of any kind, connecting or through which natural or artificial gas or electricity is furnished from the gas mains or pipes or wires of any person, company or corporation without first procuring from said person, company or corporation written permission to make such change, extension or alterations, or uses gas or electricity obtained by reason of such changes, extensions or alterations without first procuring the written permission aforesaid; or,

4. Makes any connection or re-connection with the gas mains, service pipes or wires of any person, company or corporation furnishing to consumers natural or artificial gas or electricity, or turns on or off or in any manner interferes with any valve or stopcock or other appliances belonging to such person, company or corporation and connected with its service or other pipes or wires, or enlarges the orifice of mixers, or uses natural gas for heating purposes except through mixers, or uses electricity or artificial gas for any purpose before it has passed through an instrument for measuring the quantity consumed, without first procuring from such person, company or corporation a written permit to turn on or off such stopcock or valve, or to make such connections or re-connections, or to enlarge the orifice of mixers or to use for heating purposes without mixers, or to interfere with the valves, stopcocks, wires, or other appliances of such person, company or corporation as the case may be; or,

5. Retains possession of or refuses to deliver any mixer or mixers, meter or meters, lamp or lamps, or other appliances which may be or may have been loaned or rented to them by any person, company or corporation for the purpose of furnishing gas, electricity or power through the same, or who sells, loans or in any manner disposes of the same to any person or persons other than the said person, company or corporation entitled to the possession of the same; or,

6. Sets on fire any gas escaping from wells, broken or leaking mains, pipes, valves or other appliances used by any person, company or corporation, in conveying gas to consumers, or interferes in any manner with the wells, pipes, mains, gateboxes, valves, stopcocks, wires, cables, conduits, or any other appliances, machinery or property of any person, company or corporation engaged in furnishing gas to consumers unless employed by or acting under the authority and direction of such person, company or corporation; or,

7. Opens or causes to be opened or re-connects or causes to be re-connected any valve lawfully closed or disconnected by a district steam corporation; or,

8. Turns on steam or causes it to be turned on, or to re-enter any premises when the same has been lawfully stopped from entering such premises,

Is guilty of a misdemeanor.

Formerly Penal Code, § 651, as am'd by L. 1888, ch. 219; L. 1892, ch. 692 and ch. 699; L. 1893, ch. 692; L. 1900, ch. 589; L. 1906, ch. 453.

§ 1432. Unlawful interference with water meters, water service pipes and their connections. A person who, wilfully, with intent to injure or defraud:

1. Breaks or defaces, or causes to be broken or defaced, the seal of a water meter; or,

2. Obstructs, alters, injures or prevents, or causes to be obstructed, altered, injured or prevented, the action of any such meter or other instrument used to measure or register the quantity of water supplied to or consumed by any person, corporation or company; or,

3. Makes or causes to be made any connection by means of pipe, conduit or otherwise with the water main or service pipe of any person, corporation or company furnishing water to consumers, in such manner as to take water from said main or service pipe without its passing through the meter or other instrument provided for registering or measuring the amount or quantity of water taken from said main or service pipe; or,

4. Makes any connection or re-connection with the water main or service pipe of any person, corporation or company furnishing water to consumers, or turns on or off, or in any manner interferes with any valve, stopcock or other appliance belonging to said person, corporation or company, without obtaining from such

person, corporation or company a written permit to make such connection or re-connection or to turn or otherwise interfere with said valve, stopcock or other appliance; or,

5. Prevents, by the erection of any device or construction, or by any other means, free access to any such meter by the person, company or corporation furnishing such water; or interferes, obstructs or prevents, by any means, the reading or inspection of such meter,

Is guilty of a misdemeanor.

Formerly Penal Code, § 651a, added by L. 1902, ch. 333.

§ 1433. Injury to property; how punished. A person who unlawfully and wilfully destroys or injures any real or personal property of another, or who without authority or permission from a person who has the right to give such authority or permission, loosens any brake or blocking of any car standing on any railroad track in this state, or without like authority or permission, puts upon or runs any handcar, or other car, on any railroad track in this state, or without like authority or permission, interferes or meddles with any brake or coupling of any car while standing or moving on any railroad track in this state, or takes any part therein, in a case where the punishment is not specially prescribed by statute, is punishable as follows:

1. If the value of the property destroyed, or the diminution in the value of the property by the injury is more than fifty dollars, by imprisonment for not more than four years.

2. In any other case, by imprisonment for not more than six months, or by a fine of not more than two hundred and fifty dollars, or by both such fine and imprisonment.

3. And in addition to the punishment prescribed therefor, he is liable in treble damages for the injury done, to be recovered in a civil action by the owner of such property, or the public officer having charge thereof.

Thus am'd by L. 1912, ch. 163.

ARTICLE 142

Military

§ 1486. Unlawfully exacting toll of a member of the national guard. Any person, master or keeper of a toll-gate, toll-bridge or ferry, or any person in charge thereof who wilfully hinders or delays any member of the national guard or refuses free

passage to any such member going to or returning from any parade, encampment, drill or meeting which he may be by law required to attend, or wilfully hinders, delays or refuses free passage to any conveyance or military property of the state in charge of a member of said guard, is guilty of a misdemeanor.

Formerly Penal Code, § 674d, added by L. 1894, ch. 551.

ARTICLE 152

Passage Tickets

§ 1560. Company defined. The term "company," as used in this article, includes all corporations, whether created under the laws of this state, or of the United States, or of those of any other state or nation.

Formerly Penal Code, § 627.

§ 1561. Certain sales and exchanges of passage tickets prohibited. A person who:

1. Sells, or causes to be sold, a passage ticket, or order for such ticket on any railway, vehicle, or vessel, to any immigrant passenger at a higher rate than one and a quarter cents per mile; or,

2. Takes payment for any such ticket or order for a ticket under a false representation as to the class of the ticket, whether immigrant or first-class; or,

3. Directly or indirectly, by means of false representations, purchases or receives from an immigrant passenger any such ticket; or,

4. Procures or solicits any such passenger having such a ticket, to exchange the same for another passage ticket, or to sell the same and purchase some other passage ticket; or,

5. Solicits or books any passenger arriving at the port of New York from a foreign country, before such passenger has left the vessel on which he has arrived, or enters or goes on board any vessel arriving at the port of New York from a foreign country, having immigrant passengers on board, for the purpose of soliciting or booking such passengers, and a person or agent of a corporation employing any person for the purpose of booking such passengers before leaving the ship,

Is guilty of a misdemeanor.

Formerly Penal Code, § 626.

§ 1562. Redemption of unused passage tickets. Every person who shall have purchased a passage ticket from an authorized agent of a railroad company, which shall not have been used, or shall have been used only in part, may, within thirty days after the date of the sale of said ticket, present the same, unused or partly used, for redemption, at the general office of the railroad company which issued said ticket, or at the ticket office where said ticket was sold, or at the ticket office at the point to which the ticket has been used. If said ticket, wholly unused, shall be presented for redemption at the ticket office where sold, the same shall be then and there redeemd by the agent in charge of said ticket office at the price paid for said ticket. If said ticket, partly used, shall be presented for redemption at the ticket office where sold, or at the ticket office at the point to which used, the ticket agent at either of said offices, upon the delivery of said ticket, shall issue to the holder thereof a receipt, properly describing said ticket and setting forth the date of the receipt of said ticket, and the name of the person from whom received, and shall thereupon forthwith transmit said ticket for redemption to the general office. It shall be the duty of every railroad company to redeem tickets presented for redemption, as in this section provided for, promptly and within not to exceed thirty days from the date of presentation at the general office or from the date of the aforesaid receipt. A wholly unused ticket shall be redeemed at the price paid therefor. A partly used ticket shall be redeemed at a rate which shall be equal to the difference between the price paid for the whole ticket and the cost of a ticket of the same class between the points for which said ticket was actually used. Mileage books shall be redeemed within thirty days after the date of the expiration thereof in the same manner. Every railroad company which shall wrongfully refuse redemption, as in this section provided for, shall forfeit to the aggrieved party fifty dollars, which sum may be recovered, together with the amount of redemption money to which the party is entitled, in an action in any court of competent jurisdiction, together with costs; but no such action can be maintained unless commenced within one year after the cause of action accrued.

Formerly Penal Code, part § 616, as am'd by L. 1897, ch. 506.

§ 1563. Advertising as agent, without written authorization; false or misleading information. No person issuing.

selling or offering to sell any passage ticket or any instrument giving or purporting to give any right, either absolutely or upon any condition or contingency, to a passage or conveyance upon any vessel, or a berth or stateroom in any vessel, shall hold himself out to be or advertise himself in any way as the agent of the owners or consignees of such vessel or line, unless he has received authority in writing therefor, specifying the name of the company, line or vessel for which he is authorized to act as agent and the city, town or village, together with the street, and street number in which his office is kept for the sale of tickets, and unless such written authorization is conspicuously displayed in such office. Provided that this section shall not apply to the sale of passage tickets on board any such vessel or to the offices of the actual owners or consignees of such vessel. No person issuing, selling or offering to sell or holding himself out as being authorized to sell any such passage ticket or instrument giving or purporting to give any such right to passage or conveyance shall give or cause to be given any false or misleading information or shall print, publish, distribute or circulate or cause to be printed, published, distributed or circulated any false or misleading advertisement, circular, circular letter, pamphlet, card, hand-bill or other printed paper or notice in regard to said passage, ticket or instrument or the passage or voyage to which it entitles or purports to entitle its owner, purchaser or holder or line over which, or the vessel for which such passage is sold or offered or as to his agency for such line or vessel.

Formerly Penal Code, § 616-a, added by L. 1907, ch. 546, as am'd by L. 1911, ch. 415.

§ 1564. Issuance of order or other instrument securing passage by vessel from foreign port to this state; what to contain. No person agreeing to furnish or secure for any other person, for a consideration, passage by vessel from any foreign port to any port in this state shall issue any advice, order, certificate or other instrument purporting to entitle one or more persons to a passage ticket or other evidence of a right of passage, unless every such advice, order, certificate or instrument shall be signed or countersigned by a duly appointed agent as provided in section fifteen hundred and sixty-three, of the vessel or line over which said advice, order, certificate or other instrument is held out to be good to secure such passage ticket or other evidence of a right of passage. Every such order, advice, certificate or other instrument

and every receipt for money paid for or on account of any such advice, order, certificate or other instrument, shall contain a statement of the amount paid or to be paid for such passage; the name, address and age of the person for whom intended; the name of the company or line, if any, to which the vessel on which passage is to be made belongs; the place from which such passage is to commence; the place where such passage is to terminate; the name of the person purchasing such advice, order, certificate or other instrument, and such advice, order, certificate or other instrument must be signed by the person who issues it.

Formerly Penal Code, § 616b, added by L. 1907, ch. 546.

§ 1565. Punishment for violation of two preceding sections. Any person violating any of the provisions of section fifteen hundred and sixty-three, or fifteen hundred and sixty-four, shall be guilty of a misdemeanor and for a second or further violation shall be guilty of a felony.

Formerly Penal Code, § 616c, added by L. 1907, ch. 546.

§ 1566. Street railroad transfer tickets not to be given away or sold. No transfer ticket or written or printed instrument giving, or purporting to give, the right of transfer to any person from a public conveyance operated upon one line or route of a street surface, elevated or underground railroad to a public conveyance upon another line or route of a street surface, elevated or underground railroad, or from one car to another car upon the same line of street surface, elevated or underground railroad shall be issued, sold or given except to a passenger lawfully entitled thereto. Any person who shall issue, sell or give away such transfer ticket or instrument as aforesaid to a person not lawfully entitled thereto, and any person not lawfully entitled thereto who shall receive and use or offer for passage any such transfer ticket or instrument, or shall sell or give away such transfer ticket or instrument to another with intent to have such transfer ticket used or offered for passage after the time limited for its use shall have expired, shall be guilty of a misdemeanor.

L. 1909, ch. 88 (Consolidated Laws, ch. 40), as am'd by L. 1909, ch. 204. Formerly Penal Code, § 619a, added by L. 1898, ch. 663.

§ 1567. Offices kept for unlawful sale of passage tickets declared disorderly houses. All offices kept for the purpose of selling passage tickets in violation of any of the provisions of this

article, and all offices where any such sale is made, are deemed disorderly houses; and all persons keeping any such office, and all persons associating together for the purpose of violating any of the provisions of this article, are punishable by imprisonment in a county jail for a period not exceeding six months.

Formerly Penal Code, § 621, as am'd by L. 1892, ch. 662.

§ 1568. Owners, pursers and clerks allowed to sell tickets. The provisions of this article do not prevent the actual owners or consignees of any vessel, from selling passage tickets thereon; nor do they prevent the purser or clerk of any vessel from selling in his office on board of such vessel, any passage ticket upon such vessel.

Formerly Penal Code, § 622.

§ 1569. Station masters, conductors and agents allowed to sell tickets. The provisions of this article do not prevent the station master or other ticket agent upon any railway, from selling in his office at any station on such railway, any passage tickets upon such railway; nor do they prevent any conductor upon a railway from selling such tickets upon the trains of such railway.

Formerly Penal Code, § 623.

§ 1570. What must be stated in passage ticket. A ticket or instrument issued as evidence of a right of passage upon the high seas, from any port in this state, to any port of any other state or nation, and every certificate or order issued for the purpose, or under pretense of procuring any such ticket or instrument, and every receipt for money paid for such ticket or instrument must state the name of the vessel on board of which the passage is to be made, the name of the owners or consignees of such vessel, the name of the company, or line, if any, to which such vessel belongs, the place from which such passage is to commence, the place where such passage is to terminate, the day of the month and year upon which the voyage is to commence, the name of the person purchasing such ticket or instrument, or receiving such order, certificate or receipt, and the amount paid therefor; and such ticket or instrument, order, certificate or receipt, unless sold or issued by the owners or consignees of such vessel, must be signed by their authorized agent.

Formerly Penal Code, § 624.

§ 1571. Sale of tickets not filled out, a misdemeanor. A person who issues, sells or delivers to another, any ticket, instrument, certificate, order or receipt, which is not made or filled out as prescribed in the last section, is guilty of a misdemeanor.

Formerly Penal Code, § 625.

ARTICLE 178

Railroads

§ 1980. Unlawful acts of and neglect of duty by railroad officials. An officer, agent, attorney or employee of a railroad corporation, who:

1. Offers a place, appointment, position or any other consideration to a public service commissioner or to a secretary, clerk, agent, employee or expert employed by the public service commissions; or,

2. After due notice, neglects or refuses to make or furnish any statement or report lawfully required by the public service commissions, or wilfully hinders, delays or obstructs such commissioners in the discharge of their official duties,

Is guilty of a misdemeanor.

Formerly Penal Code, § 416, as am'd by L. 1892, ch. 692; L. 1893, ch. 692.

§ 1981. Misconduct of public service commissioners and their employees. Any public service commissioner, or any secretary, clerk, agent, expert or other person employed by the public service commissions, who:

1. Directly or indirectly solicits or requests from or recommends to any railroad corporation, or to any officer, attorney or agent thereof, the appointment of any person to any place or position; or,

2. Accepts, receives or requests, either for himself or for any other person, any pass, gift or gratuity from any railroad corporation; or,

3. Secretly reveals to any railroad corporation, or to any officer, member, or employee thereof, any information gained by him from any other railroad corporation,

Is guilty of a misdemeanor.

Formerly Penal Code, § 417, as am'd by L. 1892, ch. 692.

§ 1982. Person unable to read not to act or be employed as engineer; telegraph operators. Any person unable to read the

time tables of a railroad and ordinary handwriting, who acts as an engineer or runs a locomotive or train on any railroad in this state; or any person who, in his own behalf, or in the behalf of any other person or corporation, knowingly employs a person so unable to read to act as such engineer or to run any such locomotive; or who employs a person as a telegraph operator who is under the age of eighteen years, or who has less than one year's experience in telegraphing, to receive or transmit a telegraphic message or train order for the movement of trains, is guilty of a misdemeanor.

Formerly Penal Code, § 418, as am'd by L. 1892, ch. 692; L. 1895, ch. 892.

§ 1983. Misconduct of officials or employees on elevated railroads. Any conductor, brakeman, or other agent or employee of an elevated railroad, who:

1. Starts any train or car of such railroad, or gives any signal or order to any engineer or other person to start any such train or car, before every passenger therein who manifests an intention to depart therefrom by arising, or moving toward the exit thereof, has departed therefrom; or before every passenger on the platform or station at which the train has stopped, who manifests a desire to enter the train, has actually boarded or entered the same, unless due notice is given by an authorized employee of such railroad that the train is full, and that no more passengers can then be received; or,

2. Obstructs the lawful ingress or egress of a passenger to or from any such car; or,

3. Opens a platform gate of any such car while the train is in motion, or starts such train before such gate is firmly closed,

Is guilty of a misdemeanor.

Formerly Penal Code, § 419, as am'd by L. 1892, ch. 692.

§ 1984. Intoxication or other misconduct of railroad or steamboat employees. 1. Any person who, being employed upon any railway as engineer, conductor, baggagemaster, brakeman, switch-tender, fireman, bridge-tender, flagman, signal man, or having charge of stations, starting, regulating or running trains upon a railroad, or, being employed as captain, engineer or other officer of a vessel propelled by steam, is intoxicated while engaged in the discharge of any such duties; or,

2. An engineer, conductor, brakeman, switch-tender, or other officer, agent or employee of any railroad corporation, who wil-

fully violates or omits his duty as such officer, agent or employee, by which human life or safety is endangered, the punishment of which is not otherwise prescribed,

Is guilty of a misdemeanor.

Formerly Penal Code, § 420, as am'd by L. 1892, ch. 692.

§ 1985. Ringing bells and blowing whistles at crossings; obstructing highways. A person acting as engineer, driving a locomotive on any railway in this state, who fails to ring the bell, or sound the whistle, upon such locomotive, or cause the same to be rung or sounded, at least eighty rods from any place where such railway crosses a traveled road or street on the same level, except in cities, or to continue the ringing of such bell or sounding such whistle at intervals, until such locomotive and the train to which the locomotive is attached shall have completely crossed such road or street, or any officer or employee of a corporation in charge of a locomotive, train or car, who shall wilfully obstruct, or cause to be obstructed, any farm or highway crossing with any locomotive, train or car for a longer period than five consecutive minutes, is guilty of a misdemeanor.

Formerly Penal Code, § 421, as am'd by L. 1891, ch. 358; L. 1900, ch. 759.

§ 1986. Placing passenger cars in front of other cars. A person being an officer or employee of a railway company, who knowingly places, directs, or suffers a freight, lumber, merchandise or oil car to be placed in rear of a car used for the conveyance of passengers in a railway train is guilty of a misdemeanor.

Formerly Penal Code, § 422, as am'd by L. 1889, ch. 267.

§ 1987. Platforms and heating apparatus of passenger cars. A railroad corporation, or any officer or director thereof having charge of its railroad, or any person managing a railroad in this state, or any person or corporation running passenger cars upon a railroad into or through this state, who:

1. Fails to have the platforms or ends of the passenger cars run upon such railroad constructed in such manner as will prevent passengers falling between the cars while in motion; or,

2. Except temporarily, in case of accident or emergency, heats any passenger car, while in motion, on any such railroad more than fifty miles in length, except a narrow-gauge railroad which runs only mixed trains, between October fifteenth and May first,

by any stove or furnace inside of or suspended from such car, except stoves of a pattern and kind approved by the public service commissions for cooking purposes in dining-room cars, and except within the extended time allowed by the public service commissions, in pursuance of law, for introducing other heating apparatus,

Is guilty of a misdemeanor.

Formerly Penal Code, § 423, as am'd by L. 1892, ch. 692.

§ 1988. Guard posts; automatic couplers. All corporations and persons other than employees, operating any steam railroad in this state:

1. Failing to cause guard posts to be placed in prolongation of the line of bridge trusses upon such railroad, so that in case of derailment, the posts and not the trusses shall receive the blow of the derailed locomotive or car, or in lieu thereof failing to cause guard rails to be placed within the running rails of its track, or such other safeguard as the public service commission shall order, for the same purpose; or

2. Failing to equip all of their own freight cars, run and used in freight or other trains on such railroad, with automatic self-couplers, or running or operating on such railroad any freight car belonging to any such person or corporation, without having the same equipped, except in case of accident or other emergency, with automatic self-couplers, and except within the extended time allowed by the public service commission, in pursuance of law, for equipping such car with such couplers, is guilty of a misdemeanor, punishable by a fine of five hundred dollars for each offense.

Formerly Penal Code, § 424, as am'd by L. 1892, ch. 692; L. 1896, ch. 664; L. 1913, ch. 398.

§ 1989. Inciting railroad employees not to wear uniform; unauthorized wearing of uniform. A person who:

1. Advises or induces any one, being an officer, agent or employee of a railway company, to leave the service of such company, because it requires a uniform to be worn by such officer, agent or employee, or to refuse to wear such uniform, or any part thereof; or,

2. Uses any inducement with a person employed by a railway company to go into the service or employment of any other railway company, because a uniform is required to be worn; or,

3. Wears the uniform designated by a railway company without authority,

Is guilty of a misdemeanor.

Formerly Penal Code, § 425.

§ 1990. Riding on freight trains; boarding cars in motion; obstructing passage of car. 1. A person who rides on any engine or any freight or wood car of any railway company, without authority or permission of the proper officers of the company or of the person in charge of said car or engine; or,

2. Who gets on any car or train while in motion, for the purpose of obtaining transportation thereon as a passenger; or,

3. Who wilfully obstructs, hinders or delays the passage of any car lawfully running upon any steam or horse, or street railway.

Is guilty of a misdemeanor.

Formerly Penal Code, § 426, as am'd by L. 1890, ch. 458.

§ 1991. Injuring railroad property and appurtenances; obstructing tracks. A person who wilfully:

1. Displaces, loosens, removes, injures or destroys any rail, sleeper, switch, bridge, viaduct, culvert, embankment or structure or any part thereof, attached, appertaining to or connected with any railway, or by any other means attempts to wreck, destroy, or so damage any car, tender, locomotive or railway train or part thereof, while moving or standing upon any railway track in this state, as to render such car, tender, locomotive or railway train wholly or partially unfitted for its ordinary use, whether operated by steam, electricity or other motive power; or,

2. Places any obstruction upon the track of any such railway; or,

3. Wilfully destroys or breaks any guard erected or maintained by a railroad corporation as a warning signal for the protection of its employees; or,

4. Wilfully discharges a loaded fire-arm, or projects, or throws a stone or other missile at a railway train, or at a locomotive, car or vehicle standing or moving upon a railway; or,

5. Wilfully displaces, removes, cuts, injures or destroys any wire, insulator, pole, dynamo, motor, locomotive, or any part thereof, attached, appertaining to or connected with any railway operated by electricity, or wilfully interferes with or interrupts

any motive power used in running such road, or wilfully places any obstruction upon the track of such railroad, or wilfully discharges a loaded fire-arm, or projects or throws a stone or any other missile at such railway train or locomotive, car or vehicle, standing or moving upon such railway; or,

6. Removes a journal brass from a car while standing upon any railroad track in this state, without authority from some person who has a right to give such authority,

Is punishable as follows: First. If thereby the safety of any person is endangered, by imprisonment for not more than twenty years. Second. In every other case by imprisonment for not more than five years.

Formerly Penal Code, § 635, as am'd by L. 1890, ch. 280; L. 1892, ch. 692; L. 1895, ch. 726; L. 1897, ch. 183.

CODE OF CRIMINAL PROCEDURE

Sections Specially Applicable to Corporations

§ 56. Jurisdiction of courts of special sessions. Subject to the power of removal provided for in this chapter, courts of special sessions, except in the city and county of New York and the city of Albany, have in the first instance exclusive jurisdiction to hear and determine charges of misdemeanors committed within their respective counties, as follows:

* * * * * * *

9. Intoxication of a person engaged in running any locomotive engine upon any railroad, or while acting as a conductor of a car or train of cars, on any such railroad, or a misdemeanor committed by any person on a railroad car or train.

Thus am'd by L. 1890, ch. 521; re-enacted without change by L. 1893, chs. 150 and 570.

23. Unlawfully frequenting or attending a steamboat landing, railroad depot, church, banking institution, broker's office, place of public amusement, auction room, store, auction sale or private residence, passenger car, hotel, restaurant, or any other gathering of people.

Thus am'd by L. 1886, ch. 28; re-enacted without change by L. 1893, chs. 150 and 570.

§ 136. Jurisdiction of crime on board a vessel. When a crime is committed in this state on board of a vessel navigating a river, lake or canal, or lying therein in the course of her voyage, or in respect to any portion of the cargo or lading of such boat or vessel, the jurisdiction is in any county through which, or any part of which, such river or canal passes, or in which such lake is situated, or on which it borders, or in the county where such voyage terminates, or would terminate if completed.

3 R. S. 1021, § 44.

§ 137. Of crime committed in the state on board of any railway train, etc. When a crime is committed in this state, in or on board of any railway engine, train or car, making a passage or trip on or over any railway in this state, or in respect to any portion of the lading or freightage of any such railway train or engine car, the jurisdiction is in any county through which, or any part of which, the railway train or car passes, or has passed in the course of the same passage or trip, or in any county where such passage or trip terminates, or would terminate, if completed.

§ 335. Plea of guilty, how put in. A plea of guilty can only be put in by the defendant himself in open court, except upon an indictment against a corporation; in which case, it may be put in by counsel.

§ 675. Summons upon an information or presentment against a corporation, by whom issued, and when returnable. Upon an information against a corporation, the magistrate must issue a summons, signed by him, with his name of office, requiring the corporation to appear before him, at a specified time and place, to answer the charge; the time to be not less than ten days after the issuing of the summons.

§ 676. Form of the summons. The summons must be in substantially the following form:

"County of Albany [or as the case may be].

"In the name of the people of the state of New York:

"To the [naming the corporation].

"You are hereby summoned to appear before me, at [naming the place], on [specifying the day and hour], to answer a charge made against you, upon the information of A. B., for [designating the offense, generally].

"Dated at the city [or "town"] of ———, the ——— day of ———, 18—. G. H., justice of the peace" [or as the case may be].

§ 677. When and how served. The summons must be served at least five days before the day of appearance fixed therein, by delivering a copy thereof and showing the original to the president, or other head of the corporation, or to the secretary, cashier, or managing agent thereof.

§ 678. Examination of the charge. At the time appointed in the summons, the magistrate must proceed to investigate the charge, in the same manner as in the case of a natural person brought before him, so far as those proceedings are applicable.

§ 679. Certificate of the magistrate, and return thereof with the depositions. After hearing the proofs, the magistrate must certify upon the depositions, either that there is or is not sufficient cause to believe the corporation guilty of the offense charged, and must return the depositions and certificate, in the manner prescribed in section 221.

§ 680. Grand jury may proceed as in the case of a natural person. If the magistrate return a certificate that there is sufficient cause to believe the corporation guilty of the offense charged, the grand jury may proceed thereon, as in the case of a natural person held to answer.

§ 681. Bringing an indicted corporation into court. When an indictment is filed against any corporation, such corporation must be arraigned thereon, and the court acquires jurisdiction over the corporation, in the manner following:

1. The clerk of the court wherein such indictment is found, or to which it is sent or removed, or the district attorney of the county, must issue a summons signed by him with his name of office, requiring such corporation to appear and answer the indictment by a demurrer or written plea to be verified in like manner as a pleading in a civil action, at a time and place to be specified in such summons, such time to be not less than five days after the issue thereof. The summons may be substantially in the following form:

Supreme Court, county of
(state the proper county or court, as the case may be).
The People of the State of New York

vs.

The A. B. Company.

You are hereby summoned to appear in this court and, by demurrer or plea in writing duly verified, answer an indictment filed against you by the grand jury of this county, on the day of , charging you with the crime of (designating the offense generally), at a term of the Supreme Court (or as the

case may be) of this county, at (naming the place) on (stating the day and hour), and in case of your failure to so appear and answer, judgment will be pronounced against you.

Dated at the city (or town) of , the day of , 18 .

C. D.,
District Attorney.

(or by order of the court, E. F., clerk, as the case may be).

2. The summons must be served at least four days before the appearance fixed therein, in the same manner as is provided for the service of a summons upon a corporation in a civil action; and if the corporation does not appear in the manner and at the time and place specified in the summons, judgment must be pronounced against it.

3. Nothing contained in this section shall be construed as preventing the appearance of a corporation by counsel to answer an indictment, without the issuance or service of the summons as above provided. And when an indictment shall have been filed against a corporation it may voluntarily appear and answer the same by counsel duly authorized to so appear for it; in which case the court acquires full jurisdiction over the corporation in the same manner as if the summons had been issued and served.

Thus am'd by L. 1892, ch. 219; L. 1895, ch. 880.

§ 682. Fine imposed on corporation, collection of. When a fine is imposed upon a corporation upon conviction, it may be collected in the same manner as a judgment in a civil action, and if an execution issued upon such judgment be returned unsatisfied, the district attorney of the county may thereupon bring an action in the name of the people of the state of New York, to procure a judgment sequestrating the property of the corporation, as provided by the Code of Civil Procedure.

Thus am'd by L. 1892, ch. 219.

§ 554a. Bail of certain railroad employes. Whenever a person employed as an engineer, fireman, motorman, conductor, trainman or otherwise, on a train or car of a steam, elevated or street surface railroad, is arrested in any city on a criminal charge, arising from an accident in connection with the operation of such train or car, resulting in an injury or death to a person or injury

to property, such engineer, fireman, motorman, conductor, trainman or other employe, shall be immediately taken before a magistrate, if one is accessible, and otherwise, before a captain or sergeant of police, or acting sergeant of police, in charge of a police station in such city, and be given an opportunity to be admitted to bail. Such bail shall be taken in the same manner, so far as practicable, as is provided by section five hundred and fifty-four of this code, for the taking of bail in case of misdemeanors by a captain or sergeant of police, or acting sergeant of police in a city or village, except that the amount of bail shall be fixed by such officer at not exceeding one thousand dollars, and except that the undertaking shall provide for the appearance of the defendant before the magistrate, coroner, or other officer, who, except for this section, would be authorized to take such bail. Such officer may however in his discretion, instead of exacting bail release such employe on his own recognizance, conditional for his appearance as above provided in case an undertaking is required.

New section; added by L. 1903, ch. 614.

CODE OF CIVIL PROCEDURE

Sections Specially Applicable to Corporations

§ 341. Domestic corporations, et cetera, when deemed resident, et cetera. For the purpose of determining the jurisdiction of a county court, in either of the cases specified in the last section, a domestic corporation or joint-stock association, whose principal place of business is established, by or pursuant to a statute, or by its articles of association, or whose principal place of business or any part of its plant or plants, shops, factories or offices is actually located within the county, or in case of a railroad corporation where any portion of the road operated by it is within the county, it is deemed a resident of the county; and personal service of a summons, made within the county, as prescribed in this act, or personal service of a mandate, whereby a special proceeding is commenced, made within the county, as prescribed in this act for personal service of a summons, is sufficient service thereof upon a domestic corporation wherever it is located. Provided, however, that a city which shall include within its boundaries more than one county shall not for the purpose of conferring jurisdiction on a county court be deemed a domestic corporation resident of any county so included.

Thus am'd by L. 1899, ch. 320; L. 1911, ch. 68; L. 1914, ch. 350.

§ 399. Attempt to commence action in a court of record. An attempt to commence an action, in a court of record, is equivalent to the commencement thereof against each defendant, within the meaning of each provision of this act, which limits the time for commencing an action, when the summons is delivered, with the intent that it shall be actually served, to the sheriff, or, where the sheriff is a party, to a coroner of the county, in which that defendant or one of two or more co-defendants, who are joint contractors, or otherwise united in interest with him, resides or last resided; or, if the defendant is a corporation, to a like officer of the county, in which it is established by law, or wherein its general business is or was last transacted, or wherein it keeps or

last kept, an office for the transaction of business. But in order to entitle a plaintiff to the benefit of this section, the delivery of the summons to an officer must be followed, within sixty days after the expiration of the time limited for the actual commencement of the action, by personal service thereof upon the defendant sought to be charged, or by the first publication of the summons, as against that defendant, pursuant to an order for service upon him in that manner.

§ 400. Attempt to commence action in a court not of record. The last section, excluding the provision requiring a publication or service of the summons within sixty days, applies to an attempt to commence an action in a court not of record, where the summons is delivered to an officer authorized to serve the same, within the city or town wherein the person resides or the corporation is located, as specified in that section; provided that actual service thereof is made with due diligence.

§ 431. Summons, personal service of upon a domestic corporation. Personal service of the summons upon a defendant, being a domestic corporation, must be made by delivering a copy thereof, within the State, as follows:

1. If the action is against the mayor, alderman, [aldermen] and commonalty of the city of New York, to the mayor, comptroller, or counsel to the corporation.

2. If the action is against any other city, to the mayor, treasurer, counsel, attorney, or clerk; or, if the city lacks either of those officers, to the officer performing corresponding functions, under another name.

3. In any other case, to the president or other head of the corporation, the secretary or clerk to the corporation, the cashier, the treasurer, or a director or managing agent.

Section 31 of the Municipal Court Act, providing for service of summons upon a corporation by delivering a copy to its "managing agent," means that such agent shall be in the nature of a corporate officer, and not a mere sales agent of a foreign corporation who is furnished with desk room and samples. Meyers v. No. Am. Watch Co,, 149 A. D. 215 (1912).

For provisions relative to service of process upon foreign corporations, see pages 69–72.

On a motion to set aside the service of summons on a domestic telegraph corporation, it appeared that such service was upon the general superintendent of the work of operating the lines of the company, and it was held that

the person served was the "managing agent" of the company within the meaning of this section. Barrett v. American Telephone & Telegraph Co., 138 N. Y. 491 (1893), affg. 56 Hun 430.

The design of the statute was to secure notice of the commencement of a suit to the corporation, and it is very apparent, from the description in the statute of the persons upon whom service might be made, that the Legislature intended to facilitate such service, and only required that the person to be served should sustain such responsible and representative relations to the corporation as would secure notice to it of the commencement of the action. Barrett v. American Telephone & Telegraph Co., 138 N. Y. 491 (1893).

It has been held that an allegation in a complaint that the defendant is a corporation constitutes no part of the cause of action but simply relates to the character or capacity of the defendant. Adams v. Lamson Consolidated Store Service Co., 59 Hun 127 (1891); O'Reilly, Skelly & Fogarty Co. v. Greene, 18 Misc. 423 (1896).

Service of summons upon the vice-president of a domestic corporation, or upon one who performs corresponding duties under a different appellation, is a sufficient service upon the corporation. Balmford v. Grand Lodge A. O. U. W., 16 Misc. 4 (1896); see, also, cases therein cited.

Service of summons on the president de facto of a defendant corporation gives the court jurisdiction of such corporation; and a subsequent adjudication in a proceeding to which plaintiff was not a party, that the person served was not president de jure, is ineffectual to divest or defeat jurisdiction. Stillman v. Associated Lace Makers' Co., 14 Misc. 503 (1895).

Service upon one who was known to be the president of a corporation, but who had, in fact, previously resigned his office, and at the time of service had no connection with the company, is not service upon such corporation. Buchanan v. Prospect Park Hotel Co., 14 Misc. 435 (1895); Yorkville Bank v. Zeltner Brew. Co., 80 A. D. 578, appeal dismissed, 178 N. Y. 572 (1904).

A managing agent of a corporation, upon whom service of process may be made, does not cease to be such by the appointment of temporary receivers of the company and his retention in office by them, so long as his original appointment is not revoked by the company. Faltiska v. N. Y., L. E. & W. R. R. Co., 12 Misc. 478 (1895).

The cashier of a company is its financial agent who has charge of its funds and has a right to said funds to the exclusion of any other person. Eisenhofer v. N. Y. Zeitung Pub. Co., 91 A. D. 94 (1904).

The affidavit of service upon an officer must show that the person served was such officer at the time of service. Cameron v. United Traction Co., 67 A. D. 557 (1902).

§ 438. Summons, service of by publication. An order, directing the service of a summons upon a defendant, without the State, or by publication, may be made in either of the following cases:

1. Where the defendant to be served is a foreign corporation; or, is an unincorporated association consisting of seven or more persons, having a president and treasurer, neither of whom is a resident of this state; or, being a domestic corporation, where after diligent effort, service cannot be made within the state upon the

president or other head of the corporation, the secretary or clerk to the corporation, the cashier, the treasurer or a director or managing agent; or, being a natural person, is not a resident of the state; or, where, after diligent inquiry, the defendant remains unknown to the plaintiff, or the plaintiff is unable to ascertain whether the defendant is or is not a resident of the state.

* * * * * * *

6. Where the defendant is a resident of the State, or a domestic corporation; and an attempt was made to commence the action against the defendant, as required in chapter fourth of this act, before the expiration of the limitation applicable thereto as fixed in that chapter; and the limitation would have expired, within sixty days next preceding the application, if time had not been extended by the attempt to commence the action.

7. Where the action is against the stockholders of a corporation, or joint-stock company, and is authorized by a law of the State, and the defendant is a stockholder thereof.

* * * * * * *

Thus am'd by L. 1899, ch. 301; L. 1909, ch. 492; L. 1913, ch. 179; L. 1914, ch. 346.

An action brought against a non-resident corporation served by publication is in the nature of an action in rem, and if the corporation have no res within the State, there is nothing upon which the court can exercise its jurisdiction, as the judgment can have effect only upon property situated here. Haase v. Michigan Steel Boat Co., 148 A. D. 298 (1911), distinguished in Rutkosky v. Public Service Ry. Co., 155 A. D. 631 (1913).

§ 439. Order for publication; papers to procure. The order must be founded upon a verified complaint, showing a sufficient cause of action against the defendant to be served, and proof by affidavit of the additional facts required by the last section; and also, where the application is made upon the ground that the defendant is a foreign corporation, or not a resident of the State, or in a case specified in subdivision fourth, fifth, or seventh of the last section, that the plaintiff has been or will be unable, with due diligence, to make personal service of the summons.

For other provisions relative to service by publication, see the Code of Civil Procedure, §§ 440–445.

§ 525. Verification of pleadings by corporations. The verification must be made by the affidavit of the party, or, if there are two or more parties united in interest, and pleading together, by at least one of them, who is acquainted with the facts, except as follows:

1. Where the party is a domestic corporation, the verification must be made by an officer thereof.

* * * * * * *

3. Where the party is a foreign corporation; or where the party is not within the county where the attorney resides, or if the latter is not a resident of the State, the county where he has his office, and capable of making the affidavit; or, if there are two or more parties united in interest, and pleading together, where neither of them, acquainted with the facts, is within that county, and capable of making the affidavit; or where the action or defense is founded upon a written instrument for the payment of money only, which is in the possession of the agent or the attorney; or where all the material allegations of the pleading are within the personal knowledge of the agent or the attorney; in either case, the verification may be made by the agent of or the attorney for the party.

A director of a domestic corporation is an officer and may verify a pleading. Eastham v. York State Tel. Co., 86 A. D. 563 (1903).

A liquidating committee of a corporation authorized to carry liquidation into effect are officers. Willis v. Roland & Co., 117 A. D. 122 (1907).

§ 605. Restrictions upon injunction to restrain State officers. Where a duty is imposed by statute upon a State officer, or board of State officers, an injunction order to restrain him or them or a person employed by him or them, from the performance of that duty, or to prevent the execution of the statute, shall not be granted, except by the Supreme Court, at a term thereof, sitting in the department in which the officer or board is located, or the duty is required to be performed; and upon notice of the application therefor to the officer, board, or other person to be restrained.

Thus am'd by L. 1895, ch. 946.

Prior to the amendment of 1895 injunctions under this section could only be granted at a General Term.

Where a peremptory mandamus is applied for, which by its terms acts as a restraint upon State officers engaged in, or about to perform a duty imposed by statute, and it is sought to be used as a restraining order or injunction, the limitation upon the granting of such injunction by the foregoing section applies. Peo. ex rel. Derby v. Rice, 129 N. Y. 461 (1891).

§ 610. Injunction against corporations, service of. The injunction order must briefly recite the grounds for the injunction. Where it is granted by the court, it must be served by delivering a certified copy thereof; where it is granted by a judge, it must be served by showing the original order, and delivering a copy thereof. Service of the order, upon a corporation, may be made as prescribed in this act, for making personal service of a summons upon a corporation. Copies of the papers, upon which the order was granted, must be delivered with the copy of the order.

See, also, Gen. Rules Practice 4 and 13 and Gen. Corp. Law, § 305, ante, as to injunctions suspending corporate business.

§ 624. Injunction, damages. Where the defendant enjoined was an officer of a corporation, or joint stock association, or a bailee, agent, trustee, or other representative of another, and the damages sustained by him, are less than the sum specified in the undertaking, the court or the referee may also separately ascertain and determine the damages sustained, by reason of the injunction, by the corporation, association, or person, whom the defendant represents, to an amount not exceeding the surplus of the sum specified in the undertaking; and those damages may be recovered in a separate action, brought as prescribed in the next section.

§ 625. Injunction; action on undertaking. Where the damages have been ascertained by the decision of the court, or the confirmation of a referee's report, as prescribed in the last two sections, any person, entitled to the benefit of an undertaking, executed pursuant to the provisions of this title, may bring an action thereon, without further leave of the court.

§ 635. Attachments; in what actions. A warrant of attachment against the property of one or more defendants in an action, may be granted upon the application of the plaintiff, as specified in the next section, where the action is to recover a sum of money only, as damages for one or more of the following causes:

1. Breach of contract, express or implied, other than a contract to marry.
2. Wrongful conversion of personal property.
3. An injury to property in consequence of negligence, fraud or other wrongful act.

Thus am'd by L. 1894, ch. 738, and L. 1895, ch. 578.

§ 636. Foreign corporation; attachment. To entitle the plaintiff to such a warrant he must show, by affidavit, to the satisfaction of the judge granting the same, as follows:

1. That one of the causes of action specified in the last section exists against the defendant. If the action is to recover damages for breach of a contract, the affidavit must show that the plaintiff is entitled to recover a sum stated therein, over and above all counterclaims known to him.

2. That the defendant is either a foreign corporation or not a resident of the state; or, if he is a natural person and a resident of the state, that he has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent; or, if the defendant is a natural person, or a domestic corporation, that he or it has removed, or is about to remove, property from the state, with intent to defraud his or its creditors; or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete property with the like intent; or where, for the purpose of procuring credit, or the extension of credit, the defendant has, made a false statement in writing under his own hand or signature, or under the hand or signature of a duly authorized agent, made with his knowledge and acquiescence as to his financial responsibility or standing.

* * * * * * * * * *

Thus am'd by L. 1894, ch. 736; L. 1895, ch. 578; L. 1899, ch. 598.

An attachment against a foreign corporation cannot issue under the Code, sections 635 and 636, upon an allegation that defendant is a foreign corporation unless the affiant gives the sources of his information and states facts indicating that the averment is made upon personal knowledge. N. Dain's Sons Co. v. McNally Co., 137 A. D. 857 (1910), and cases cited.

Where a foreign corporation has property within the State an attachment regularly issued creates the creditor's right to the property, upon which the same is levied, superior to the claim of a receiver appointed in the home jurisdiction, even though such receivership antedates the levy of the attachment, if it be levied prior to the appointment of a receiver in this State. Natl. Park Bk. v. Clark, 92 A. D. 262, 266 (1904).

A debt due from a foreign corporation to a non-resident debtor cannot be attached at the instance of a resident creditor of the latter. Wood v. Furtick, 17 Misc. 561 (1896). An attachment proceeding is dependent for its validity upon the presence of the res, the debt, within the jurisdiction of the court; and the situs of a debt is at the place of residence of the creditor; such residence of a corporation is within the domain of the sovereignty which created it. Id., Douglas v. Phenix Ins. Co., 138 N. Y. 209 (1893); Nat'l Broadway Bk. v. Sampson, 179 N. Y. 213 (1904).

Mere averment of facts as upon personal knowledge, in an affidavit made to procure an attachment, is not sufficient unless circumstances are stated

from which an inference can fairly be drawn that the affiant has personal knowledge of the facts which he alleges. Hoormann v. Climax Cycle Co., 9 A. D. 579 (1896), affg. 17 Misc. 734.

Where a creditor of a corporation procures an attachment and its levy, prior to the appointment of a receiver of the corporation, the property passes to the receiver subject to the lien of the attachment, and the possession is in the sheriff and not in the receiver. Bennett v. Complete Electric Construction Co., 8 A. D. 301 (1896).

An affidavit made by the assignee of a claim, who is not alleged to have been otherwise connected therewith, although positively stating the non-residence of defendant and the facts constituting the cause of action, will be presumed to have been made upon information and belief, and is sufficient to authorize the granting of an attachment. Einstein v. Climax Cycle Co., 18 Misc. 88 (1896).

Although the Code of Civil Procedure provides in what cases attachments may be issued, and what must be shown by the plaintiff to entitle him thereto, yet such provisions are not exclusive, and it is entirely within the province of the Legislature to affix other conditions to the right of persons in the State of New York to invoke such remedies. Sawyer Lumber Co. v. Bussell, 84 Hun 114 (1895). As a remedy by attachment is a step in an action the provisions of section 15 of the General Corporation Law apply. Id.

The papers upon which a foreign corporation doing business in the State of New York, in relation to a transaction arising in such State, procures an attachment, must show, for the purposes of the attachment, that the corporation has complied with section 15 of the General Corporation Law, and if such fact does not appear in the papers upon which the warrant of attachment was granted, the omission of such allegation is legal cause for vacating the attachment. Sawyer Lumber Co. v. Bussell, 84 Hun 114 (1895).

The power of the court to reach by its process the property of a foreign corporation within the limits of this State, depends entirely upon statutory enactment, and does not proceed from any inherent or general jurisdiction which the court possesses. Therefore, where such right is created by statute, the conditions therein attached to its exercise must be fulfilled, and they must appear before the court obtains jurisdiction. Oliver v. Walter Heywood Mfg. Co., 10 N. Y. Supp. 771 (1890); Sawyer Lumber Co. v. Bussell, 84 Hun 114 (1895). Where the plaintiff in an action procures an attachment for a cause of action which arises in the State of New York, it is necessary, in order that the court shall acquire jurisdiction, that it shall appear that the plaintiff is a resident of the State. Sawyer Lumber Co. v. Bussell, 84 Hun 114 (1895); Smith v. Union Milk Co., 70 Hun 348, affd. on op. below, 143 N. Y. 622 (1894). To maintain an attachment, issued with the complaint in an action brought against a foreign corporation (which has neither been served with process in the State nor has appeared in the action) to recover damages for breach of contract, as against a motion by a subsequent attaching creditor, whose writ is in all respects regular, to vacate the attachment upon the papers on which it was granted, such papers, if they do not show that the plaintiff is a resident of the State, must show either that the contract in suit was made within this State, or that the cause of action arose therein. Smith v. Union Milk Co., 70 Hun 348.

Unless the jurisdictional facts appear in the papers upon which a warrant of attachment is granted against a foreign corporation the attachment must be set aside. The plain meaning of the Code is that it must appear by affidavit that a cause of action of which the court has jurisdiction exists to

the satisfaction of the judge granting the warrant. Ladenburg v. Commercial Bk. of Newfoundland, 87 Hun 269 (1895). The provision of the Code regarding actions against foreign corporations is not restrictive of the jurisdiction of the Supreme Court, but an enlargement thereof and does not infringe upon the constitutional provisions as to the jurisdiction of said court. Id. In an action brought against a foreign corporation commenced by attachment where the cause of action arose without the State the Supreme Court has no jurisdiction unless the plaintiffs are residents of the State of New York. Id.

An attachment against a corporation will not be justified because of fraudulent acts of the president in disposing of his individual property. Central Nat. Bk. v. Fort Ann Woolen Co., 57 St. Rep. 316 (1894).

Where the damages are unliquidated, the papers must contain facts from which the court can determine for itself whether the amount claimed is proper. Merely stating that a specified amount is due is not sufficient. Delafield v. Armsby Co., 62 A. D. 262 (1901); Southwell v. Kingsland, 85 A. D. 384 (1903); James v. Signell, 60 A. D. 75 (1901).

§ 646. Foreign corporation; attachment of unpaid subscription to. Under a warrant of attachment against a foreign corporation, other than a corporation created by or under the laws of the United States, the sheriff may levy upon the sum remaining unpaid upon a subscription to the capital stock of the corporation, made by a person within the county; or upon one or more shares of stock therein, held by such a person, or transferred by him, for the purpose of avoiding payment thereof.

§ 647. Interest in shares or bonds. The rights or shares which the defendant has in the stock of an association or corporation, or in a bond negotiable or otherwise, together with the interest and profits thereon, may be levied upon; and the sheriff's certificate of the sale thereof entitles the purchaser to the same rights and privileges, with respect thereto, which the defendant had when they were so attached.

Thus am'd by L. 1911, ch. 419.

Stock of a foreign corporation is not attachable where neither the certificate nor the owner are within the State. Plimpton v. Bigelow, 93 N. Y. 592 (1883).

If the certificate of stock of a foreign corporation is pledged within the State of New York, the owner's equity may be attached. Simpson v. Jersey City Contracting Co., 165 N. Y. 193 (1900).

As to motions to vacate a levy where the property is not attachable, see Weil v. Gallun, 75 A. D. 439 (1902), and Bridges v. Wade, 113 A. D. 350 (1906).

A debt from a limited partnership to a corporation both organized under the laws of another State, having a foreign situs, is not attachable in this State. National Broadway Bank v. Sampson, 179 N. Y. 213 (1904), discussing situs of debts for purposes of attachment, but see Flynn v. White, 122 A. D. 780 (1907).

§ 648. Attachment of corporation bonds, notes, etc. The attachment may also be levied upon a cause of action arising upon contract; including a bond, promissory note, or other instrument for the payment of money only, negotiable or otherwise, whether past due, or yet to become due, executed by a foreign or domestic government, state, county, public officer, association, municipal or other corporation, or by a private person, either within or without the state, which belongs to the defendant, and is found within the county. The levy of the attachment thereupon is deemed a levy upon, and a seizure and attachment of, the debt represented thereby. * * * * *

Amended by L. 1907, ch. 318, relating to interest in decedent's estates which is not printed above.

Quære whether applicable to action on contract where the damages are unliquidated. Pruyn v. McCreary, 105 A. D. 302 (1905).

§ 649. Shares of stock; how attached. A levy under a warrant of attachment must be made as follows:

* * * * * * * * * *

3. Upon other personal property, by leaving a certified copy of the warrant, and a notice showing the property attached with the person holding the same; or, if it consists of a demand, other than as specified in the last subdivision, with the person against whom it exists; or, if it consists of right or share in the stock of an association or corporation, or interests or profits thereon, with the president, or other head of the association or corporation, or the secretary, cashier, or managing agent thereof. * * * * *

Amended by L. 1907, ch. 318, relating to interest in decedent's estates which is not printed above.

The receiver of a corporation, appointed in proceedings for a voluntary dissolution, is vested with title to the assets of the corporation upon the making of the order appointing him, and no superior lien is obtained by the levy of an attachment thereon between the making of such order and the taking of possession by the receiver. Dickey v. Bates, 13 Misc. 489.

§ 650. Shares of stock attached; certificate by the corporation. Upon the application of a sheriff, holding a warrant of attachment, the president or other head of an association or corporation, or the secretary, cashier, or managing agent thereof, or a debtor of the defendant, or a person holding property, including a bond, promissory note, or other instrument for the payment of money, belonging to the defendant, must furnish to the sheriff a

certificate, under his hand, specifying the rights or number of shares of the defendant, in the stock of the association or corporation, with all dividends declared, or incumbrances thereon; or the amount, nature, and description of the property, held for the benefit of the defendant, or of the defendant's interest in property so held, or of the debt or demand owing to the defendant, as the case requires.

See Stine v. Greene, 65 A. D. 221 (1901), and Donner v. Mercy, 81 A. D. 181 (1903).

§ 651. Refusal of corporation to give information. If a person to whom aplication is made, as prescribed in the last section, refuses to give such a certificate; or if it is made to appear, by affidavit, to the satisfaction of the court, or a judge thereof, or the county judge of the county to which the warrant is issued, that there is reason to suspect that a certificate given by him is untrue, or that it fails fully to set forth the facts, required to be shown thereby; the court or judge may make an order, directing him to attend, at a specified time, and at a place within the county, to which the warrant is issued, and submit to an examination under oath, concerning the same. The order may, in the discretion of the court or judge, direct an appearance before a referee named therein.

§ 707. Foreign corporation; judgment enforceable only against attached property. Where a defendant, who has not appeared, is a non-resident of the State, or a foreign corporation, and the summons was served without the State, or by publication, pursuant to an order obtained for that purpose, as prescribed in chapter fifth of this act, the judgment can be enforced only against the property which has been levied upon, by virtue of the warrant of attachment, at the time when the judgment is entered. But this section does not declare the effect of such a judgment, with respect to the application of any statute of limitation.

The judgment is in rem. Pennoyer v. Neff, 95 U. S. 714 (1877).

§ 791. Certain actions against corporations entitled to preference. Civil causes are entitled to preference among themselves, in the trial or hearing thereof, in the following order, next after the causes specified in the last section but one:

* * * * * * * * * *

7. An action against a corporation or joint-stock association, issuing bank notes or any kind of paper credits to circulate as money, or by or against the receiver of such corporation or association. An action in which a county or town is sole plaintiff or defendant.

8. An action against a corporation founded upon a note or other evidence of debt, for the absolute payment of money. An action upon an undertaking given upon an appeal to the court of appeals or to stay the execution on an appeal to the court of appeals.

Subdivision 8 applies to an action brought by one foreign corporation against another foreign corporation. Martins Bank v. Amazonas Co., 98 A. D. 146 (1904).

§ 839. **Admission by member of corporation.** The admission of a member of an aggregate corporation, who is not a party, shall not to be received as evidence against the corporation unless it was made concerning and while engaged in a transaction in which he was the authorized agent of the corporation; or unless it was made while a member of such corporation and testifying as a witness concerning a transaction of the corporation, when the official record of such testimony shall be received.

Thus am'd by L. 1903, ch. 384.

§ 929. Where a party wishes to prove an act or transaction of a foreign corporation, the book or books of the corporation may be used for that purpose, as presumptive evidence, whether any or all of the parties are or are not members of the corporation.

Original books of a foreign corporation which have been in the custody of its proper officer are admissible to prove its corporate transactions in an action against a transferee of stock for unpaid calls, without first proving the correctness of each entry by the person making it, and are presumptive evidence for that purpose under section 929 of the Code. Sigua Iron Co. v. Brown, 171 N. Y. 488 (1902).

It is necessary to show the correctness of the entries in corporate books before they can be received in evidence where they are offered to prove an account of a corporation for the purpose of establishing a debt or liability against third persons in an action brought by or in behalf of the corporation. Sigua Iron Co. v. Brown, 171 N. Y. 488, 496 (1902).

§ 930. **Copies as evidence.** If an original book is not produced at the trial, as prescribed in the last section, a copy thereof,

or an entry therein, verified as prescribed in the next section, may be used, with like effect as the original book; provided that the party, intending to use the copy, gives the adverse party at least ten days' notice of his intention, specifying briefly the nature of the evidence to be given. But this and the next section do not apply, where the foreign corporation is a party to the action, and seeks to prove its own act or transaction, in its own behalf.

§ 931. Verification of copy. The copy must be verified by the deposition, taken as prescribed by law, or the oral testimony, taken at the trial, of the person who made it, or of a person who has examined and compared it with the original book or the entry therein. The witness must testify that the copy produced is correct; that he made it, or compared it with the original; and that he then knew that the original book so copied, or containing the entry, was the book of the corporation; or that it was then acknowledged to him to be such, by an officer or receiver of the corporation, or a person having the custody thereof, naming the person who made the acknowledgment; and he must specify where, and in whose custody, the original was then kept.

§ 931a. Copy of designation of person upon whom to make service, as evidence. An exemplified copy of a designation of a person upon whom to make service filed by a foreign corporation as provided in section sixteen of the general corporation law accompanied with a certificate that it has not been revoked, is presumptive evidence of the execution thereof, and conclusive evidence of the authority of the officer executing it.

Added by L. 1909, ch. 65, formerly Code Civ. Pro., § 432, subd. 2, in part.

§ 931b. Recital in order, resolution or record of public officers, board or body presumptive evidence of certain facts. A recital in any order, resolution or other record of any proceeding of a meeting referred to in section forty-one of the general construction law that such meeting had been held or adjourned as provided in said section or that it had been held upon notice to the members, as therein provided, shall be presumptive evidence thereof.

Added by L. 1909, ch. 65, formerly Statutory Construction Law, § 19, in part.

§ 1650. An action may be maintained, as prescribed in this article, by or against a corporation, or by or against an unincorporated association, as if it was a natural person, or such an action may be maintained by or against the receiver or other successor of any such corporation or association.

The article (ch. 14, t. 1, a. 5) relates to actions to compel the determination of a claim to real property.

§ 1775. Complaint in action by or against a corporation. In an action brought by or against a corporation, the complaint must aver that the plaintiff, or the defendant, as the case may be, is a corporation; must state whether it is a domestic corporation or a foreign corporation; and, if the latter, the state, country or government, by or under whose laws it was created. But the plaintiff need not set forth, or specially refer to, any act or proceeding, by or under which the corporation was created.

Pleading; Action by a Corporation.

The complaint of a corporation should allege that it is a corporation and also whether it be domestic or foreign, and if the latter, the State or country by or under whose laws it was created. Kaulbach v. Knickerbocker Trust Co., 139 A. D. 566 (1910).

In a suit against a foreign corporation upon a contract to repurchase its own stock, the existence of statutory provisions of the foreign State or facts rendering such contract unenforcible are matters of defense which are available only when pleaded and proved. Strodl v. Farish-Stafford Co., 145 A. D. 406 (1911). Such a contract is neither against public policy nor void at common law. Id.

When a foreign corporation sues in the courts of this State and its complaint states a good cause of action it will be presumed to be rightfully in the State and properly in court until the contrary is made to appear. Eclipse Silk Mfg. Co. v. Hiller, 145 A. D. 568 (1911). As to all contracts, except those made in this State, a foreign corporation has the same rights in our courts as a domestic corporation. Id.; see, also, Singer Sewing Mach. Co. v. Foster, 75 Misc. 641 (1912).

§ 1776. When proof of corporate existence unnecessary. In an action, brought by or against a corporation, the plaintiff need not prove, upon the trial, the existence of the corporation, unless the answer is verified, and contains an affirmative allegation that the plaintiff, or the defendant, as the case may be, is not a corporation.

A party who has entered into a contract with another, in which the latter assumes to be and contracts as a corporation, is estopped from denying the corporate existence. U. S. Vinegar Co. v. Schlegel, 143 N. Y. 537 (1894).

The corporate existence of a plaintiff is not put in issue by a mere allegation in an answer that "defendant has no knowledge or information sufficient

to form a belief" as to the allegations of the complaint in respect thereto; to raise such an issue there must be affirmative allegations that plaintiff is not a corporation. Snow, Church & Co. v. Hall, 19 Misc. 655 (1897).

In an action for goods sold to a corporation, the latter cannot show, under a general denial, that it was not incorporated at the time of the sale alleged; to authorize such proof the answer must affirmatively allege the fact that the defendant was not a corporation. Schmidt v. Nelke Art Lithographic Co., 17 Misc. 124 (1896), revsg. 16 Misc. 300.

§ 1777. Misnomer, when waived. In an action or special proceeding brought by or against a corporation, the defendant is deemed to have waived any mistake in the statement of the corporate name, unless the misnomer is pleaded in the answer, or other pleading in the defendant's behalf.

The fact that a writ of certiorari is directed to "The Board of Trustees of the New York and Brooklyn Bridge" instead of "The Trustees of the New York and Brooklyn Bridge" is not such a misnomer, where the corporate name is correctly stated in the body of the petition, as will defeat the proceeding, and the addition of the words "The Board of" may be regarded as immaterial. Peo. ex rel. Fitzgibbons v. N. Y. & Brooklyn Bridge, 1 A. D. 186 (1896).

Where a corporation, plaintiff in an action, has misnamed itself in the summons and complaint, it is no effectual ground of demurrer; the error is merely formal and is amendable upon motion. Empire State Sav. Bk. v. Beard, 81 Hun 184 (1894).

The question of misnomer is not raised by the mere allegation that the plaintiff is not incorporated. Associate Presbyterian Congregation v. Hanna, 113 A. D. 12 (1906).

§ 1778. Action against a corporation upon a note, etc. In an action against a foreign or domestic corporation, to recover damages for the non-payment of a promissory note, or other evidence of debt, for the absolute payment of money, upon demand, or at a particular time, an order, extending the time to answer or demur, shall not be granted, except by the court, upon notice to the plaintiff's attorney. In such an action, unless the defendant serves, with a copy of his answer, or demurrer, copy of an order of a judge, directing that the issues presented by the pleadings be tried, the plaintiff may take judgment, as in case of default in pleading, at the expiration of twenty days after service of a copy of the complaint, either personally with the summons, or upon the defendant's attorney, pursuant to his demand therefor; or, if the service of the summons was otherwise than personal, at the expiration of twenty days after the service is complete.

Where a corporation defendant in an action upon a promissory note fails to serve with its answer a copy of an order directing that the issues be tried,

the plaintiff may take judgment by default without returning the answer with a notice calling attention to the failure to serve said copy of order. Watertown Nat. Bk. v. Westchester County Water Works Co., 19 Misc. 685 (1897).

This section does not apply to an action against a domestic corporation in a Justices' Court. Center v. Hoosick River Pulp Co., 43 Misc. 247 (1904).

An order is not necessary where the instrument does not show on its face that the plaintiff is entitled to the amount sought to be recovered. Tautphœus v. Harbor & Suburban Assn., 96 A. D. 23 (1904); nor is an order necessary where the action is brought against a corporation as an indorser. Shorer v. Times Printing & Pub. Co., 119 N. Y. 483 (1890): nor where the answer admits the allegation of the complaint and sets up a counterclaim. Pennypacker v. Levis & Co., 63 Misc. 384 (1909).

§ 1779. When foreign corporation may sue. An action may be maintained by a foreign corporation, in like manner, and subject to the same regulations, as where the action is brought by a domestic corporation, except as otherwise specially prescribed by law. But a foreign corporation cannot maintain an action, founded upon an act, or upon a liability or obligation, express or implied, arising out of, or made and entered into in consideration of, an act, which the laws of the State forbid a corporation or association of individuals to do, without express authority of law. This section does not affect the validity of a meeting of the stockholders or directors of a foreign corporation, held within the State, where such a meeting is authorized by the laws of the State, country, or government, by or under which the corporation is created, or of an act, done at such a meeting, which is not in conflict with the same laws, or the laws of the state.

For numerous cases respecting the right of a foreign corporation to sue, see Gen. Corp. Law, § 15.

§ 1780. When foreign corporation may be sued. An action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation, for any cause of action. An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only:

1. Where the action is brought to recover damages for the breach of a contract, made within the State, or relating to property situated within the State, at the time of the making thereof.

2. Where it is brought to recover real property situated within the State, or a chattel, which is replevied within the State.

3. Where the cause of action arose within the State, except where the object of the action is to affect the title to real property situated without the State.

4. Where a foreign corporation is doing business within this state.

Subd. 4 was added by L. 1913, ch. 60.

Constitutionality of Section.

This section does not violate the Constitution of the United States, for it does not discriminate between citizens of various States, but only between residents and non-residents. Robinson v. Oceanic Steam Nav. Co., 112 N. Y. 315 (1889); Johnson v. Victoria Chief Copper M. & S. Co., 150 A. D. 653 (1912).

Suit Against Foreign Corporation for Accounting.

A non-resident plaintiff cannot maintain a suit in the courts of this State against a foreign corporation for an accounting in relation to business of a partnership in a foreign territory. Johnson v. Victoria Chief Copper M. & S. Co., 150 A. D. 653 (1912), distinguished in Wrightsville Hardware Co. v. Assets Realization Co., 159 A. D. 849.

Actions by Non-resident Against Foreign Corporation.

Where a contract between a foreign corporation and a non-resident of New York was to be performed in a foreign country but the contract was repudiated by a telegram delivered for transmission in New York, the breach occurred in this State and our courts have jurisdiction of an action for breach of the contract. Wester v. Casein Co., 206 N. Y. 506 (1912), revsg. 146 A. D. 442.

A non-resident plaintiff can maintain an action against a foreign corporation in the courts of this State only as permitted by this section, and when, at any stage of the proceedings, a lack of jurisdiction appears, the action must be dismissed. Jones v. Burr Bros., Inc., 142 A. D. 640 (1911).

The courts of this State have no jurisdiction of an action to enforce a contract made by a non-resident plaintiff with a foreign corporation to be performed, and actually performed, in another State. Jones v. Burr Bros., Inc., 142 A. D. 640 (1911).

Where the place of performance of a contract between a non-resident and a foreign corporation was in the foreign country, but the breach occurred in New York by delivery of a cablegram repudiating the contract, the courts of this State had jurisdiction under the foregoing section. Wester v. Casein Co., 206 N. Y. 506 (1912), revsg. 140 A. D. 442.

Our courts have no jurisdiction over an action by a non-resident against a foreign corporation for injuries sustained in another State. Klunck v. Penn. R. R. Co., 148 A. D. 786 (1912).

Action by Non-resident Receiver of Foreign Corporation.

A non-resident receiver of a foreign corporation, who holds a judgment recovered in another State against another foreign corporation, may sue in our courts to recover assets of the judgment debtor claimed to have been unlawfully diverted and held by residents of this State. Trotter v. Lisman, 209 N. Y. 174 (1913), affg. 154 A. D. 922, 932, and distg. same v. same, 199 N. Y. 497.

Statute of Limitations of Another State.

In an action brought by a non-resident of the State of New York against a foreign corporation the latter may set up as a defense the Statute of

Limitations in force in the State in which it was created and of which it is consequently a resident. Smith v. Western Pacific Ry. Co., 154 A. D. 130 (1912).

Equity Power of Court.

The provisions of this section do not affect the inherent power of a court of equity to take jurisdiction when invoked in a case falling within some subject of equity jurisdiction. Trotter v. Lisman, 209 N. Y. 174 (1913), affg. 154 A. D. 922 and 932. Creditors' actions to reach personal property of their judgment debtors have always been of equitable cognizance. Id.

Place Where Cause of Action Arose.

Where the assets of a partnership were taken over in another State by a foreign corporation, a creditor of such partnership cannot in our courts recover from such corporation the amount of his demand, to the extent of the assets so taken over, as the cause of action did not arise in this State. Fenkart v. Bodenmann, 64 Misc. 140 (1909).

Residence of Foreign Railroad Corporation.

Under the Code, section 984, a foreign railroad corporation is deemed to have a residence in any county through which it operates its road. Polley v. Lehigh Val. R. R. Co., 138 A. D. 636 (1910), affd., 200 N. Y. 585. This is also true of a domestic railroad corporation. Poland v. United Traction Co., 88 A. D. 281 (1903), affd., 177 N. Y. 557.

Miscellaneous Cases.

A contract made between two foreign corporations by a written order mailed within the State and accepted in another State where one of the corporations is domiciled is not a contract made within this State, as the contract was not completed until the acceptance of the order; therefore a certificate, under section 15 of the General Corporation Law, authorizing the vendor corporation to do business here, was not necessary. A cause of action based on a default in paying for goods delivered in this State on such contract arises here and can be maintained under subdivision 3 of the foregoing section. Shelby Steel Tube Co. v. Burgess Gun Co., 8 A. D. 444 (1896).

Where a contract was made in the city of New York for work to be done in Illinois and payment was to be made in bonds without specifying the place of delivery of such bonds, the presumption is that the bonds were to be delivered in New York, therefore the cause of action for their non-delivery would be one coming under the third subdivision of the foregoing section. O'Brien v. Peoria Water Co., 5 A. D. 229 (1896).

The City Court of New York has jurisdiction in an action where the plaintiff resides within this State, and the cause of action arises therein, although the defendant is a foreign corporation, service upon it having been made within the State. Mass v. Cunard S. S. Co., 18 Misc. 379 (1896).

The courts of this State may decline to exercise jurisdiction in an action to enforce a contract between foreign railroad corporations for transportation to be performed in the State of their common domicile, and an injunction pendente lite, restraining violations of such contract, and thus restricting the defendant to that extent in the exercise in that State of its full corporate rights, should not be granted. D., L. & W. R. R. Co. v. N. Y., S. & W. R. R. Co., 12 Misc. 231 (1895), and cases cited.

When, in an action against a foreign corporation, the status of the plaintiff as a foreign corporation or non-resident is conceded or otherwise ascertained,

and the case is not one of class enumerated in section 1780, the court must dismiss the action. Gundlin v. Hamburg-American Packet Co., 8 Misc. 291 (1894). When the non-residence of the plaintiff in an action against a foreign corporation does not affirmatively appear, and the evidence in relation thereto is conflicting, the court may properly submit that question to the jury. Id.

Where a contract between foreign corporations was not made in this State, or the cause of action did not arise here, the voluntary appearance of the defendant in an action on such contract does not confer jurisdiction on the court. Seiser Bros'. Co. v. Potter Produce Co., 62 St. Rep. 69, 23 Civ. Pro. Rep. 348 (1894).

See Waton v. Boston Woven Cordage Co., 75 Hun 115 (1894); and Robeson v. Cent. R. R. Co. of N. J., 76 Hun 444 (1894).

See Grant v. Cobre Grande Copper Co., 193 N. Y. 306 (1908), revsg. 126 A. D. 750, and affg. 59 Misc. 1, where many cases are collated. See same case, 189 N. Y. 241.

§ 2865. Justices' courts, actions in. An action cognizable by a justice of the peace, may be brought by or against a corporation; by or against a natural person in his own right; by or against a town or county officer in his official character; or by an executor, administrator, trustee of an express trust, or a receiver in supplementary proceedings.

§ 2879. Justices' courts; summons, service upon corporations generally. Where the defendant to be served is a corporation, or person, company or partnership doing business in another county than that in which he or it resides, the summons may be personally served upon it or him by delivering a copy thereof to an officer, managing agent or person to whom a copy of the summons in an action brought against the corporation in the supreme court might be delivered as prescribed in sections four hundred and thirty-one and four hundred and thirty-two of this act, or, to any director, managing agent or trustee of the corporation, person, partnership or company by whatever official title he or it is called.

Thus am'd by L. 1904, ch. 527.

§ 2880. Id.; special provision relating to railroad corporations. Where the defendant to be served is a railroad corporation, and no officer thereof resides in the county, to whom a copy of the summons may be delivered, as prescribed in the last section, it may be personally served, by delivering a copy thereof to a local superintendent of repairs, freight agent, agent to sell tickets, or station keeper of the corporation, residing in the county; unless, at least thirty days before it was issued, the corporation had filed,

in the office of the clerk of the county, a written instrument, designating a person residing in the county, upon whom process to be issued by a justice of the peace against it, may be served; in which case, the summons may be personally served by delivering a copy to the person so designated.

Thus am'd by L. 1900, ch. 511.

§ 2881. Services of summons, relating to express, insurance and telegraph companies. Where the defendant to be served is a corporation, association, partnership or person doing business in the state as an express company, an insurance company, or a telegraph company, and no person resides in the county to whom a copy of the summons may be delivered, as prescribed in the foregoing sections of this article, it may be personally served on the express company by delivering a copy thereof to any local or general agent to receive freight or, parcels, route agent, or messenger of the defendant, residing in the county, and on any insurance company by delivering a copy thereof to any local or general agent of the defendant, residing in the county, and on any telegraph company by delivering a copy thereof to any office manager of the defendant, residing in the county; unless at least thirty days before it was issued, the defendant had filed in the office of the clerk of the county, a written instrument, designating a person residing in the county, upon whom process to be issued by a justice of the peace against the defendant may be served; in which case the summons may be personally served by delivering a copy thereof to the person so designated.

Thus am'd by L. 1895, ch. 349; L. 1905, ch. 211.

§ 2882. Justices' courts; service upon person designated. Where a person has been designated, as prescribed in either of the last two sections and the designation has been revoked, or it appears, by affidavit or the return of the constable, to whom a summons has been duly delivered for service, that the person designated is dead, or has ceased to reside within the county; or that he cannot, after due diligence, be found within the county, so as to deliver a copy of the summons to him; the original summons, or the second or third summons, issued as prescribed in the next section, may be served as if the designation had not been made. Such a designation may be revoked by a writing, executed and

filed in like manner as required for the purpose of making the designation.

§ 3268. In action by foreign corporations security for costs may be required. The defendant, in an action brought in a court of record, may require security for costs to be given, as prescribed in this title, where the plaintiff was, when the action was commenced, either

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2. A foreign corporation.

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In the first and second departments defendant's absolute right to the costs is waived by not applying therefor before answer, and a motion made after answer is addressed to the court's discretion and some excuse must be shown for the delay. In the third department the absolute right to apply for security is not lost by the fact that the answer has been served before the application. Knaggs v. Easton, 54 Misc. 51 (1907), citing many cases.

§ 3343. Corporation defined. In construing this act, the following rules must be observed, except where a contrary intent is expressly declared in the provision to be construed, or plainly apparent from the context thereof:

* * * * * * * * * *

18. A "domestic corporation" is a corporation created by or under the laws of the State; or located in the State, and created by or under the laws of the United States, or by or pursuant to the laws, in force in the colony of New York, before the 19th day of April, in the year 1775. Every other corporation is a "foreign corporation."

See also the definition of a domestic corporation in the General Corporation Law, § 3, subd. 5, ante.

A national bank doing business in New York city is a domestic corporation. Matter of Cushing, 40 Misc. 505 (1903); but a national bank located in another State is a foreign corporation. Beckham v. Hague, 44 A. D. 146 (1899).

QUO WARRANTO

Code of Civil Procedure, Section 1948, containing the provisions for testing the title to office and the right to exercise corporate privileges, reads as follows:

§ 1948. **Action by attorney-general.** The attorney-general may maintain an action, upon his own information, or upon the complaint of a private person in either of the following cases:

1. Against a person who usurps, intrudes into, or unlawfully holds or exercises, within the state, a franchise, or a public office, civil or military, or an office in a domestic corporation.

* * * * * * * * * *

3. Against one or more persons who act as a corporation within the state, without being duly incorporated; or exercise within the state, any corporate rights, privileges, or franchises, not granted to them by the law of the state.

4. Against a foreign corporation which exercises within the state any corporate rights, privileges or franchises, not granted to it by the law of this state; or which within the state, has violated any provision of law, or, contrary to law, has done or omitted any act, or has exercised a privilege or franchise, not conferred upon it by the law of this state, where, in a similar case, a domestic corporation would, in accordance with section one hundred and thirty-one of the general corporation law, be liable to an action to vacate its charter and to annul its existence; or which exercises within the state any corporate rights, privileges or franchises in a manner contrary to the public policy of the state.

Subdivision 4 added by L. 1896, and thus am'd by L. 1909, ch. 65.

For other provisions upon this subject, see Code of Civil Procedure, §§ 1949-1956.

Section a Substitute for Former Writ of Quo Warranto.

This section was intended as a substitute for the writ of quo warranto, which would lie in every case where a franchise was unlawfully asserted and used. Peo. v. Loew, 19 Misc. 248 (1897).

Change in Form of Procedure Since Abolition of Writ of Quo Warranto.

The legislature in abolishing the writ of quo warranto did not intend to deprive the court of jurisdiction of proceedings for such relief, but merely intended to change the form of procedure and to provide that the relief should

be had in actions or by motions as prescribed in the Code. People v. Bleecker St. & Fulton Ferry R. R. Co., 140 A. D. 611 (1910), affd., 201 N. Y. 594.

Exercise of Special Franchise After Its Expiration.

Assuming that an action is maintainable against a corporation under this subdivision, yet a gas company by continuing to use pipes laid in city streets after the expiration of the period for which permission of the municipal authorities was given, is not unlawfully holding or exercising a franchise, and it seems that if the corporation continues to use such pipes after the term has expired, the municipality is the one to sue. Peo. v. Cons. Gas. Co., 130 A. D. 626 (1909).

Usurpation of Corporate Powers; Injunction.

A corporation furnishing electricity to a city under a franchise which is not exclusive, cannot enjoin another competing corporation from furnishing electricity to the city upon the ground that it lacks corporate existence because the special act incorporating it is void; however, the corporation could have called upon the Attorney-General to bring an action to prevent an unlawful exercise of alleged corporate rights. Geneva-Seneca Elec. Co. v. Economic Power & Const. Co., 136 A. D. 219 (1910).

An action may be brought under the third subdivision of this section for a perpetual injunction restraining persons from transacting the business of a corporation after the term for which the corporation was organized had expired, but in such action the corporation is not a proper party. Peo. ex rel. Haberman v. James, 5 A. D. 412 (1896).

The Action is Against Individuals, not Corporations.

This section contemplates an action against individuals and not against corporations. Peo. v. Equity Gas Light Co., 141 N. Y. 232 (1894); Peo. ex rel. Haberman v. James, 5 A. D. 412 (1896); Peo. v. Consolidated Gas Co., 130 A. D. 626 (1909).

Expiration of Term of Existence; Distribution of Assets.

Under the foregoing section an action cannot be maintained in the name of the people to close up the affairs of the corporation or to distribute its assets, as section 35 of the General Corporation Law provides that when the existence of a corporation terminates its assets shall be held by the directors as trustees for its creditors and stockholders with full power to close up its affairs. Peo. ex rel. Haberman v. James, 5 A. D. 412 (1896). If such an action becomes necessary it should be brought by a creditor or stockholder. Id.

Suits to Determine Rights of Rival Claimants to Office.

An action in the nature of a quo warranto, brought by the Attorney-General in the name of the people, under the provisions of the Code to try the title to a corporate office to which there are several claimants, depends only upon legal inquiries and legal principles and not upon matters of equitable consideration, and the issues therein are strictly legal ones; therefore, the trial of such issues by a jury is the constitutional right of the parties. People v. Albany & Susquehanna R. R. Co., 57 N. Y. 161, 174 (1874), and cases cited therein; In re Hines, 141 A. D. 569, 574 (1910).

The Supreme Court has no power in a suit in equity brought by a stockholder in his own behalf and that of all other stockholders to try the respective claims to the office of director as between rival claimants not parties to the action. Nor can it enjoin a de facto director, holding under color of

an election, from performing the duties of the office. Moir v. Provident Savings Life Assur. Soc., 127 App. Div. 591, 603 (1908); Washington Lighting Co. v. Dimmick, 41 App. Div. 596 (1899). In the latter case the court said, quoting from Ciancimino v. Man (1 Misc. 122): "A court of equity has no inherent power to try the disputed title to corporate office and to enjoin one in possession from the exercise of its functions at the suit of a rival claimant. * * * Such may be done and judgment of ouster rendered only in an action in the nature of a quo warranto instituted by the Attorney-General on behalf of and in the name of the people."

Remedy of Director Illegally Removed from Office.

The remedy of a director who claims that he was illegally removed and another was elected in his place is by quo warranto, under Code Civil Pro., § 1948, and not by mandamus for reinstatement. Peo. ex rel. Manice v. Powell, 201 N. Y. 194 (1911).

Suit Against Directors Unlawfully Holding Over.

At an election of directors the failure of a stockholder to write the Christian name of his candidates on the ballot does not invalidate his vote, and directors holding over on the claim of the invalidity of such ballot may be proceeded against under this section; but the petitioners may not avail themselves of the provisions of the General Corporation Law, section 32. Opinion of Atty. Genl., March 21, 1913.

Action to Declare Forfeiture of Special Franchise.

This section, subdivision 1, confers upon the Attorney-General authority to bring an action to declare the forfeiture of a special franchise granted to a corporation, and such action is to be distinguished from one under the General Corporation Law, section 131, for an annulment of the corporate charter or existence. No leave of court is required for the maintenance of such an action. People v. Bleecker St. & Fulton Ferry R. R. Co., 140 A. D. 611 (1910), affd., 201 N. Y. 594. The word "person," as used in subdivision 1, includes a corporation. Id.

Foreign Corporation; Forfeiture of Certificate of Authority.

In an action under this section against a foreign corporation upon proof of its violation of the various States' statutes prohibiting monopolies in restraint of trade, the court may grant the relief by injunction as provided in General Business Law, section 342, and may also declare forfeited the certificate under the General Corporation Law, section 15, authorizing the corporation to do business in this State. Peo. v. Am. Ice Co., 136 A. D. 180, 184 (1909).

Action for Abatement of Nuisance.

The Attorney-General cannot maintain an action in the name of the people against a corporation, either under the foregoing section or as a matter of common law, to restrain the commission of a nuisance in a city street, where local officials have authority to protect the street. Peo. v. Equity Gas Light Co., 141 N. Y. 232 (1894). The jurisdiction of a court of equity to abate an existing or prevent a threatened nuisance upon application of the Attorney-General, is limited to those public nuisances which affect or endanger the public safety or convenience, and require immediate judicial interposition, and where the relief sought may not with equal facility be obtained by other constituted authorities and public officers. Id.

General Corporation Law.

The court has power under Gen. Corp. Law, § 32, ante, to annul an election and it is not necessary that the Attorney-General should proceed under the above section. Matter of Empire State Supreme Lodge, 118 App. Div. 616 (1907); Matter of Northern Dispensary, 26 Misc. 147 (1899); and see Matter of Ringler & Co., 204 N. Y. 30 (1912). For other cases see Gen. Corp. Law, § 32, ante.

Religious Corporations.

Title to office of a trustee of a religious corporation is to be tried by action under this section rather than by an action in equity. Hartt v. Harvey, 32 Barb. 55 (1860); North Baptist Ch. v. Parker, 36 Barb. 171 (1862). The provision of Gen. Corp. Law, § 32, is also available.

Unincorporated Associations.

The section has no application to unincorporated associations. Boston Baseball Assn. v. Brooklyn Baseball Club, 37 Misc. 521 (1902).

For forms of pleading and judgment in action to try title of officers of a religious corporation see St. Stephen's Church cases, 25 Abb. N. C. 253 (1890).

Where the incumbents who are ousted hold office by virtue of a regularly issued certificate of election and the contest is with regard to the rejection of proper votes or the reception of improper votes, a fine will not be imposed. St. Stephen's Church cases, 25 Abb. N. C. 253 (1890).

THE CONDEMNATION LAW

Laws of 1890, Chapter 95, as Amended

CHAPTER 23 OF THE CODE OF CIVIL PROCEDURE

TITLE 1

Proceedings for Condemnation of Real Property

§ 3357. Short title. This title shall be known as the condemnation law.

This chapter provides a complete system of practice in condemnation proceedings. Dansville & Mt. Morris R. R. Co. v. Hammond, 77 Hun 39 (1894); Matter of Trustees, 137 N. Y. 97 (1893); City of Syracuse v. Stacey, 86 Hun 450 (1895); Village of Canandaigua v. Benedict, 13 A. D. 602 (1897); County of Orange v. Ellsworth, 98 A. D. 281 (1904).

§ 3358. Definitions. The term "person," when used herein, includes a natural person and also a corporation, joint-stock association, the state and a political division thereof, and any commission, board, board of managers or trustees in charge or having control of any of the charitable or other institutions of the state; the term "real property," any right, interest or easement therein or appurtenances thereto; and the term "owner," all persons having any estate, interest, or easement in the property to be taken, or any lien, charge, or incumbrance thereon. The person instituting the proceedings shall be termed the plaintiff; and the person against whom the proceeding is brought, the defendant.

Thus am'd by L. 1896, ch. 589.

One holding an unexpired lease of lands taken is an "owner" within the meaning of this section and if a resident and under no legal disability to convey title and an offer to purchase has not been served upon him, he is entitled to costs under § 3372, post. Peo. v. Thornton, 122 A. D. 287 (1907).

In a proceeding to condemn land for telephone poles, the municipality is not deemed an owner. New Union Tel. Co. v. Marsh, 96 A. D. 122 (1904).

§ 3359. Proceedings. Whenever any person is authorized to acquire title to real property, for a public use by condemnation

the proceeding for that purpose shall be taken in the manner prescribed in this title.

An owner whose property is to be taken by a proposed railroad may review by certiorari the granting of a certificate of public convenience where he claims that there is no evidence showing necessity for the railroad. Peo. ex rel. Potter v. Board of R. R. Comrs., 124 A. D. 47 (1908), affd., 192 N. Y. 573.

Where a private corporation condemns property it cannot take an unqualified fee without statutes expressly authorizing the same. The extent and quality of the interest taken should be measured by public convenience and necessity. Hudson & Manhattan R. R. Co. v. Wendel, 193 N. Y. 166 (1908).

Application and Construction.

The Condemnation Law merely regulates the procedure for the condemnation of property, and authorizes such procedure only when the person instituting it has authority under some independent statute to acquire the title to real property for public use. Matter of Thomson, 86 Hun 405, affd., 147 N. Y. 701 (1895).

The power of eminent domain which resides in the State as an attribute of sovereignty is dormant until called into exercise by an act of the Legislature. Until a statute authorizes an exercise of the power, it is latent and potential merely, and not active or efficient, and the State can neither exercise the prerogative, nor can it delegate its exercise, except through the medium of legislation. Therefore, it is that wherever an attempt is made, either by the officers of the State or by a corporation organized for a public purpose, to take private property under the power of eminent domain, the officers or body claiming the right must be able to point to a statute conferring it. In the absence of statutory authority private property cannot be invaded by this power, however strong may be the reasons for the appropriation. In construing statutes which are claimed to authorize the exercise of the power of eminent domain, a strict, rather than a liberal, construction is the rule. Such statutes assume to call into active operation a power which, however essential to the existence of the government, is in derogation of the ordinary rights of private ownership and of the control which an owner usually has of his property. In re Poughkeepsie Bridge Co., 108 N. Y. 483 (1888); Matter of Thomson, 86 Hun 405, affd., 147 N. Y. 701 (1895); City of Syracuse v. Stacey, 86 Hun 441 (1895).

Statutes delegating the right of eminent domain to corporations, being in derogation of common right, are not to be extended by implication. They must be strictly complied with, but are not to be construed so literally as to defeat the evident purpose of the Legislature. N. Y. & H. R. R. Co. v. Kip, 46 N. Y. 546 (1871).

The propriety of taking private property for a public use, is not a judicial question, but one of political sovereignty, to be determined by the Legislature, either directly or by delegating the power to public agents. People ex rel. Herrick v. Smith, 21 N. Y. 595 (1860).

Procedure.

The clear intention of the Condemnation Law is to adapt the procedure, as far as practicable, to the ordinary procedure in actions and proceedings. The only material change is that the applicant must now go in the first instance to the Special Term, and no longer has an option to proceed first

either at the Special or General Term. Manhattan Ry. Co. v. O'Sullivan, 6 A. D. 571, affd., 150 N. Y. 569 (1896).

As to petition when the road has already been constructed, see 55 Hun 198 (1890), 12 N. Y. Supp. 506, supra (1891).

Description of Property.

It is the petitioner's duty to insert in the petition an accurate specific description, with reasonable certainty, of the precise property rights sought to be condemned, to the end that the proceedings shall comply with the statute, and the property owner be enabled by the petition to understand just what is sought to be taken from him and just what is left, if anything, after the property rights have been taken under the proceedings instituted by the petition. City of Syracuse v. Stacey, 86 Hun 441 (1895).

A description of the real estate to be acquired is not sufficient unless the land is so described as to show its location and the boundaries thereof. In re N. Y. C. & H. R. R. R. Co. v. Rau, 70 N. Y. 191 (1877).

If in the petition, three lots are incorporated in a single description it does not make such lots a single entity or unit, if the fact be otherwise; where there are three independent structures on the property, each lot being used and held by itself, each is to be considered as a separate plot. In re Brooklyn El. R. R. Co., 87 Hun 104 (1895).

The petition need not state whether it is an easement, or the fee of the abutting owners in the street that is sought to be taken. In re Met. El. Ry. Co., 12 N. Y. Supp. 506, 36 St. Rep. 606 (1891). Easements sought to be acquired, which the petition designates as those "Which now are or may be the subject of injury from a construction of said railroad or incidental to its use," are sufficiently described. In re Brooklyn El. R. R. Co. v. Nagel, 75 Hun 590, affd., 150 N. Y. 562 (1896).

There must be no uncertainty in the description of the property to be taken nor in the degree of interest to be acquired. Matter of Water Comrs. of Amsterdam, 96 N. Y. 351 (1884).

A petition asking the condemnation of easements for the erection of a telephone line which merely asks "a right of way or easement for the plaintiff's line of telephone wires and fixtures," is too indefinite as the owner is entitled to know the size, number and location of the poles, their height and the manner in which wires are to be strung. Suffolk Tel. Co. v. Gammon, 113 A. D. 764 (1906).

Where a petition describes the property to be taken as an easement of right of way for the erection of a line of telephones to consist of a designated number of poles, and with the right to trim such trees as may be necessary to protect the said line from interference, the petition is insufficient in that it does not sufficiently state the extent of the right which the petitioner desires to acquire to trim the trees in order that the owner may be informed as to the extent of the interest to be condemned. Bell Tel. Co. of Buffalo v. Parker, 187 N. Y. 299 (1907).

Public Use and Necessity.

The petition should disclose the specific purpose to which the land is to be applied. In re N. Y. C. & H. R. R. R. Co. v. Armstrong, 5 Hun 86 (1875), affd. other grounds, 66 N. Y. 407.

State lands under water may be acquired by condemnation proceedings. In re N. Y. Cable Co., 104 N. Y. 1, 43 (1887).

The right to divert the waters from a natural stream can only be acquired by virtue of the sovereign right of eminent domain and upon making

just compensation, which right it is in certain cases competent for the Legislature to grant to corporations. City of Syracuse v. Stacey, 86 Hun 441 (1895).

Furnishing light to a municipality is a public use and it is no objection that plaintiff is a private corporation so long as the use or purpose to which the property is to be devoted is public. Matter of East Canada Creek El. & Power Co., 49 Misc. 565 (1905), and cases cited. Transportation Corporations Law, § 61, subd. 2, ante, giving the right of condemnation to electric light companies contracting with a municipality is constitutional. Id.

To justify the taking of land for railroad purposes, not only the necessity therefor must exist but such necessity must be required by statute and be provided for in some grant of power, and the corporation must make out a case within the statutory delegation of power when the right to exercise the same is claimed. Erie R. R. v. Stewart, 170 N. Y. 172 (1902).

Rural cemetery associations, whose certificate of incorporation or by-laws do not exclude any person from the privilege on equal terms with others of purchasing a lot or of burial in its cemetery, may constitutionally secure the condemnation of lands for cemetery purposes. Stannards Corners Rural Cemetery Assn. v. Brandes, 14 Misc. 270 (1895).

The mere allegation that property is required for a public park is insufficient. Matter of Meagher, 35 Misc. 601 (1901).

Owners' Names, Residence, Etc.

If it be irregular to join lands of different owners in one petition the court may sever the cases. In re Brooklyn El. R. R. Co. v. Nagel, 75 Hun 590 (1894). One petition to acquire lands of several owners is but one proceeding, and requires one appeal and one allowance of costs. In re Prospect Pk. & C. I. R. R. Co. v. Moynahan, 67 N. Y. 371 (1876).

The word "residence" does not mean the place where the owner actually was when served. So held where the owner had a "residence" in this State but was in Europe at the time of service. In re N. Y. & O. M. R. R. Co., 40 How. 335 (1870).

The residence of a wife having an inchoate right of dower should be given. Marcellus Elec. R. R. Co. v. Crisler, 33 Misc. 1 (1900).

The petition is not fatally defective for failure to state the owner's residence where the latter appeared and filed a claim for damages thus establishing his identity. Matter of City of Rochester, 102 A. D. 99 (1905).

Statement of Disagreement.

A statement that the petitioner has not been able to acquire title to the land because of the owner's demand for unreasonable compensation, and has not been able to agree with the owner, is sufficient. In re Suburban R. T. Co., 38 Hun 553 (1886); In re N. Y., W. S. & B. Ry. Co. v. Watson, 64 How. 216; Marcellus Elec. R. R. Co. v. Crisler, 33 Misc. 1 (1900); but see Met. El. Ry. Co. v. Dominick, 55 Hun 198 (1889), as to the statement on information and belief. A petition which fails to state the reasons for disagreement is defective. In re Marsh, 71 N. Y. 316 (1877).

Good Faith.

A petition made by a railway corporation under this section is defective in case it does not contain, as required by subdivision 7, "a statement that it is the intention of the plaintiff in good faith to complete the work or improvement for which the property is to be condemned." Erie & Central N. Y. Ry. Co. v. Welch, 1 A. D. 140 (1896). Objections may be taken orally to such a petition. Id.

Statute of Limitations.

A proceeding by an owner of land taken for a public use to recover compensation therefor and for resultant damage to his remaining property is not one to recover upon a liability created by statute nor one "to recover damages for an injury to property," and hence it is not within the six years' limitation provided by subdivisions 2 and 3 of section 382 of the Code of Civil Procedure. In re Clark v. Water Comrs. of Amsterdam, 148 N. Y. 1 (1896), revsg. 74 Hun 294.

§ 3360. **Petition; what to contain.** The proceeding shall be instituted by the presentation of a petition by the plaintiff to the supreme court setting forth the following facts:

1. His name, place of residence, and the business in which engaged; if a corporation or joint-stock association, whether foreign or domestic, its principal place of business within the state, the names and places of residence of its principal officers, and of its directors, trustees or board of managers, as the case may be, and the object or purpose of its incorporation or association; if a political division of the state, the names and places of residence of its principal officers, and if the state or any commission or board of managers or trustees in charge or having control of any of the charitable or other institutions of the state, the name, place of residence of the officer acting in its or their behalf in the proceedings.

Thus am'd by L. 1896, ch. 589.

2. A specific description of the property to be condemned and its location, by metes and bounds, with reasonable certainty.

3. The public use for which the property is required and a concise statement of the facts showing the necessity of its acquisition for such use.

4. The names and places of residence of the owners of the property; if an infant, the name and place of residence of his general guardian, if he has one, if not, the name and place of residence of the person with whom he resides; if a lunatic, idiot, or habitual drunkard, the name and place of residence of his committee or trustee, if he has one; if not, the name and place of residence of the person with whom he resides. If a non-resident, having an agent or attorney residing in the state authorized to contract for the sale of the property, the name and place of residence of such agent or attorney; if the name or place of residence of any owner can not after diligent inquiry be ascertained, it may

be so stated with a specific statement of the extent of the inquiry which has been made.

5. That the plaintiff has been unable to agree with the owner of the property for its purchase and the reason of such inability.

6. The value of the property to be condemned.

7. A statement that it is the intention of the plaintiff, in good faith, to complete the work or improvement, for which the property is to be condemned; and that all the preliminary steps required by law have been taken to entitle him to institute the proceeding.

8. A demand for relief, that it may be adjudged that the public use requires the condemnation of the real property described, and that the plaintiff is entitled to take and hold such property for the public use specified, upon making compensation therefor, and that commissioners of appraisal be appointed to ascertain the compensation to be made to the owners for the property so taken.

Under an allegation that the petitioner has taken all the preliminary steps required by law to entitle it to institute the proceeding, proof may be given of the necessary facts showing compliance with the statute. Dexter & Northern R. R. Co. v. Foster, 64 Misc. 500 (1909).

A petition need not state the degree of interest sought to be acquired in the street, whether fee, easement or leasehold, nor need it point out to each owner the surrounding conditions and indicate how he, in particular, is to be affected. Dexter & Northern R. R. Co. v. Foster, 64 Misc. 500 (1909). The petition must specifically describe the property sought to be acquired. Id.

A final order in condemnation proceedings is an order confirming or dismissing the proceeding or finally terminating the matter. An order denying a motion to amend the proceedings and the map filed is not final, and not appealable to the Court of Appeals. Matter of Simmons, 206 N. Y. 577 (1912).

Where there are conflicting claims of ownership all persons claiming such ownership are necessary parties to the proceeding. N. Y. Central & H. R. R. R. Co. v. Matthews, 70 Misc. 567 (1911).

The owner of lands abutting upon navigable waters is a proper party to a proceeding to condemn lands under water, as he has riparian rights therein even though he has no fee. N. Y. C. & H. R. R. R. Co. v. Mathews, 144 A. D. 732 (1911). The commissioners in condemnation proceedings have no power to determine questions of disputed title. Id.

In proceedings by a railroad company for the condemnation of property in order to widen its right of way and eliminate curves, it is left to the company to a large extent to determine, under the delegation of power to it by the State, the extent of its wants, and to fix upon the location of lands, subject to the qualification that the purposes for which the land is to be taken are strictly within its charter. Where a reasonable necessity is shown, the courts will not interfere to control that discretion, unless it will result in great injury or is influenced by some improper motive. N. Y. Central & H. R. R. R. Co. v. Albany Steam Trap Co., 161 A. D. 329 (1914), and cases cited.

It is a compliance with subdivision 7 of this section to embody in the petition the phraseology of said subdivision. Rochester Ry. Co. v. Robinson, 133 N. Y. 242 (1892). This section prescribes the method of judicial procedure in those cases where by virtue of the provisions of some other law, the exercise of the right of eminent domain has been conferred for public purposes. Id.

Verification of Petition.

A petition verified by the attorney for a railroad company was held to have been verified by an officer thereof. In re St. Law. & Adirondack R. R. Co. v. De Camp, 133 N. Y. 270 (1892). A general land agent having charge of the purchase of lands for the purposes of the company may also verify the petition. In re N. Y., Lack. & W. Ry. Co., 33 Hun 148, affd., 98 N. Y. 664 (1885).

Objections.

Objections to the regularity of the proceedings must be made upon the presentation of the petition for the appointment of commissioners. N. Y. & E. R. R. Co. v. Corey, 5 How. 177 (1850); In re N. Y., W. S. & B. Ry. Co. v. Watson, 64 How. 217 (1882); In re N. Y. & Jamaica R. R. Co. v. Wilson, 21 How. 434 (1860); In re Union El. Ry. Co., 8 N. Y. Supp. 813, 30 St. Rep. 164 (1890); see, also, Roch., Horn. & Lack. R. R. Co. v. Hartshorn, 7 N. Y. Supp. 279, 26 St. Rep. 753 (1889); In re Board of Supervisors, 57 Misc. 665 (1908).

When a petition in condemnation proceedings is duly presented and no sufficient cause in opposition is shown, it is the duty of the court to make an order appointing commissioners to ascertain the compensation to be made to the property owner, and, when their report comes in to be confirmed by the court, the proper judicial action may be taken, either in confirming it, or in setting it aside for irregularity or for error of law in the proceedings. In re Southern Boulevard R. R. Co., 146 N. Y. 352 (1895).

Sufficiency of Petition; Amendments, etc.

For discussion of sufficiency of a petition for condemnation for water supply in connection with Village Law, § 222, see Village of Waverly v. Waverly Water Co., 127 A. D. 440 (1908), affd., 194 N. Y. 545, and Matter of Roe, 59 Misc. 535 (1908).

Proceedings for condemnation under section 223 of the Village Law must be brought in the name of the village and not in the name of the board of water commissioners. Matter of Roe, 59 Misc. 535 (1908).

In a proceeding to condemn an alley, subdivision 3 is complied with by an allegation that the street is unnecessary and useless as a public street, is a menace and will necessitate a large expense in maintaining the same and that it is not desired by abutting owners. Matter of City of Rochester, 102 A. D. 199 (1905).

The petition is not defective for failing to contain the statement specified in subdivision 7 as such allegation is not vital in a proceeding to close an alley. Matter of City of Rochester, 102 A. D. 199 (1905).

The court may allow a defective petition to be cured by amendment at the hearing. Matter of Suburban R. T. Co., 38 Hun 553 (1886).

§ 3361. Notice of presentation of petition; upon whom served. There must be annexed to the petition a notice of the time and place at which it will be presented to a special term of the supreme court, held in the judicial district where the property or some portion of it is situated, and a copy of the petition and notice must be served upon all the owners of the property at least eight days prior to its presentation.

In a proceeding to condemn land for telephone poles, the municipality is not an owner and need not be made a party. New Union Tel. Co. v. Marsh, 96 A. D. 122 (1904).

Mortgagees of record are entitled to notice. Matter of Oneida St., 22 Misc. 235 (1897).

§ 3362. Service of petition and notice, how made. Service of the petition and notice made must be made in the same manner as the service of a summons in an action in the supreme court is required to be made, and all the provisions of articles one and two of title one of chapter five of this act, which relate to the service of a summons, either personally or in any other way, and the mode of proving service, shall apply to the service of the petition and notice. If the defendant has an agent or attorney residing in this state, authorized to contract for the sale of the real property described in the petition, service upon such agent or attorney will be sufficient service upon such defendant. In case the defendant is an infant of the age of fourteen years or upwards, a copy of the petition and notice shall also be served upon his general guardian, if he has one, if not, upon the person with whom he resides.

§ 3363. Appearance for an infant, idiot, lunatic or habitual drunkard. If a defendant is an infant, idiot, lunatic or habitual drunkard, it shall be the duty of his general guardian, committee or trustee, if he has one, to appear for him upon the presentation of the petition and attend to his interests, and in case he has none, or in case his general guardian, committee or trustee fails to appear for him, the court shall, upon the presentation of the petition and notice, with proof of service, without further notice, appoint a guardian ad litem for such defendant, whose duty it shall be to appear for him and attend to his interests in the proceeding, and, if deemed necessary to protect his rights, the court may require a general guardian, committee or trustee, or a guard-

ian ad litem to give security in such sum and with such sureties as the court may approve. If a service other than personal has been made upon any defendant, and he does not appear upon the presentation of the petition, the court shall appoint some competent attorney to appear for him and attend to his interests in the proceeding.

§ 3364. Appearance of parties. The provisions of law and of the rules and practice of the court, relating to the appearance of parties in person or by attorney in actions in the supreme court, shall apply to the proceeding from and after the service of the petition, and all subsequent orders, notices and papers may be served upon the attorney appearing and upon a guardian ad litem in the same manner and with the same effect as the service of papers in an action in the supreme court may be made.

A party putting in a general appearance and proceeding without objection submits himself to the jurisdiction of the court. N. Y., L. & W. Ry. Co. v. Scheu, 33 Hun 148, affd., 98 N. Y. 664 (1885); In re Roch., Horn. & L. R. R. Co. v. Hartshorn, 7 N. Y. Supp. 279, 26 St. Rep. 753 (1889).

§ 3365. Answer; contents. Upon presentation of the petition and notice with proof of service thereof, an owner of the property may appear and interpose an answer, which must contain a general or specific denial of each material allegation of the petition controverted by him, or of any knowledge or information thereof sufficient to form a belief, or a statement of new matter constituting a defense to the proceeding.

Defenses.

In condemnation proceedings brought by a corporation to acquire lands, an answer which merely denies any knowledge or information sufficient to form a belief as to the organization of the corporation and the powers conferred upon it by statute is insufficient to raise an issue, for the provisions of section 1776 of the Code apply to condemnation proceedings. L. I. R. R. Co. v. Jones, 151 A. D. 407 (1912).

The answer in the form prescribed by this section raises an issue, and a corporation seeking to proceed must meet it by proof. City of Syracuse v. Benedict, 86 Hun 343 (1895).

The intention of the company in good faith to construct and operate the road may be put in issue. In re Met. Transit Co. v. Mayor, etc., 111 N. Y. 588 (1889).

If the corporation has forfeited its corporate rights that fact may be averred by the landowner in answer to the application. In re Brooklyn, W. & N. Ry. Co., 72 N. Y. 245 (1878); see In re Kings Co. El. R. R. Co. v. Nathan, 105 N. Y. 97, 119 (1887).

The mere fact that the land to be acquired is not needed for present purposes is not necessarily a defense. In re Staten Isl. R. T. Co., 103 N. Y. 251

(1886). Nor that the company owns other lands claimed to be equally available. In re N. Y. C. & H. R. R. R. Co. v. Charlotte Iron Works, 28 St. Rep. 64, aff'd., 121 N. Y. 665 (1890).

The fact that a railroad corporation has, by virtue of a private contract, surrendered its right to use steam on a small portion of its route, and that it has violated such contract, is no defense in proceedings instituted by it to condemn lands shown to be necessary for its corporate purpose. Matter of Long Island R. R. Co., etc., 143 N. Y. 67 (1894).

§ 3366. Verification of petition and answer. A petition or answer must be verified, and the provisions of this act relating to the form and contents of the verification of pleadings in courts of record, and the persons by whom it may be made, shall apply to the verification.

§ 3367. Trial of issues; referee. The court shall try any issue raised by the petition and answer at such time and place as it may direct, or it may order the same to be referred to a referee to hear and determine, and upon such trial the court or referee shall file a decision in writing, or deliver the same to the attorney for the prevailing party, within twenty days after the final submission of the proofs and allegations of the parties, and the provisions of this act relating to the form and contents of decisions upon the trial of issues of fact by the court, or a referee, and to making and filing exceptions thereto, and the making and settlement of a case for the review thereof upon appeal, and to the proceedings which may be had, in case such decision is not filed or delivered within the time herein required, and to the powers of the court and referee upon such trial, shall be applicable to a trial and decision under this title.

Order of Reference.

When the petition of a railroad corporation shows that all the preliminary steps have been taken and that certain lands are necessary, the mere fact that the map or route approved by the New York city board of rapid transit commissioners does not include said lands, is not ground for refusing an order of reference to determine whether in fact such lands are necessary. Hudson & Manhattan R. R. Co. v. Wendel, 112 A. D. 822 (1906), affd., 186 N. Y. 535.

If the order of reference is made at Special Term by a justice who was disqualified because appointed to the Appellate Division, it is a nullity and the fact that the parties consented to the entry of the order cannot confer jurisdiction, but where the reference has been had and judgment ordered by the referee, the court may make an order appointing such referee and enter the same nunc pro tunc. Owasco Cemetery v. Teller, 110 A. D. 450 (1906).

Where an answer is interposed and after a reference the report of the referee orders judgment to be entered in accordance with such report, judg-

ment may be entered accordingly upon the filing of the report without further application to the court. Erie & Jersey R. R. Co. v. Brown, 57 Misc. 161 (1907).

Burden of Proof.

The burden is on the petitioner to show the necessity for acquiring the property, its intention to complete the road, and its endeavor to acquire by purchase. In re Met. El. Ry. Co., 12 N. Y. Supp. 506; In re Staten I. R. T. Co. v. Bechtel, 20 W. Dig. 15 (1884).

The burden is on the owner as to an issue raised concerning petitioner's incorporation. Same v. Bodine, 38 Hun 381 (1885); In re Roch., Horn. & Lack. R. R. Co. v. Babcock, 110 N. Y. 119 (1888).

See, also, In re N. Y. C. R. R. Co. v. Armstrong, 66 N. Y. 407 (1876); In re Lockport & Buf. R. R. Co. v. N. Y. C. & H. R. R. R. Co., 77 N. Y. 557 (1879).

Appeal.

Where, after a trial before a referee of the issues raised by an answer in condemnation proceedings, a report has been made and judgment has been entered dismissing the petition, with costs, but "without prejudice to the plaintiff's right to begin other proceedings," an appeal therefrom by the defendant will be dismissed. Village of Canandaigua v. Benedict, 13 A. D. 600 (1897).

§ 3368. Other provisions applicable. The provisions of title one of chapter eight of this act shall also apply to proceedings had under this title.

Where the petition through inadvertence omits a highway to be condemned for railroad purposes because of the belief that the defendants had no title thereto and the mistake is discovered before the award is made, the petition may be amended on terms so as to include the highway. Matter of Lake Shore & M. S. R. R. Co., 53 Misc. 340 (1907), revsd. on other grounds, 112 N. Y. Supp. 1134.

Amendment of petition; see In re Met. Transit Co., 45 Hun 159, affd., 111 N. Y. 588 (1889); In re Prosp. Pk. & C. I. R. R. Co. v. Moynahan, 67 N. Y. 371 (1876); In re N. Y., W. S. & B. Ry. Co. v. Walsh, 89 N. Y. 453 (1882); In re Roch., Hornsv. & Lacka. Ry. Co. v. Babcock, 45 Hun 126, affd., other grounds, 110 N. Y. 119 (1888).

Appointment of a receiver of petitioner and his addition as a petitioner does not affect the rights of either party. In re Roch., Horn. & L. R. R. Co. v. Hartshorn, 26 St. Rep. 753 (1889).

§ 3369. Judgment; commissioners, appointment of. Judgment shall be entered pursuant to the direction of the court or referee in the decision filed. If in favor of the defendant the petition shall be dismissed, with costs to be taxed by the clerk at the same rates as are allowed, of course, to a defendant prevailing in an action in the Supreme Court, including the allowances for proceedings before and after notice of trial. If the decision is in favor of the plaintiff, or if no answer has been interposed and

it appears from the petition that he is entitled to the relief demanded, judgment shall be entered, adjudging that the condemnation of the real property described is necessary for the public use, and that the plaintiff is entitled to take and hold the property for the public use specified, upon making compensation therefor, and the court shall thereupon appoint three distinterested and competent freeholders, residents of the judicial district embracing the county where the real property, or some part of it, is situated, or of some county adjoining such judicial district, commissioners to ascertain the compensation to be made to the owners for the property to be taken for the public use specified, and fix the time and place for the first meeting of the commissioners. Provided, however, that in any such proceeding instituted within the first or second judicial district, such commissioners shall be residents of the county where the real property, or some part of it, is situated, or of some adjoining county. If a trial has been had, at least eight days' notice of such appointment must be given to all the defendants who have appeared. The parties may waive, in writing, the provisions of this section as to the residence of the commissioners, and in that case they may be residents of any county in the State. Where owners of separate properties are joined in the same proceeding, or separate properties of the same owner are to be condemned, more than one set of commissioners may be appointed.

Thus am'd by L. 1895, ch. 530.

Appointment of Commissioners.

If one of the commissioners has acted as agent of the petitioner in procuring rights of way, he is not unbiased and the mere fact that he has acted is sufficient to require the setting aside of the award. Rochester, Syracuse & E. R. R. Co. v. Tolan, 116 A. D. 696 (1906). Such commissioner acts in a judicial capacity and must be free from suspicion of partiality or bias. Id.

Allegations of the verified petition not denied by affidavits regarded as sufficient for the order appointing commissioners. In re N. Y., L. & W. Ry. Co., 99 N. Y. 12 (1885).

The appointment of three commissioners who had been selected by the parties discussed. In re N. Y., Lacka. & W. Ry. Co. v. Bennett, 33 Hun 639, affd., 98 N. Y. 447 (1885); 40 Hun 130, revsd., 102 N. Y. 704 (1886).

An application for appointment of commissioners should not be denied because other companies having coincident routes have refused their consent. Inability to procure the assent of landowners is the statutory prerequisite. In re Thirty-fourth St. R. R. Co., 102 N. Y. 343 (1886).

Where two of the commissioners appointed by the court were neither residents of the county where the property was situated nor residents of some adjoining county, it was held that the claimants had notice by the order

appointing them and it did not affect the jurisdiction of the commission, having been waived. Matter of City of N. Y.; Iselin, et al., 65 Hun 424 (1895).

As a condition precedent to appointment of commissioners in condemnation proceedings the petitioner must prove inability to agree with the owner upon the purchase price of the land after an effort made in good faith. Matter of N. Y., Westchester & Boston Ry. Co., 151 A. D. 50 (1912).

Removal of Commissioner.

Grounds for removal of a commissioner of appraisal discussed. Matter of Low, 142 A. D. 533 (1911); Matter of Bensel, 138 A. D. 581 (1910).

Vacancy in Commission.

Under this section and the Gen. Construction Law, § 41, the survivors of the commission have power to continue the work when one of the commissioners dies. There is no provision for the appointment of a new commissioner to fill the vacancy. Lake Shore & M. S. Ry. Co. v. Mahle, 72 Misc. 129 (1911).

Waiver of Irregularities.

Where commissioners were appointed on consent of parties, and it subsequently appeared one of them was not a freeholder, held, that the irregularity was waived. In re N. Y., W. S. & B. Ry. Co. v. Hart, 35 Hun 575 (1885).

A corporation by going into court and consenting to the appointment of commissioners to determine the damages alleged to have been sustained by a landowner estops itself from thereafter raising any question as to the authority of the court to make such appointment; and by thereafter going before the commission and participating in its proceedings without objection, and taking chances of a favorable result, it will not be permitted, upon being disappointed, to raise the question of lack of authority or of irregularity in the proceedings. Akin v. Water Comrs. of Amsterdam, 82 Hun 265 (1894).

Unfair Appraisal.

Condemnation proceedings are not invalidated on the theory that one commissioner was not disinterested merely because he was an attorney for another railroad which owned a majority of the stock of the condemnor, in the absence of proof of bias or prejudice. Matter of N. Y., Westchester & Boston Ry. Co., 151 A. D. 50 (1912).

Commissioners may act upon their own judgment and upon information obtained from a view of the lands as well as upon the testimony taken. Their award will not be set aside for inadequacy or excessiveness unless palpably wrong in either respect. N. Y., Westchester & Boston Ry. Co., 151 A. D. 50 (1912).

The appointment of a commissioner's son as a station agent by the company pending the proceedings is ground for setting aside an appraisal. Same v. Townsend, 36 Hun 630 (1885); see, also, Alb. Nor. R. R. Co. v. Cramer, 7 How. 164 (1852); In re Buf., N. Y. & Phil. R. R. Co. v. McIntosh, 32 Hun 289 (1884).

Evidence that a commissioner held out for an unreasonably low valuation in order to force the making of an inadequate award is considered and held insufficient. Terminal Ry. v. Gerbereux, 55 Misc. 1 (1907), citing leading cases on disqualification of commissioners.

Costs and Allowances.

There is no authority for granting an extra allowance to a defendant who was successful on the trial of the issues raised by his answer to the petition. The word "allowances" as used in this section does not mean extra allowances, but only those specified in Code Civ. Pro., § 3251. Erie & Jersey R. R. Co. v. Brown, 123 A. D. 655 (1908).

The only case in which a defendant is entitled to costs upon the preliminary hearing is when he succeeds in having the petition dismissed. Dansville & Mt. Morris R. R. Co. v. Hammond, 77 Hun 39 (1894). The proper practice in condemnation proceedings considered. Id.

§ 3370. Duties and powers of commissioners. The commissioners shall take and subscribe the constitutional oath of office. Any of them may issue subpœnas and administer oaths to witnesses; a majority of them may adjourn the proceeding before them, from time to time in their discretion. Whenever they meet, except by appointment of the court or pursuant to adjournment, they shall cause at least eight days' notice of such meeting to be given to the defendants who have appeared, or their agents or attorneys. They shall view the premises described in the petition, and hear the proof and allegations of the parties, and reduce the testimony taken by them, if any, to writing, and after the testimony in each case is closed, they, or a majority of them, all being present, shall, without unnecessary delay ascertain and determine the compensation which ought justly to be made by the plaintiff to the owners of the property appraised by them; and, in fixing the amount of such compensation, they shall not make any allowance or deduction on account of any real or supposed benefits which the owners may derive from the public use, for which the property is to be taken, or the construction of any proposed improvement connected with such public use. But in case the plaintiff is a railroad corporation and such real property shall belong to any other railroad corporation, the commissioners on fixing the amount of such compensation, shall fix the same at its fair value for railroad purposes. They shall make a report of their proceedings to the supreme court with the minutes of the testimony taken by them, if any; and they shall each be entitled to six dollars for services for every day they are actually engaged in the performance of their duties, and their necessary expenses to be paid by the plaintiff; provided, that in proceedings within the counties of New York and Kings such commissioners shall be entitled to such additional compensation not exceeding twenty-

five dollars for every such day, as may be awarded by the court, and provided that in proceedings instituted by a village or any board thereof under this title such commissioners shall be entitled to such additional compensation, not exceeding five dollars for every such day, as may be awarded by the court.

Thus am'd by L. 1898, ch. 384; L. 1913, ch. 232.

Proof of Structural Value.

When a building has an intrinsic value which must be added to the land value to determine the value of the entire property taken, the owner is entitled to prove the structural value of the building which is cost of reproduction after making proper deductions for wear and tear. These two values together show the value of the land as enhanced by the building thereon and are the measure of compensation. Matter of City of New York, 198 N. Y. 84 (1910).

Lands Already Taken for a Public Use.

Land already taken by condemnation or acquired by purchase for public use should not be taken for another public use unless the reasons therefor are special, unusual or peculiar and unless the new use would not interfere with or destroy the first use and the legislative intent that they should be so taken is shown by express terms or necessary implication. N. Y. C. & H. R. R. R. Co. v. Buffalo, 200 N. Y. 113 (1910).

Lands Used for Both Railroad and Street Purposes.

Lands may be used for railroad purposes and for a highway crossing at same time and the company and the municipality have a common right of use, but the use by either must not be inconsistent with the rights of the other. N. Y. C. & H. R. R. R. Co. v. Buffalo, 200 N. Y. 113 (1910).

Award, to Whom Paid.

A person claiming a portion of an award made to unknown owners is entitled to intervene in a proceeding instituted to ascertain to whom the award shall be paid. Matter of N. Y. City (public park), 136 A. D. 654 (1910).

Commissioners' Oath.

The omission of the word "faithfully" from the constitutional oath which the statute requires the commissioners to take is sufficient to invalidate the proceedings unless the parties can be held to have waived the objection by going on without calling attention to the defect until the report was made. Matter of City of N. Y.; Iselin, et al., 85 Hun 424 (1895).

Procedure at Hearings.

The order in which the commissioners shall proceed is entirely in their discretion. Alb. Nor. R. R. Co. v. Lansing, 16 Barb. 68 (1852).

The landowner has the right to open and close the argument. In re N. Y., Lack. & W. Ry. Co. v. Scheu, supra. The commissioners must hear all evidence which would be competent in a court on similar questions. Roch. & Syr. R. R. Co. v. Budlong, 6 How. 467 (1851). They are controlled by established rules of evidence. Troy & B. R. R. Co. v. Nor. Turnpike Co., 16 Barb.

100 (1851); Utica, C. & S. V. R. R. Co. v. Mening, 56 Barb. 456 (1868). An error in receiving evidence is not cured by the certificate of a commissioner that it did not affect the report. In re N. Y., Lack. & W. Ry. Co. v. Haskin, 29 Hun 1 (1883). Nor by a statement to that effect in their report. In re N. Y., W. S. & B. Ry. Co. v. Sutherland, 35 Hun 260 (1885). But errors occurring in the report of testimony may be corrected by the commissioners. Same v. Judson, 33 Hun 293 (1884).

It is the duty of the commissioners to view the premises and hear the proofs and allegations of parties. In re N. Y., Lack. & W. Ry. Co. v. Scheu, 33 Hun 148, affd., 98 N. Y. 664 (1891); Same v. Longwell, 63 How. 265 (1882); Troy & Boston R. R. Co. v. Lee, 13 Barb. 169 (1852); In re N. Y. El. R. R. Co., 29 St. Rep. 190; In re Kings Co. El. Ry. Co. v. Smith, 15 N. Y. Supp. 516.

Award.

An elevated railroad company, even when acting with the permission of municipal authorities, in enlarging its structures so as to destroy the easements of an adjoining landowner must make compensation. Rothschild v. Interborough Rapid Transit Co., 162 A. D. 532 (1914).

An owner of lands should not be allowed damages for machinery or fixtures which can be removed from the buildings without injury thereto. Jackson v. State of N. Y., 160 A. D. 110 (1914).

The mere fact that land about to be condemned by a railroad company is within the lines of its road does not give it additional value. Its condition and situation are to be considered at the time it is taken and not as enhanced by the purpose for which it is taken. N. Y. Central & H. R. R. R. Co. v. Mills, 160 A. D. 6 (1913).

Defendants may show the highest utility and opportunity for improvement of the property to be condemned so that its present market value may be determined. N. Y. Telephone Co. v. DeNogelles Brick Co., 154 A. D. 845 (1913), affd., 209 N. Y. 526.

Although commissioners of appraisal in condemnation proceedings may regard any use for which the property is advantageously adapted, and even a special value of the party condemning by reason of some intrinsic quality in the property itself, the real question is what has the owner lost and not what has the party acquiring the property gained. N. Y. Central & H. R. R. R. Co. v. Mills, 160 A. D. 6 (1913).

Market value is the price the property will bring when offered for sale by one desiring but not obliged to sell, and bought by one under no necessity of buying. N. Y., Westchester & Boston Ry. Co., 151 A. D. 50 (1912). The mere fact that lands are within the lines of a proposed railroad does not enhance its value to the railroad. Id.

Where lands of a railroad company are to be acquired by the State the company is entitled not only to the market value of the lands taken, but to the depreciation of its other, contiguous lands not taken, by reason thereof. Lehigh Valley Ry. Co. v. State of New York, 66 Misc. 432 (1910).

Evidence of prices paid by the condemnor for other property in the neighborhood is not proof of value. N. Y., Westchester & Boston Ry. Co., 151 A. D. 50 (1912).

Lands subject to a covenant restricting the use to residential purposes may be taken for railroad purposes by condemnation. N. Y., Westchester & Boston Ry. Co., 151 A. D. 50 (1912).

A street railroad is not a street use, but an additional burden for which the fee owner is entitled to compensation. Rasch v. Nassau Elec. R. R. Co., 198 N. Y. 385 (1910).

Where a street railroad is built the owner of the fee in the street is entitled to damages for injury to his easements of light, air and access and for that due to the noise and vibration resulting from the operation of cars. Rasch v. Nassau Elec. R. R. Co., 198 N. Y. 385 (1910).

Where suburban property is clearly available for building lots it should be appraised on the basis of lot values rather than the total acreage. In re Simmons, 141 A. D. 120 (1910), affd., 202 N. Y. 606; followed, In re B'd of Water Supply, 73 Misc. 231; County of Westchester v. Wakefield Park Realty Co., 71 Misc. 485, and In re Simmons, 144 A. D. 255, revsd. on other grounds, 203 N. Y. 241.

Price at which an owner has authorized a sale is competent evidence as to value, but not the price at which a former deceased owner agreed to sell. Matter of Simmons, 68 Misc. 65 (1910).

Evidence as to the suitability of the land for the cultivation of any particular product should be received. Matter of Simmons, 68 Misc. 68 (1910).

Damages are to be awarded as of the date when the award is made. Matter of City of N. Y. (Titus Street), 139 A. D. 238 (1910).

The value of land burdened by private assessments is much less than its value if wholly unencumbered. But where an owner, in order to obtain a higher award, delays filing a map showing a proposed street, and after entering into contracts of sale of lots bordering on such proposed street, induces the city to take title at an early date and delays conveying to purchasers until the city has given title, he violates the spirit if not the letter of the law and is entitled to only nominal damages. Matter of the City of New York (Edgewater Road), 138 A. D. 203 (1910), affd., 199 N. Y. 560.

In a condemnation proceeding by a railroad company general benefits to land not taken cannot be offset against the value of land actually taken, but may be offset against consequential damages to that part of the land not taken. Matter of N. Y., Westchester & Boston Ry. Co., 73 Misc. 219 (1911).

Where the awards are more than twice the average amounts stated by defendant's witnesses and are only one-half the amount stated by claimant's witnesses, confirmation will not for that reason be denied. Johns v. Vil. of Salamanca, 67 Misc. 521 (1910).

Value of land may not be determined by showing what was paid for other land similarly situated. Matter of City of New York, 142 A. D. 665 (1911).

One who purchased land knowing that it was to be taken for a street opening and erected a building situated partly on the portion to be taken is entitled to no award for the building, as there was no intention of making it a permanent attachment to the realty. In re City of N. Y., 137 A. D. 630 (1910), affd., 199 N. Y. 567; see, also, In re City of N. Y., 196 N. Y. 255.

The owner is entitled to receive the market value of the property which is its fair value as between one who wants to purchase and one who wants to sell. He is not entitled to an enhanced value merely because the land is peculiarly adapted to the use to which it is to be put. Evidence as to the value of the buildings should be included, but evidence of the cost of construction is inadmissible. Matter of Simmons, 130 A. D. 350 (1909), affd., 195 N. Y. 573.

In estimating the damage caused by taking easements of light and air the possible benefits to the realty may be considered. Manhattan Ry. Co. v. Stuyvesant, 126 A. D. 848 (1908).

The rental of the improved realty is relevant on the question of fee value. Actual rents given and received within the time proper to be considered is competent, but evidence of what the property would earn if apartment houses were built thereon is too uncertain and speculative. Matter of City of New York, 118 A. D. 272 (1907).

Where the owner of two strips of land divided by a railroad has reserved the right of access from one to the other which constitutes a water front, an award made on the condemnation of the water front property should include compensation for loss of access to the water upon the principle that the owner is entitled to receive the value of the land taken and compensation for the injury to the residue. N. Y. Central & H. R. R. R. Co. v. Marshall, 120 A. D. 742 (1907), and cases cited.

Where village authorities against the command of the owner wrongfully constructed a reservoir and pipes before instituting the proceedings, and proceedings are thereafter instituted, the owner is entitled to have the value of the structure placed upon his premises before the institution of the proceedings considered by the commissioners in arriving at their determination as to the amount of compensation. The question to be determined is how much the improvements placed upon the property enhance the value thereof and is neither the cost of the improvements nor their value or the value of their use to the village. Village of St. Johnsville v. Smith, 184 N. Y. 341 (1906).

Where on dissolution of a partnership owning lands standing in the names of the partners as tenants in common, one assigned his interest therein to the other, such assignee and his grantees obtained an equitable right to the assignor's interest and are entitled to an award made in proceedings instituted prior to said assignment. Rosenbaum v. City of N. Y., 129 A. D. 351 (1908).

A landlord and tenant may agree to an apportionment of damages for property taken which either of them might claim if he were the owner of the entire estate. Matter of City of N. Y., 193 N. Y. 117 (1908); see, also, Matter of City of N. Y., 192 N. Y. 295 (1908), modifying 122 A. D. 890, and Matter of City of N. Y., 182 N. Y. 281 (1905), affg. 101 A. D. 527.

Where real estate is sold under condemnation proceedings the proceeds thereof become personal estate as if the sale had been voluntary, and the devisee of the property under a will made by the owner before the sale is not entitled to the proceeds. Ametrano v. Downs, 170 N. Y. 388 (1902).

As to damages, the proper inquiry is, what is the fair marketable value of the whole property; what will be the fair marketable value of the property not taken? The difference is the amount to be awarded. In re N. Y., Lack. & W. Ry. Co. v. Arnot, 27 Hun 151 (1882); In re Utica, C. & S. V. R. R. Co. v. Mening, 56 Barb. 456 (1868); In re Gilbert El. Ry. Co., 38 Hun 438 (1886); In re Pros. Pk. & C. I. R. R. Co. v. Sheehy, 24 Hun 199 (1881); In re N. Y., Lack. & W. Ry. Co. v. Haskin, 29 Hun 1 (1883). Where plaintiffs occupied premises for their business and there was no evidence to show any special damage to that business, they are entitled to recover damages based upon the rental, instead of the usable value of the property if they so elect. Woolsey v. N. Y. El. R. R. Co., 134 N. Y. 323 (1892). The award for compensation should include the value of the land taken, and in addition the depreciation in value of that from which it is severed. In re N. Y., W. S. & B. Ry. Co. v. Duddleston, 29 Hun 609; Same v. Sutherland, 35 Hun 260 (1885); Henderson v. N. Y. C. R. R. Co., 78 N. Y. 423 (1879), 6 How. 467, supra; In re N. Y. C. & H. R. R. R. Co. v. Met. Gas Lt. Co., 6 Hun 149 (1875); Purdy v. Man. El. Ry. Co., 13 N. Y. Supp. 295; In re B'klyn El. R. R. Co., 55 Hun 165; Newman v. Met. El. Ry. Co., 118 N. Y. 618 (1890). Inconveniences from noise, smoke, etc., may be taken into consideration in estimating depreciation of balance. Brooklyn Park Comrs. v. Armstrong, 45 N. Y. 234 (1871); see, also, Kings Co. El. Ry. Co. v. Smith; Same v. Bryan, 15 N. Y. Supp. 516 (1891), 39 St. Rep. 876. The land must be appraised

at its actual value; a reservation of easements and privileges to the owner cannot be made. Hill v. M. & H. R. R. Co., 7 N. Y. 152 (1852); see, also, In re Hartf. & Conn. W. R. R. Co., 65 How. 133 (1883). An appraisal will not be set aside as excessive unless the excess is plain and palpable on the evidence. In re N. Y., Lack. & W. Ry. Co. v. June. C. & R. R. Co., 27 Hun 116 (1882).

In determining the measure of compensation to be awarded the commissioners must take into consideration the availability of the property for the use to which it is to be devoted by the party seeking its acquisition. Matter of City of N. Y.; Iselin, et al., 85 Hun 424 (1895).

Where the fee of land already subject to the right of passage thereover by owners of adjacent lots is taken from the owner, he is entitled to such substantial damages as may be ascertained by measuring the effect upon the value of his remaining property of the loss of the fee of the street, and this rule is based upon the fact that the ownership of the fee of the land in a street vests in the owner certain rights, of which he is deprived by the taking of the fee of the land for street purposes. Matter of Opening 173d Street, 78 Hun 487 (1894).

A possible reverter of the land is never contemplated in the assessment of damages. The appropriation is regarded as permanent and the damages are awarded upon that basis. Miner v. N. Y. C. & H. R. R. R. Co., 123 N. Y. 242 (1890).

Loss of business profits and good will are not substantial grounds for damages. Troy & Boston R. R. Co. v. Northern Turnp. Co., 16 Barb. 100 (1852); In re N. Y., W. S. & B. Ry. Co. v. Cosack, 35 Hun 633 (1885). Appraisal of leasehold estate, see same; also, In re N. Y. C. & H. R. R. R. Co. v. Pierce, 35 Hun 306 (1885); N. Y., W. S. & B. Ry. Co. v. Bell, 28 Hun 426 (1882).

Where it appears that there has been an almost unparalleled rise in the value of similar property and the increase in value has not been shared by the parcel to be taken, its failure so to share in the increase in value may properly be attributed to the construction and maintenance of the railroad. Manhattan Ry. Co. v. O'Sullivan, 6 A. D. 571 (1896).

Proof that values of real estate in the vicinity have gradually appreciated, while those of property abutting upon an elevated railroad have declined, is sufficient to show that such abutting property has sustained substantial pecuniary damage from the maintenance and operation of the road. Courtney v. N. Y. El. R. R. Co., 10 Misc. 115 (1894); Johnson v. Same, id. 136.

A grant to a corporation by an abutting owner of a right to a portion of the street and of the right to construct a railroad thereon, carries also the right to operate the road when constructed, and damages to the grantor's abutting property are not recoverable unless the road was improperly constructed or negligently operated. Conabeer v. N. Y. C. & H. R. R. R. Co., 84 Hun 34 (1895).

Where a railroad company had for more than twenty years occupied a street under legislative and municipal authority, it cannot be assumed, that for an award of one dollar, it intended to surrender its right in the street. Conabeer v. N. Y. C. & H. R. R. R. Co., 84 Hun 34 (1895).

When land is acquired by condemnation, an easement therein may be reserved, with the consent of the owner, and its value may be considered in determining damages. Conabeer v. N. Y. C. & H. R. R. R. Co., 84 Hun 34 (1895).

The compensation to be made to a widow having a dower or life estate should be determined. Matter of William St., 19 Wend. 678 (1838). Also compensation to a mortgagee. Matter of John St., 19 Wend. 659 (1838).

The corporation acquires an absolute right to the lands divested of any inchoate right of dower of a wife. Moore v. Mayor, etc., 8 N. Y. 110 (1853).

A provision in a statute for a public improvement which authorizes condemnation proceedings furnishes a sufficient provision for the payment of compensation for land taken for such improvement. Swikehard v. Michels, 8 Misc. 568 (1894), affd., 81 Hun 325; affd., 144 N. Y. 684.

The fact that the construction and operation of an elevated railroad creates discomfort to the occupier of residential property is not conclusive as to the right of the owner or occupant to a substantial award; if the property has enhanced in value, in part because of the construction and operation of the railroad, and the increase is sufficient to equal the injury the property owner is entitled only to a nominal award. In re Brooklyn El. R. R. Co., 87 Hun 88 (1895).

Report.

The report is to be signed by a majority of the commissioners, but all need not be present at the signing. In re Roch. & Gen. V. R. R. Co. v. Beckwith, 10 How. 168 (1854).

Review of Award.

An award cannot be reduced to a nominal sum on account of benefits received, for this would result in taking private property for public use without just compensation. Peo. ex rel. Lyon v. Nelson, 162 A. D. 34 (1914).

Courts of review will not disturb the determination of commissioners for mere errors in admission or exclusion of evidence, unless the commissioners have proceeded upon a wrong theory to the prejudice of one of the parties. The commissioners view the premises, and in coming to a conclusion as to value they take into consideration the knowledge thus acquired in connection with the oral evidence produced before them. Matter of City of New York, 198 N. Y. 84 (1910); Matter of City of New York, 142 A. D. 665 (1911).

Where confirmation of a report of commissioners is refused by the court on the ground that award is too large, new commissioners should be appointed. The award should be based upon the actual, not prospective, market value. Matter of Collis, 144 A. D. 382 (1911).

The determination of commissioners will not be disturbed for errors in admission or exclusion of evidence unless they have proceeded upon an erroneous theory to the injury of a party. Matter of City of New York, 142 A. D. 665 (1911).

Where the commissioners had a view of the premises and did not proceed upon an erroneous theory the Appellate Division will not interfere. But an assessment for benefits will be sent back when it does not show whether such violation was made as of the time of the assessment, namely, before the street was opened or after. A statement that the assessment does not exceed one-half of the value of the land is not conclusive when the evidence shows that it has been inadvertently or erroneously made. Matter of City of New York (Thayer Street), 138 A. D. 252 (1910). See, also, Matter of City of New York (Thayer Street), 142 A. D. 721.

The commissioners may not base an award solely upon a view of the premises and disregard the testimony. Matter of City of New York, 66 Misc. 488 (1910). Neither an award in excess of the owner's claim, nor one less than that testified to by petitioner's witnesses should stand. Id.

The Appellate Division will not interfere with an award made on a street opening where it is sustained by the evidence and the commissioners had the

benefit of a view of the premises and did not proceed upon an erroneous theory. In re City of N. Y. (Thayer St.), 138 A. D. 252 (1910); see, also, 142 A. D. 721.

Commissioners may not base an award wholly upon a view by them; neither may they disregard the statements of witnesses and make an award in excess of what the owners claim or less than the value fixed by the claimant's witness. Matter of City of N. Y. (Avenue A), 66 Misc. 448 (1910). The price paid at a bona fide sale near the time of taking title may be received as evidence of value. Id.

The award made by commissioners will not be disturbed unless they acted upon a wrong principle or their award is grossly inadequate. Buffalo, Lockport, etc., Ry. Co. v. Phelps, 52 Misc. 315 (1907), and cases cited.

An award will not be disturbed unless the court can clearly see that the commissioners have proceeded upon erroneous principle or have been influenced by passion or prejudice or have overlooked or disregarded the evidence. Matter of Manhattan R. Co. v. Comstock, 77 A. D. 341 (1902).

The report of commissioners of appraisal will be upheld, unless it is so clearly against the weight of the body of the evidence as to justify a reversal for that reason. Matter of City of Brooklyn to Acquire Property of Long Island Water Supply Co., 73 Hun 499 (1893).

When compensation for private property taken for public use is ascertained in the constitutional method, what review shall be permitted of the determination of the jury or commissioners, within their jurisdiction, rests in the discretion of the Legislature. In re De Camp, 151 N. Y. 557 (1897), revsg. 77 Hun 478.

§ 3371. Confirmation of report, or setting aside; final order; deposit of award. Upon filing the report of the commissioners, any party may move for its confirmation at a special term, held in the district where the property or some part of it is situated, upon notice to the other parties who have appeared, and upon such motion, the court may confirm the report, or may set it aside for irregularity, or for error of law in the proceedings before the commissioners, or upon the ground that the award is excessive or insufficient. If the report is set aside, the court may direct a rehearing before the same commissioners, or may appoint new commissioners for that purpose, and the proceedings upon such rehearing shall be conducted in the manner prescribed for the original hearing, and the same proceeding shall be had for the confirmation of the second report, as are herein prescribed for the confirmation of the first report. If the report is confirmed, the court shall enter a final order in the proceeding, directing that compensation shall be made to the owners of the property, pursuant to the determination of the commissioners, and that upon payment of such compensation, the plaintiff shall be entitled to enter into the possession of the property condemned, and take

and hold it for the public use specified in the judgment. Deposit of the money to the credit of, or payable to the order of the owner, pursuant to the direction of the court, shall be deemed a payment within the provisions of this title.

Motion to Confirm Report; Notice.

The landowner may apply for confirmation of the report. Bloomfield, etc., Gas Lt. Co. v. Calkins, 62 N. Y. 386 (1875).

Notice of motion for confirmation is only a step in the proceedings. Service of the petition and notice of its presentation give jurisdiction, and sustain the proceedings when attacked collaterally. Allen v. Utica, I. & E. R. R. Co., 15 Hun 80 (1878).

The default of a landowner upon the hearing before commissioners may be excused and the report set aside upon the motion to confirm the report. In re N. Y., L. E. & W. Ry. Co. v. Wolfe, 93 N. Y. 385 (1883).

Grounds for Setting Aside.

The report of commissioners in condemnation proceedings must be confirmed unless there has been misconduct or palpable mistake on their part, resulting in harm to an interested party. Confirmation cannot be refused on technical objections, or for omissions in no way harmful to a party. Matter of Grade Crossing Comrs., 148 A. D. 412 (1911).

It is not ground for denying confirmation of an award that it was less than half the average estimates of value of the owner's experts and more than twice the average valuation given by the witnesses of the other party. Johns v. Salamanca, 67 Misc. 521 (1910). But unless a reason is given an award will not be confirmed which is lower than the value given by any witness. Matter of Bensel, 68 Misc. 85 (1910).

A report must show error, fraud, misconduct or irregularity to enable the court to set it aside. Rondout & Oswego R. R. Co. v. Field, 38 How. 187 (1869); In re N. Y. C. & H. R. R. R. Co. v. Cunningham, 64 N. Y. 60 (1876); In re N. Y., Lack. & W. Ry. Co. v. Longwell, 63 How. 265 (1882); In re Buf., N. Y. & Phil. R. R. Co. v. McIntosh, 32 Hun 289 (1884); In re N. Y. & Jamaica R. R. Co. v. Wilson, 21 How. 434; In re N. Y. El. R. R. Co. v. Story, 41 Hun 502 (1886); Alb. N. R. R. Co. v. Cramer, 7 How. 164 (1852); In re Pros. Pk. & C. I. R. R. Co., 85 N. Y. 489 (1881); In re N. Y., Lack. & W. Ry. Co., 102 N. Y. 704 (1886); N. Y. C. R. R. Co. v. Marvin, 11 N. Y. 276 (1854); N. Y., W. S. & B. R. Co. v. Gennet, 37 Hun 317 (1885).

It is not sufficient ground for setting aside a report because the commissioners received from the corporation compensation for their services in excess of the statutory allowance. In re Staten Isl. R. T. R. R. Co. v. Hamilton, 41 Hun 392 (1886).

An award made by commissioners will not be set aside for inadequacy or as excessive, unless it is palpably wrong in that respect. In re Brooklyn El. R. R. Co., 87 Hun 88 (1895).

The report of commissioners may be set aside for irregularity, error of law, and because of an excessive or insufficient award, but if, in such case, a new appraisal is ordered, it will not be final and conclusive. Manhattan Ry. Co. v. O'Sullivan, 6 A. D. 571 (1896). Such new appraisal has the same effect as the original appraisal, and the proceedings for its confirmation are precisely the same as for the confirmation of the first report. Id.

In considering the proceedings of the commissioners, every intendment is in favor of their action; which is not determined solely by the evidence, as they may view the premises to assist them in reaching a conclusion. Id.

Upon a motion to confirm the report a commissioner will not be allowed to stultify himself by an affidavit that he signed without reading it. Roch. & Genesee Val. R. R. Co. v. Beckwith, 10 How. 168 (1854).

The court will not review the judgment of commissioners upon the facts, except when gross inequality of values is developed, or the appraisal is made upon a wrong principle. In re Mayor, etc., of N. Y., 99 N. Y. 569 (1885); see, also, In re N. Y., W. S. & B. R. R. Co. v. Yates, 18 W. Dig. 272 (1883).

Appeals.

An order refusing to confirm the commissioner's report and remitting the assessments of damages to be paid to the defendant to new commissioners, is appealable. Matter of Manhattan Ry. Co. v. Stuyvesant, 126 A. D. 848 (1908), distg. Matter of Commissioners of Public Works, 185 N. Y. 391 (1906).

An order confirming the report of the commissioners is a final order, and the question whether an appeal lies therefrom to the Court of Appeals is a matter to be determined by that court. Manhattan Ry. Co. v. O'Sullivan, 8 A. D. 320 (1896).

When the corporation instituting condemnation proceedings desires to appeal from an award in favor of the owner for a substantial amount, the corporation should not be allowed to keep the property taken, and also retain, during the pendency of the appeal, the amount of the award. In such case the proper course is for the court to direct the corporation to pay the amount of the award, and require the owner to give a bond in a suitable amount, conditioned that if the order shall be reversed and a new appraisal shall be made, under which a less sum shall be awarded than had been awarded in the first instance, the owner will make restitution to the corporation of the difference between the amount which the owner shall receive under the existing order and that which he may receive under the new order, if the award shall be thereby reduced. Manhattan Ry. Co. v. O'Sullivan, 8 A. D. 320 (1896).

Where the petitioner has fairly made out a case establishing that the premises are necessary for its use, and the company has acted in good faith and exercised a reasonable discretion, the court will not interfere. In re N. Y., Lack. & W. Ry. Co. v. Union S. Co., 35 Hun 220 (1885).

The exercise of this discretion may be reviewed at General Term. In re N. Y. C. & H. R. R. R. Co. v. Cunningham, 64 N. Y. 60 (1876). And if a substantial right is involved an appeal may be had to the Court of Appeals. In re N. Y. & H. R. R. Co., 98 N. Y. 12, 19 (1885); In re Pros. Pk. & C. I. R. R. Co., 85 N. Y. 489 (1881).

Amendment of Report.

When the report of commissioners is made in general terms and affords grounds for the belief that an erroneous legal rule of damages has been adopted it may be sent back for correction. Matter of N. Y., Westchester & Boston Ry. Co., 73 Misc. 219 (1911).

After filing their report the commissioners have no power to amend. Peo. ex rel. Mann v. Mott, 60 N. Y. 649. But upon application the court may amend or correct their report to conform to the facts. N. Y. & E. R. R.

Co. v. Corey, 5 How. 177 (1850). It has no power, however, to modify the award. Matter of Guilford, 85 A. D. 208 (1903).

It seems that the court has power to send the report back to the commissioners for amendment or supplemental information. Bd. of Water Comrs. v. Shutts, 25 A. D. 22 (1898). But see Waterford Elec. Lt. Co. v. Reed, 103 A. D. 103 (1905), condemning the practice.

§ 3372. Offer to purchase and acceptance; costs and allowances. In all cases where the owner is a resident and not under legal disability to convey title to real property the plaintiff before service of his petition and notice, may make a written offer to purchase the property at a specified price, which must within ten days thereafter be filed in the office of the clerk of the county where the property is situated; and which can not be given in evidence before the commissioners, or considered by them. The owner may at the time of the presentation of the petition, or at any time previously, serve notice in writing of the acceptance of plaintiff's offer, and thereupon the plaintiff may, upon filing the petition, with proof of the making of the offer and its acceptance, enter an order that upon payment of the compensation agreed upon, he may enter into possession of the real property described in the petition, and take and hold it for the public use therein specified. If the offer is not accepted, and the compensation awarded by the commissioners does not exceed the amount of the offer with interest from the time it was made, no costs shall be allowed to either party. If the compensation awarded shall exceed the amount of the offer with interest from the time it was made, or if no offer was made, the court shall, in the final order, direct that the defendant recover of the plaintiff the costs of the proceeding, to be taxed by the clerk at the same rate as is allowed, of course, to the defendant when he is the prevailing party in an action in the supreme court, including the allowances for proceedings before and after notice of trial and the court may also grant an additional allowance of costs, not exceeding five per centum upon the amount awarded. The court shall also direct in the final order what sum shall be paid to the general or special guardian, or committee or trustee of an infant, idiot, lunatic or habitual drunkard, or to an attorney appointed by the court to attend to the interests of any defendant upon whom other than personal service of the petition and notice may have been made, and who has not appeared, for costs, expenses and counsel fees, and by whom or out of what fund the same shall be paid.

If a trial has been had, and all the issues determined in favor of the plaintiff, costs of the trial shall not be allowed to the defendant, but the plaintiff shall recover of any defendant answering the costs of such trial caused by the interposition of the unsuccessful defense, to be taxed by the clerk at the same rate as is allowed to the prevailing party for the trial of an action in the supreme court.

As to offer to purchase property at a specified price and acceptance of same, see Code, §§ 736–740.

Costs in General.

The court may, in its discretion, award costs to either party according to the rate allowed for similar services in an action. In re N. Y., L. & W. Ry. Co. v. Wagner, 26 Hun 592 (1882). An extra allowance cannot be granted. In re R. & S. R. R. Co. v. Davis, 55 N. Y. 145 (1873).

The provision in relation to costs and extra allowances applies to proceedings to take land under the Buffalo Grade Crossing Act, chapter 345, Laws of 1888. Matter of Grade Crossing Comrs., 19 Misc. 230 (1897).

Costs to Petitioner.

Separate bills of costs should not be allowed in condemnation proceedings to the petitioner against two persons answering where it was alleged in the petition that such persons were copartners, and owned the premises sought to be condemned as such, if such is found in the decision to be the fact. City of Syracuse v. Benedict, 86 Hun 343 (1895).

Upon an appeal by the petitioner from the order of confirmation the General Term has no power to award costs against the landowner. In re N. Y., W. S. & B. Ry. Co. v. Walsh, 94 N. Y. 287 (1884); see, also, In re Ulster & Del. R. R. Co. v. Gross, 31 Hun 83 (1883).

Costs to Landowner.

In a proceeding under the Rapid Transit Act the court has power to award costs and disbursements under Code Civil Pro., § 3240, although there is no special provision for such costs in the Rapid Transit Act. Matter of Low, 208 N. Y. 25 (1913).

Under this section when the plaintiff is entitled to the costs of the trial of the issue made by the pleadings, the defendants are not deprived of their right to other taxable costs in the proceedings; an absolute right to taxable costs is given to the defendant, of which he cannot be deprived by the court, if an award is obtained greater than the offer made. Matter of Manhattan Ry. Co. v. Taber, 78 Hun 434 (1894), revg. 7 Misc. 347.

The provision that if no offer is made the court shall in the final order direct that the defendant recover the costs of the proceeding, and may also grant an additional allowance, do not apply to a situation where the defendants are under a legal disability to convey; under such circumstances an offer would be an idle ceremony, and, therefore, the reason for charging a plaintiff with costs for not making an offer entirely fails. Manhattan Ry. Co. v. McKee, 1 A. D. 488 (1895).

This section providing that the court may grant the property owner in condemnation proceedings an extra allowance not exceeding five per cent upon the amount of the award does not extend to proceedings taken under a subsequent special statute enacted to cover a case not within the general

law, and which prescribes an independent and materially different procedure and makes no provision for costs or allowances. Matter of Brooklyn to acquire property, etc., of Long Island Water Supply Co., 148 N. Y. 107, affg. 88 Hun 176, which revsd. 10 Misc. 650 (1894).

Offer.

One holding an unexpired lease of lands taken is an "owner" within the meaning of section 3358, supra, and if a resident and under no legal disability to convey title and an offer to purchase has not been served upon him, he is entitled to costs under this section. Peo. v. Thornton, 122 A. D. 287 (1907).

When the landowners refuse an offer to purchase and answer the petition alleging that public use does not require the condemnation, on which issue they are defeated but are successful in obtaining a more favorable award than the sum offered, both parties are entitled to costs: the petitioner to the costs of the trial of the issue before the court and the defendant to a full bill of costs for the proceedings before the commissioners. Matter of Village of Theresa, 121 A. D. 119 (1907).

See, also, Matter of City of Rochester, 181 N. Y. 322 (1905).

§ 3373. Judgment; enforcement thereof; writ of assistance. Upon the entry of the final order, the same shall be attached to the judgment roll in the proceeding, and the amount directed to be paid, either as compensation to the owners, or for the costs or expenses of the proceeding, shall be docketed as a judgment against the person who is directed to pay the same, and it shall have all the force and effect of a money judgment in an action in the supreme court, and collection thereof may be enforced by execution and by the same proceedings as judgments for the recovery of money in the supreme court may be enforced under the provisions of this act. When payment of the compensation awarded, and costs of the proceeding, if any, has been made, as directed in the final order, and a certified copy of such order has been served upon the owner, he shall, upon demand of the plaintiff, deliver possession thereof to him, and in case possession is not delivered when demanded, the plaintiff may apply to the court without notice, unless the court shall require notice to be given, upon proof of such payment and of service of the copy order, and of the demand and non-compliance therewith, for a writ of assistance, and the court shall thereupon cause such writ to be issued, which shall be executed in the same manner as when issued in other cases for the delivery of possession of real property.

Entry of Order.

The fact that the order of confirmation had not been recorded did not affect its conclusive character. Oberfelder v. Met. El. Ry. Co., 138 N. Y. 181 (1893). Recording the original order is a compliance with the law. Morgan v. N. Y. & Mass. Ry. Co., 130 N. Y. 692 (1892).

The entry of the final order fixes the date from which interest on the award must be computed. Trustees N. Y. & B. Bridge Co. v. M. E. Church, 45 St. Rep. 615 (1892).

Interest Acquired.

Under a strict rule of construction that no more is to be condemned than is necessary for the public use, it is to be assumed, in the absence of specific statutory authority, that an easement only is taken for a highway; hence, upon abandonment of such highway, the whole title reverts to the owner of the fee. Bklyn., Queens Co. & Suburban R. R. Co. v. Bird, 76 Misc. 62 (1912), and cases cited.

The interest acquired in lands by condemnation proceedings, whatever its exact legal character, is scarcely less than a fee. Vandermulen v. Vandermulen, 108 N. Y. 195 (1888); see, also, Crowner v. Rome & Watertown R. R. Co., 9 How. 457 (1854); In re N. Y. & H. R. R. Co., 98 N. Y. 12 (1885); In re Hartford & Conn. W. R. R. Co., 65 How. 133 (1883).

The plaintiff does not acquire any greater rights than were possessed by the landowner who has been divested of title. Anderson v. Roch., L. & N. F. R. R. Co., 9 How. 553 (1854).

It has also been held that a company does not acquire the same unqualified title and right of disposition which individuals have in their lands. Alb. Nor. R. R. Co. v. Brownell, 24 N. Y. 345 (1862).

The interest acquired by a railroad company in land condemned for the use of its road is a permanent easement, and while it exists the company is entitled to the exclusive use, possession and control of the land. Roby v. N. Y. C. & H. R. R. R. Co., 142 N. Y. 176 (1894). The easement may be abandoned, and the owner of the fee again become entitled to possession, but this must be done by unequivocal acts, or by a nonuser for a long time. Id.

The easements acquired are permanent and remain vested in a consolidated company, even after the term of existence of the constituent company which acquired them, has expired by limitation. Miner v. N. Y. C. & H. R. R. R. Co., 123 N. Y. 242 (1890). As to permanency of easements acquired, see, also, Roby v. N. Y. C. & H. R. R. R. Co., 142 N. Y. 176 (1894). As to effect of extension of corporate existence upon the title to lands taken by eminent domain, see Beal v. N. Y. C. & H. R. R. R. Co., 41 Hun 172 (1886), affd., 119 N. Y. 635.

An award in condemnation proceedings to the owner of a farm crossed by the track of a railroad, does not deprive the owner of his right to compel the railroad company to construct suitable crossings. Beardsley v. Lehigh Valley Ry. Co., 142 N. Y. 173 (1894).

Collection of Award.

In an action against a company for an award a complaint, which contains no allegation that the defendant had failed or omitted to pay the award or was indebted to plaintiff, does not state a cause of action. Lent v. N. Y. & Mass. Ry. Co., 130 N. Y. 504 (1892).

As to apportionment of amount of an award made for a portion of an unopened private street. Pentz v. Shafer, 76 Hun 209 (1894), affd., 143 N. Y. 621; see, also, Matter of Opening Eleventh Ave., 81 N. Y. 446 (1880).

§ 3374. Abandonment and discontinuance of proceeding. Upon the application of the plaintiff to be made at any time after the presentation of the petition and before the expiration of thirty days after the entry of the final order, upon eight days' notice of motion to all other parties to the proceeding who have appeared therein or upon an order to show cause, the court may, in its discretion, and for good cause shown, authorize and direct the abandonment and discontinuance of the proceeding, upon payment of the fees and expenses, if any, of the commissioners, and the costs and expenses directed to be paid in such final order, if such final order shall have been entered, and upon such other terms and conditions as the court may prescribe; and upon the entry of the order granting such application and upon compliance with the terms and conditions therein prescribed, payment of the amount awarded for compensation, if such compensation shall have been theretofore awarded, shall not be enforced, but in such case, if such abandonment and discontinuance of the proceeding be directed upon the application of the plaintiff, the order granting such application, if permitting a renewal of such proceedings, shall provide that proceedings to acquire title to such lands or any part thereof shall not be renewed by the plaintiff without a tender or deposit in court of the amount of the award and interest thereon.

Thus am'd by L. 1894, ch. 475.

Where the rights of third parties are not affected a corporation may discontinue proceedings, as provided in this section, if it deems the price fixed by the commissioners too high and more than it ought to expend for the property. N. Y., Ont. & Western Ry. Co. v. Nelson, 152 A. D. 245 (1912).

Confirmation of the commissioners' report prevents abandonment of proceedings. In re Rhinebeck & Conn. R. R. Co., 67 N. Y. 242 (1876). Proceedings may be abandoned prior to the order of confirmation. In re N. Y., W. S. & B. Ry. Co. v. Thorne, 1 How. N. S. 190 (1884); In re Same v. Watson, 18 W. Dig. 536 (1883); Ex parte N. Y., S. & B. R. R. Co., 4 Hun 311 (1875). Upon an application for leave to abandon proceedings, the court may fix such terms as justice and fairness require. 1 How. N. S. 190, above; In re Waverly Water Works Co., 85 N. Y. 478 (1881); see, also, In re N. Y., W. S. & B. Ry. Co. v. Watson, 64 How. 216 (1882).

The right to discontinue is not absolute and should not be allowed on the motion of the condemnor made long after the report of the commissioners has been confirmed except for the gravest reasons. N. Y. C. & H. R. R. R. Co. v. Marshall, 127 A. D. 534 (1908).

§ 3375. Appeal from final order; stay. Appeal may be taken to the general term of the supreme court from the final order, within the time provided for appeals from orders by title four of chapter twelve of this act; and all the provisions of such chapter

relating to appeals to the general term from orders of the special term shall apply to such appeals. Such appeal will bring up for review all the proceedings subsequent to the judgment, but the judgment and proceedings antecedent thereto may be reviewed on such appeal, if the appellant states in his notice that the same will be brought up for review, and exceptions shall have been filed to the decision of the court or the referee, and a case or a case and exceptions shall have been made, settled and allowed, as required by the provisions of this act, for the review of the trial of actions in the supreme court without a jury. The proceedings of the plaintiff shall not be stayed upon such an appeal, except by order of the court, upon notice to him, and the appeal shall not affect his possession of the property taken, and the appeal of a defendant shall not be heard except on his stipulation not to disturb such possession.

Appeal to Appellate Division.

The defendants cannot appeal from the interlocutory judgment authorizing the condemnation, but may under this section review such judgment on an appeal taken from the order confirming the commissioners' report. Village of St. Johnsville v. Smith, 61 A. D. 380 (1901).

Notice of appeal from an order confirming the commissioners' report must be served upon a railroad company which is liable for a part of the award. Matter of Grade Crossing Comrs., 68 A. D. 560 (1902).

The decision of the County Court upon motion to confirm, modify or vacate the decision of commissioners appointed to determine the necessity of a highway is final and conclusive on the questions of necessity and amount of compensation to the landowner, but is appealable as to questions of the power and jurisdiction of the County Court to make the order. Matter of De Camp, 151 N. Y. 557 (1897), revg., 77 Hun 478.

Commissioners appointed in condemnation proceedings are judges of the law and the fact so far as relates to the compensation to be awarded to landowners; when their report has been confirmed and the order of confirmation has been affirmed by the General Term, no further appeal can be taken. In re Southern Boulevard R. R. Co., 143 N. Y. 253 (1894).

The duty of the Appellate Division is similar to that of the Special Term, for the reason that both courts are called upon to act in a discretionary manner. Manhattan Ry. Co. v. O'Sullivan, 6 A. D. 571, affd. on op. below, 150 N. Y. 569 (1896). When the award of commissioners is set aside by the Special Term as excessive, the Appellate Division has an inherent power to review the order. Id. The case is treated as though the Special Term had confirmed the report and as if the parties, who deemed the award excessive, were appealing. Id.

Any person deeming himself aggrieved may appeal. N. Y. & E. R. R. Co. v. Corey, 5 How. 177 (1850). An appeal from the appraisal and report may be had, but not from the order of confirmation. In re N. Y., W. S. & B. Ry. Co. v. Hart, 35 Hun 575 (1885); see, also, In re Met. El. Ry. Co. v. Bache, 57 Hun 130 (1890); In re N. Y., W. S. & B. Ry. Co. v. Lang, 33 Hun 231

(1884). The court will not direct a new appraisal unless it appears that error has injuriously affected the party appealing. N. Y. C. R. R. Co. v. Marvin, 11 N. Y. 276 (1854); T. & B. R. R. Co. v. Lee, 13 Barb. 169 (1852); In re B., H. T. & W. Ry. Co. v. Turnbull, 31 Hun 461 (1884). The rule which deprives a party of the right to appeal from an order or judgment under which he has taken a benefit, does not apply to these proceedings. The landowner is not estopped from appealing by accepting pay for the land and giving receipt therefor. In re N. Y. C. & H. R. R. R. Co., 98 N. Y. 12 (1885); In re N. Y., W. S. & B. Ry. Co. v. Walsh, 94 N. Y. 287 (1884). And when the company obtains a confirmation of the report it is not thereby estopped from appealing to review the commissioners' report. Met. El. R. Co. v. Levy, 36 St. Rep. 606 (1891).

Appeal to Court of Appeals.

No appeal lies to the Court of Appeals from a General Term order confirming the commissioner's report. In re Met. El. Ry. Co., 128 N. Y. 600 (1891); In re N. Y. C. & H. R. R. R. Co., 64 N. Y. 60 (1876); In re Kings Co. El. R. R. Co., 82 N. Y. 95 (1880); In re D. & H. C. Co., 69 N. Y. 209 (1877); In re N. Y. C. R. R. Co. v. Marvin, 11 N. Y. 276 (1854); see, also, In re Southern Boulevard R. R. Co., 141 N. Y. 532 (1894), and cases there cited; and, also, 143 N. Y. 253 (1894).

For cases appealable to Court of Appeals, see In re Pros. Pk. & C. I. R. R. Co., 85 N. Y. 489 (1881); In re N. Y., L. E. & W. R. R. Co., 98 N. Y. 447 (1885); In re N. Y. & H. R. R. R. Co., 98 N. Y. 12 (1885).

While an award of the appraisers which has been confirmed by the General Term is not reviewable by the Court of Appeals, yet if the General Term modify the award, by increasing or diminishing it, its action is reviewable. In re Trustees N. Y. B'klyn Bridge, 137 N. Y. 95 (1893).

An order of the General Term, affirming an order of the Special Term, confirming the report of commissioners, is not appealable when there is presented only an error of law or fact, and no question as to the jurisdiction of the commissioners is raised. In re Brooklyn Elevated R. R. Co. v. Flynn, 147 N. Y. 344 (1895), reported below, 87 Hun 104.

§ 3376. Appeal by plaintiff from judgment in favor of defendant. If a trial has been had and judgment entered in favor of the defendant, the plaintiff may appeal therefrom to the general term within the time provided for appeals from judgments by title four of chapter twelve of this act, and all the provisions of such chapter relating to appeals from judgments shall apply to such appeals; and on the hearing of the appeal the general term may affirm, reverse or modify the judgment, and in case of reversal may grant a new trial, or direct that judgment be entered in favor of the plaintiff. If the judgment is affirmed, costs shall be allowed to the respondent, but if reversed or modified, no costs of the appeal shall be allowed to either party.

§ 3377. New appraisal before the same or new commissioners. On the hearing of the appeal from the final order the

court may direct a new appraisal before the same or new commissioners, in its discretion, and the report of such commissioners shall be final and conclusive upon all parties interested. If the amount of the compensation to be paid is increased by the last report, the difference shall be a lien upon the land appraised, and shall be paid to the parties entitled to the same, or shall be deposited as the court shall direct; and if the amount is diminished, the difference shall be refunded to the plaintiff by the party to whom the same may have been paid, and judgment therefor may be rendered by the court, on the filing of the last report, against the parties liable to pay the same.

The General Term may set aside and vacate the report of commissioners for errors of law or of fact and direct a new appraisal, in which case the second report is "final and conclusive upon all the parties interested," except in case there is some irregularity in the proceedings affecting the jurisdiction of the commissioners, or fraud, mistake or accident of such a character as would authorize a court of equity to set aside a judgment, a report of a referee or an award of arbitrators. In re Southern Boulevard R. R. Co., 143 N. Y. 253 (1894).

Where an award of commissioners is reversed and a new appraisal directed, and upon a second hearing a new award is made, the second report is final and conclusive on all the parties interested, and no appeal lies to the Court of Appeals from a General Term order affirming an order of Special Term confirming the second report. In re Southern Boulevard R. R. Co., 141 N. Y. 532 (1894); In re Same, 128 N. Y. 93 (1891), and cases therein cited. This provision precludes as well a review by common-law certiorari as by appeal. People ex rel. Schuylerville & U. H. R. R. Co. v. Betts, 55 N. Y. 600 (1874).

If the second report does not increase or diminish the amount of the first award it need not be presented to the court for confirmation. In re Pros. Pk. & C. I. R. R. Co., 85 N. Y. 489 (1881). When the second appraisal diminishes the award the landowner, upon refunding the difference, must pay interest only from the time the final report was confirmed and the order served upon him or his attorney. In re N. Y. El. R. R. Co. v. Story, 44 Hun 117. The railroad company cannot avoid the increased award by changing its route. Crowner v. R. & W. R. R. Co., 9 How. 457 (1854).

Where the Court of Appeals reversed the order appointing commissioners after their report had been confirmed and new commissioners were appointed and their report confirmed in new proceedings, the report of such new commissioners is not a second report within the terms of the statute. In re N. Y., W. S. & B. Ry. Co. v. Chrystie, 29 Hun 646 (1883).

For cases in which new appraisals have been directed, see In re N. Y. El. R. R. Co. v. Story, 36 Hun 427 (1885); In re N. Y., W. S. & B. Ry. Co. v. Sutherland, 35 id. 260 (1885); In re Same v. Lang, 33 id. 231 (1884); In re Same v. Duddleston, 29 id. 609 (1883); In re Same v. Bell, 28 id. 426 (1882); In re Same v. Le Fevre, 27 id. 537 (1882); In re N. Y., Lack. & W. Ry. Co. v. Bennett, 33 id. 639 (1884); In re Same v. Haskin, 29 id. 1 (1883); In re Same v. Arnot, 27 id. 151 (1882); Roch. & Sy. R. R. Co. v. Budlong, 6 How. 467 (1851); N. Y. & E. R. R. Co. v. Coburn, 6 How. 223 (1851).

This provision precludes as well a review by common-law certiorari as by appeal. People ex rel. Schuylerville & U. H. R. R. Co. v. Betts, 55 N. Y. 600 (1874).

§ 3378. Conflicting claimants to compensation for property. If there are adverse and conflicting claimants to the money, or any part of it, to be paid as compensation for the property taken, the court may direct the money to be paid into the court by the plaintiff, and may determine who is entitled to the same, and direct to whom the same shall be paid, and may, in its discretion, order a reference to ascertain the facts on which such determination and direction are to be made.

When commissioners are unable to determine to whom an award should be made, it should be made to unknown owners. The title to the award can be determined between the claimants in subsequent proceedings. A nominal award because of failure to make title is erroneous. In re Dept. of Public Parks, 53 Hun 280.

This section is not unconstitutional. The money takes the place of land, subject to the same liens as was the land before being taken. In re N. Y. C. & H. R. R. R. Co. v. Armstrong, 60 N. Y. 116 (1875).

A claim by the county to a portion of the award for unpaid taxes upon the property cannot be maintained on any ground which would be insufficient in a direct proceeding by virtue of the assessment to support a sale of the property or uphold a tax title. In re N. Y. C. & H. R. R. R. Co., 90 N. Y. 342 (1882).

§ 3379. Continued possession of the property by plaintiff; conditions. At any stage of the proceeding the court may authorize the plaintiff, if in possession of the property sought to be condemned, to continue in possession, and may stay all actions or proceedings against him on account thereof, upon giving security, or depositing such sum of money as the court may direct to be held as security for the payment of the compensation which may be finally awarded to the owner therefor and the costs of the proceeding, and in every such case the owner may conduct the proceeding to a conclusion, if the plaintiff delays or neglects to prosecute the same.

Where it appears that a village has forcibly taken and used a strip of the highway for the purpose of laying water pipes and for the erection of poles for electric power, and that the only steps which it has taken to acquire the property consist in the fact that, a few days before its violent acts, it had begun condemnation proceedings, which were subsequently resisted by the landowner and were referred but not further prosecuted by the village, the case presented is not one in which the court should exercise the powers specified in the foregoing section and continue the village in possession of the property. Village of Canandaigua v. Benedict, 8 A. D. 475 (1896). There is no statute which authorizes the courts to protect a municipal corporation, having the right to acquire title to property by condemnation, in the possession of property which it has acquired by trespass, force or fraud. Id. The order, authorized by section 3379, is not designed for the permanent protection of a corporation in a possession which it may have acquired even

peaceably, but is designed to temporarily protect its possession pendente lite, while it is actively engaged in prosecuting a proceeding for the condemnation of the property. Where the corporation has been guilty of laches in prosecuting the proceeding, such an order should be set aside. Id.

The purpose of this section is to provide a remedy for the protection of the plaintiff's possession of property sought to be condemned during pendency of the proceedings, but it does not authorize the court to grant, after the order of confirmation has been entered, an order forever restraining the defendants from maintaining actions in respect to the property. Manhattan Ry. Co. v. Taber, 78 Hun 434 (1894). When the final order has been entered and the award has been made or deposited, the plaintiff is entitled to the possession of the property condemned, and the defendants, in case they appeal, are required to stipulate not to disturb the plaintiff's possession during the pendency of the appeal. Id.

This section does not apply where a corporation unlawfully entered upon land, without claim or pretense of right, in defiance of the will of the owner, under no mistake and no color of authority, and thereafter began condemnation proceedings to acquire title. In re St. Law. & Adirondack R. R. Co. v. De Camp, 133 N. Y. 270 (1892). Constitutionality of the section undetermined. Id.

This section does not authorize the court to restrain an owner from maintaining a right of action which accrued prior to the commencement of the proceedings. Wait v. Hudson Valley Ry. Co., 33 Misc. 304 (1904).

§ 3380. Immediate possession after answer, when given. When an answer to the petition has been interposed, and it appears to the satisfaction of the court that the public interests will be prejudiced by delay, it may direct that the plaintiff be permitted to enter immediately upon the real property to be taken, and devote it temporarily to the public use specified in the petition, upon depositing with the court the sum stated in the answer as the value of the property, and which sum shall be applied, so far as it may be necessary for that purpose, to the payment of the award that may be made, and the costs and expenses of the proceeding, and the residue, if any, returned to the plaintiff, and, in case the petition should be dismissed, or no award should be made, or the proceedings should be abandoned by the plaintiff, the court shall direct that the money so deposited, so far as it may be necessary, shall be applied to the payment of any damages which the defendant may have sustained by such entry upon and use of his property, and his costs and expenses of the proceeding, such damages to be ascertained by the court, or a referee to be appointed for that purpose, and if the sum so deposited shall be insufficient to pay such damages, and all costs and expenses awarded to the defendant, judgment shall be entered against the plaintiff for the

deficiency, to be enforced and collected in the same manner as a judgment in the supreme court; and the possession of the property shall be restored to the defendant.

Before a petitioner is entitled to temporary possession of lands, pending condemnation proceedings, he must show specific facts from which the court can be satisfied that immediate possession is necessary for the prosecution of the public improvement. Central New England Ry. Co. v. Whittley, 159 A. D. 468 (1913).

Where the defendant failed to answer, the court is without power to award immediate possession to the condemnor on giving security, as this section provides only for cases in which an answer has been interposed. N. Y. C. & H. R. R. R. Co. v. Reusens, 151 A. D. 458 (1912).

To avail itself of the right to immediate possession on giving the required security it is not necessary that the right of the corporation to condemn be first established. The purpose of the statute is to enable the corporation to proceed at its own expense pending the determination of its right to condemn, provided it chooses to risk an unfavorable decision, with the consequent loss of the amount expended and also the obligation to make good to the defendant all his damage resulting therefrom. L. I. R. R. Co. v. Jones, 151 A. D. 407 (1912).

The provision of this section, authorizing immediate possession prior to compensation for the lands taken, is not unconstitutional by taking private property for public use without just compensation, for the constitutional provision does not require compensation to precede possession. L. I. R. R. Co. v. Jones, 151 A. D. 407 (1912).

A railroad company, having entered into a written agreement with a landowner or his lessee to submit the question of damages to three arbitrators named in the agreement, cannot thereafter obtain an order under the Condemnation Law authorizing it to take possession of the property upon making a deposit. Niagara Falls & Lewiston R. R. Co. v. Brundage, 7 A. D. 445 (1896).

This section provides for compensation to the landowner for any damages sustained by the entry of the corporation, and is, therefore, constitutional. In re St. Law. & Adirondack R. R. Co. v. De Camp, 133 N. Y. 270 (1892).

This section is constitutional. Matter of Niagara, Lockport & Ontario Power Co., 111 A. D. 686 (1906).

When a power company is partly constructed and the company is under contract to receive and deliver large quantities of electric power and the transmission of the same in other ways than those contemplated would be dangerous and impracticable, "the public interests would be prejudiced by delay within the meaning of this section." Matter of Niagara, Lockport & Ontario Power Co., 111 A. D. 686 (1906). A deposit of the fair value of the land shown by the petitioner by affidavits founded on the assessed value is sufficient if the contestant at the request of the court refuses to set a value. Id.

The court has no power to permit a railroad company to take immediate possession upon depositing less than the amount stated in the answer as the value of the property. Matter of N. Y., Westchester & Boston Ry. Co., 51 Misc. 333 (1906), distg. 111 A. D. 686, supra; but see N. Y. C. & H. R. R. R. Co. v. Lally, 62 Misc. 506 (1909).

§ 3381. Notice of pendency of proceedings; filing in county clerk's office; effect. Upon service of the petition, or at any time afterwards before the entry of the final order, the plaintiff may

file in the clerk's office of each county where any part of the property is situated, a notice of the pendency of the proceeding stating the names of the parties and the object of the proceeding, and containing a brief description of the property affected thereby, and from the time of filing, such notice shall be constructive notice to a purchaser, or incumbrancer of the property affected thereby, from or against a defendant with respect to whom the notice is directed to be indexed, as herein prescribed, and a person whose conveyance or incumbrance is subsequently executed or subsequently recorded, is bound by all proceedings taken in the proceeding, after the filing of the notice, to the same extent as if he was a party thereto. The county clerk must immediately record such notice when filed in the book in his office kept for the purpose of recording notices of pendency of actions, and index it to the name of each defendant specified in the direction appended at the foot of the notice, and subscribed by the plaintiff or his attorney.

§ 3382. Court may make necessary orders to carry into effect the object of this title. In all proceedings under this title, where the mode or manner of conducting all or any of the proceedings therein is not expressly provided for by law, the court before whom such proceedings may be pending, shall have the power to make all necessary orders and give necessary directions to carry into effect the object and intent of this title, and of the several acts conferring authority to condemn lands for public use, and the practice in such cases shall conform, as near as may be, to the ordinary practice in such court.

When application is made to suspend the operation of an injunction, pending proceedings for condemnation, the applicant must show that such proceedings were commenced without unreasonable delay and are prosecuted with reasonable diligence. Jacquelin v. Manhattan Ry. Co., 9 Misc. 329 (1894); Youmans v. Same, 9 id. 329 (1894).

See, also, Henney v. Brooklyn El. R. R. Co., 75 Hun 543.

It is doubtful whether on a motion for confirmation the court has power to return the report to the commissioners with directions to state the grounds of their decision. If the power exists the exercise is not to be commended and will not be sustained unless the commissioners were guilty of misconduct or the proceedings were illegal. Waterford El. L. Co. v. Reed, 103 A. D. 103 (1905).

§ 3383. Repealing clause. So much of all acts and part of acts as prescribe a method of procedure in proceedings for the condemnation of real property for a public use is repealed, except

such acts and parts of acts as prescribe a method of procedure for the condemnation of real property for public use as a highway, or as a street, avenue, or public place in an incorporated city or village, or as may prescribe methods of procedure for such condemnation for any public use for, by, on behalf, on the part, or in the name of the corporation of the city of New York, known as the mayor, aldermen, and commonalty of the city of New York, or by whatever name known, or by or on the application of any board, department, commissioners or other officers acting for or on behalf or in the name of such corporation or city, or where the title to the real property so to be acquired vests in such corporation or in such city; and all proceedings for the condemnation of real property embraced within the exceptions enumerated in this section are exempted from the operation of this title.

Thus am'd by L. 1890, ch. 247.

A park is a public place within the meaning of this section and consequently the Park Act of the city of Rochester, Laws 1888, ch. 193, was not repealed thereby. Matter of City of Rochester, 102 A. D. 181 (1905).

§ 3384. When this title to take effect. This title shall take effect on the first day of May, one thousand eight hundred and ninety, and shall not affect any proceeding previously commenced.

THE STATE CONSTITUTION

Provisions Relative to Corporations

Article VIII, Section 1. **Corporations, how created.** Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the Legislature, the objects of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed.

This provision is permissive, not mandatory. Matter of Taxpayers of Kingston, 40 How. 444.

A special act for incorporation is not unconstitutional by reason of the existence of a general law; the necessity of the act is in the legislative discretion. Peo. v. Bowen, 21 N. Y. 517; Mosier v. Hilton, 15 Barb. 657; Metropolitan Bk. v. Van Dyck, 27 N. Y. 448.

An act remedying a technical defect in the organization of a corporation is valid. Syracuse City Bk. v. Davis, 16 Barb. 188.

Corporate powers obtained under general laws may be extended by special act. In re Prospect Park & C. Isl. R. R. Co., 67 N. Y. 372.

The power reserved in this section enables the Legislature to impose upon corporations such additional restrictions and conditions as the public good requires. Mayor, etc. v. 23d St. Ry. Co., 113 N. Y. 311; Peo. ex rel. Kimball v. B. & A. R. R. Co., 70 N. Y. 569; Peo. v. O'Brien, 111 N. Y. 1; N. Y. Cable Ry. Co. v. Chambers St. Ry. Co., 40 Hun 29; Troy & Rutland R. R. Co. v. Kerr, 17 Barb. 603; Northern R. R. Co. v. Miller, 10 Barb. 282.

Article VIII, § 2. **Debts of corporations.** Dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law.

It seems that the word "dues" does not include "dues" to directors. McDowell v. Sheehan, 129 N. Y. 201.

Article VIII, § 3. **"Corporations" defined.** The term corporations as used in this article shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships. And all corporations shall have the right to sue and

shall be subject to be sued in all courts in like cases as natural persons.

Summary proceedings to enforce individual liability are valid. U. S. Trust Co. v. U. S. Fire Ins. Co., 18 N. Y. 199 (1858).

A provision in a railway charter that the Supreme Court alone shall issue injunctions against it, is invalid. Story v. N. Y. El. R. R. Co., 3 Abb. N. C. 478; see, also, Van Vranken v. City of Schenectady, 31 Hun 516.

ARTICLE III, § 16. **Restriction as to private and local bills.** No private or local bills, which may be passed by the Legislature, shall embrace more than one subject, and that shall be expressed in the title.

The Public Service Commissions Law, requiring the city of New York to pay the expenses and salaries of certain employees of the commission for the first district, is constitutional, and does not offend this section. Gubner v. McClellan, 130 A. D. 716 (1909).

In submitting an amendatory act to the test of the constitutional provision that "no private or local bill * * * shall embrace more than one subject, and that shall be expressed in the title," the inquiry must be based upon the title of the original act. In re N. Y. & Long Island Bridge Co., 148 N. Y. 540. Where an act deals with a subject not expressed in its title, and the void provisions are separable from those that are lawful, and that which remains is capable of being executed, and stands complete in itself, it may be treated as constitutional. 140 N. Y. 540, supra; Peo. ex rel. City of Rochester v. Briggs, 50 N. Y. 553; Matter of Van Antwerp, 56 N. Y. 267; Matter of Sackett and Other Streets, 74 N. Y. 95; Matter of Village of Middletown, 82 N. Y. 196; Peo. ex rel. v. Kenney, 96 N. Y. 294, and cases therein cited.

An act containing both general and local provisions is not a local act, and the general provisions are not void because the title refers only to the local provisions (Peo. v. McCann, 16 N. Y. 58), but the local provisions are void unless specified in the title. Peo. v. Supervisors of Chautauqua, 43 N. Y. 10.

An expression of the general subject is sufficient. Nuendorff v. Duryea, 69 N. Y. 557.

A local act embracing two subjects, one relating to the establishment of a town board of improvement and its powers, and the other attempting to confirm a contract made by the board for the lighting of the town, violates the constitutional provision that "no private or local bill which may be passed by the Legislature shall embrace more than one subject, and that shall be expressed in the title." Parfitt v. Ferguson, 3 A. D. 176. A local act is not wholly void because it embraces two subjects, but it can be sustained only as to that subject which is expressed in its title. Id.

ARTICLE III, § 18. **Private or local bills, when prohibited; general laws to be passed; street railroads, conditions relating thereto.** The Legislature shall not pass a private or local bill in any of the following cases:

* * * * * * * * * *

Granting to any corporation, association or individual the right to lay down railroad tracks.

Granting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever.

Providing for public bridges, and chartering companies for such purposes, except on the Hudson river below Waterford, and on the East river, or over the waters forming a part of the boundaries of the State.

The Legislature shall pass general laws providing for the cases enumerated in this section, and for all other cases which in its judgment may be provided for by general laws. But no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained, or in case the consent of such property owners cannot be obtained, the Appellate Division of the Supreme Court, in the department in which it is proposed to be constructed, may, upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners.

The provision of the Constitution which prohibits the Legislature from passing a private or local bill granting to any corporation, association or individual the right to lay down railroad tracks, does not apply to a grant to a municipality. Sun Publishing Assn. v. Mayor, etc., of New York, 152 N. Y. 257, affg. 8 A. D. 230.

A provision in a statute, enacting that a bridge shall be so constructed as to provide for "the accommodation and transportation of passengers and vehicles of every description," is not to be so construed as to authorize the laying of railroad tracks when the effect of such construction would be to render the statute repugnant to the constitutional inhibition against the passage of any private or local bill granting the right to lay down railroad tracks. In re N. Y. & Long Island Bridge Co., 148 N. Y. 540, affg. 90 Hun 312. Where there is room for two constructions of a statute both equally obvious and equally reasonable, the court must adopt the construction which, without doing violence to the fair meaning of the word used, brings the statute into harmony with the Constitution. 148 N. Y. 540, supra; Oneida Co. Supervisors v. Brogden, 112 U. S. 268; Peo. ex rel. Burroughs v. Supervisors, 17 N. Y. 241; Peo. ex rel. Bolton v. Albertson, 55 N. Y. 54; In re Gilbert Elevated R. R. Co. 70 N. Y. 367.

The amended provision requiring the application for appointment of commissioners to determine whether a street railroad should be constructed to

be made to the Appellate Division, did not take effect until January 1, 1896, and until that date the General Term continued to have jurisdiction to entertain such applications. Matter of Board of Rapid Transit Railroad Comrs., 147 N. Y. 260.

The above provision of the Constitution that the determination of commissioners, confirmed by the court, may be taken in lieu of the consent of the property owners, does not give to the Appellate Division any power in the matter where the report of the commissioners is unfavorable to the construction of the road. Matter of Nassau Electric R. R. Co., 6 A. D. 141, distg. 82 N. Y. 95, and 143 N. Y. 249. It is only a favorable report, confirmed by the court, which can be taken in lieu of the consent of the property owners. Id.

When a street railroad seeks to cross a bridge, one half of which lies in a village in one town and the other half in a village in an adjoining town, the bridge having been built by the two towns, both of which are chargeable with its repair and maintenance, the consent of the highway commissioners of the two towns is a prerequisite, under the foregoing section, to the construction and operation of the railroad. Town of Wheatfield v. Tonawanda Street R. R. Co., 92 Hun 460. A consent obtained from the trustees of the two villages will not, in such a case, satisfy the constitutional requirement. Id.

These provisions for consent of property owners do not apply to the city of New York. In re Gilbert Elev. R. R. Co., 70 N. Y. 361.

As to meaning of "private or local bill," see Peo. v. Supervisors, etc., 43 N. Y. 10; In re Church, 92 N. Y. 1; In re N. Y. El. R. R. Co., 70 N. Y. 350; In re Union Ferry Co., 98 N. Y. 139, and cases therein cited.

An act authorizing the construction of an illustrative section of elevated railway on a street in New York city is invalid. Peo. v. Loew, 102 N. Y. 471.

An act to extend the time for the completion of a railroad, after the expiration of the time fixed by L. 1850, ch. 140, § 47, as amended by L. 1867, ch. 775, is unconstitutional. In re Brooklyn, etc., R. R. Co., 75 N. Y. 335; Patten v. N. Y. El. R. R. Co. 3 Abb. N. C. 306. But an act restricting and regulating an existing right is not within the prohibition of this section. In re Gilbert El. R. R. Co., 70 N. Y. 361; Peo. v. B., F. & C. I. R. R. Co., 89 N. Y. 75; In re N. Y. El. R. R. Co., 70 N. Y. 327; Moran v. L. I. City, 101 N. Y. 439.

The Legislature may enact that a second railway shall not be constructed in a street until the consent of the first is obtained. In re 34th St. R. R. Co., 102 N. Y. 343.

This section relates to every kind of street railroad — surface, elevated or underground — in the existence or non-existence of which the local authorities and property owners might have an interest. In re N. Y. Dist. Ry. Co., 107 N. Y. 42. It also embraces pneumatic railways. Astor v. Arcade Ry. Co., 113 N. Y. 93.

The determination of the commissioners is not operative until confirmed by the General Term. In re Kings Co. El. R. R. Co., 82 N. Y. 95.

Consent of a property owner need not be under seal, or convey any interest he may have in the street or highway. In re Cortland & Homer H. R. R. Co., 31 Hun 72, affd., 95 N. Y. 663; see, also, the Railroad Law, § 91.

As to change of route, see Negus v. City of B'klyn, 10 Abb. N. C. 180; see, also, Weincke v. N. Y. C. & H. R. R. R. Co., 39 St. Rep. 584, affd. on op. below, 133 N. Y. 656; Hilton v. 34th St. R. R. Co., 1 How. Pr. N. S.

453; Met. Transit Co. v. Mayor, etc., 111 N. Y. 588; Schaper v. B. & L. I. C. Ry. Co., 4 St. Rep. 860. 124 N. Y. 630.

The provision as to highways applies only to public highways. Peo., etc. v. Banks, 67 N. Y. 568.

ARTICLE III, § 23. **When the foregoing section shall not apply.** Sections seventeen and eighteen of this article shall not apply to any bill, or the amendments to any bill, which shall be reported to the Legislature by commissioners who have been appointed pursuant to law to revise the statutes.

The Legislature is the exclusive judge whether a bill was so reported. Peo. v. Petrea, 92 N. Y. 128.

ARTICLE VIII, § 9. **State aid to corporations prohibited.** Neither the credit nor the money of the State shall be given or loaned to or in aid of any association, corporation or private undertaking. This section shall not, however, prevent the Legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents, as to it may seem proper. Nor shall it apply to any fund or property now held, or which may hereafter be held, by the State for educational purposes.

ARTICLE VIII, § 10. **Municipal aid to corporations prohibited.** No county, city, town or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association or corporation, or become directly or indirectly the owner of stock in, or bonds of, any association or corporation; nor shall any such county, city, town or village be allowed to incur any indebtedness except for county, city, town or village purposes. * * *

This provision annulled all acts relating to bonding of towns for railroad purposes, but does not affect contracts actually made and in force when it went into effect. In re Buffalo & Jamestown R. R. Co. v. Comrs., etc., 5 Hun 485; see, also, Same v. Falconer, 103 U. S. 821; Falconer v. Buffalo & Jamestown R. R. Co., 69 N. Y. 491; Peo. ex rel. Hatfield v. Trustees, 70 N. Y. 28; Town of Cherry Creek v. Becker, 123 N. Y. 161.

A municipality may pay an acknowledged debt. Hills v. Peekskill Sav. Bk., 101 N. Y. 490.

ARTICLE I, § 6. **Private property taken for public use.** * * * No person shall * * * be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation.

Relative to the acquisition of private property for public use, see the Condemnation Law.

An act of the Legislature is not, of itself, "due process of law." Stuart v. Palmer, 74 N. Y. 183. The owner of property should have an opportunity to be heard, and to defend, enforce and protect his rights. Id.

"Due process of law," meaning of, considered. Westervelt v. Gregg, 12 N. Y. 209; Happy v. Mosher, 48 N. Y. 313.

An easement is property. Hussner v. Brooklyn City R. R. Co., 114 N. Y. 433; Lahr v. M. El. R. R. Co., 104 N. Y. 268; Arnold v. H. R. R. R. Co., 55 N. Y. 661; Story v. N. Y. El. R. R. Co., 90 N. Y. 122; Peo. ex rel. Williams v. Haines, 49 N. Y. 587.

It is the province of the Legislature, not the courts, to determine whether the public benefit will justify taking private property for public uses. In re Fowler et al., 53 N. Y. 60; In re Hendrick v. Smith, 21 N. Y. 595; In re Townsend, 39 N. Y. 171; B. & N. Y. City R. R. Co. v. Brainard, 9 N. Y. 100; Bloodgood v. M. & H. R. R. R. Co., 18 Wend. 9. Also what interest shall be taken. Brooklyn, etc., v. Armstrong, 45 N. Y. 234. Whether the use is public or private is a question for the courts. In re Split R. C. R. Co., 128 N. Y. 408; In re Niag. F. & W. Ry. Co., 108 N. Y. 375.

Under this provision ch. 554, L. 1885, is unconstitutional. Peo. ex rel. Harvey et al. v. Loew, 102 N. Y. 471.

A law authorizing exercise of right of eminent domain must provide for obtaining compensation. Bloodgood v. M. R. R. R. Co., 18 Wend. 9.

Payment of compensation need not be made a condition precedent to an entry. Chapman v. Gates, 54 N. Y. 132.

Taking a street or highway for railroad purposes entitles the owner of the fee to compensation. Williams v. N. Y. C. R. R. Co., 16 N. Y. 97; McMahon v. Same, 24 N. Y. 658; Carpenter v. O. & S. R. R. Co., Id. 655; Wager v. Troy U. R. R. Co., 25 N. Y. 526; Craig v. Rochester, etc., R. R. Co., 39 N. Y. 404.

The Legislature may authorize railroads upon streets or highways, the fee of which is owned by a municipality, without entitling either abutting owners or the municipality to compensation. Forbes v. R., W. & O. R. R. Co., 121 N. Y. 505; Kellinger v. 42d St. R. R. Co., 50 N. Y. 209; Mahady v. Bushwick R. R. Co., 91 N. Y. 148.

Rights of abutting owner who has no interest in the fee of the street. Abendroth v. Man. El. R. R. Co., 122 N. Y. 1; Kane v. N. Y. El. R. R. Co., 125 N. Y. 164.

See, also, Uline v. N. Y. C. & H. R. R. R. Co., 101 N. Y. 98; In re Niag. F. & W. Ry. Co., 121 N. Y. 319; Griswold v. Met. El. Ry. Co., 122 N. Y. 102; Peo. v. O'Brien, 111 N. Y. 1; N. Y. Cable Co. v. Mayor, etc., 104 N. Y. 1, 43; In re N. Y., W. S. & B. Ry. Co., 101 N. Y. 685.

ARTICLE I, § 7. **Compensation; how ascertained.** When private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the State, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law. Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road and the amount of all damage to be sustained by the opening thereof shall be first determined by a jury of freeholders, and such amount, together with the expenses of the proceeding, shall

be paid by the person to be benefited. General laws may be passed permitting the owners or occupants of agricultural lands to construct and maintain for the drainage thereof, necessary drains, ditches and dykes upon the lands of others, under proper restrictions and with just compensation, but no special laws shall be enacted for such purposes.

See the Condemnation Law.

The word "jury," as used in the foregoing clause of the Constitution, means a jury of men possessing such qualifications as the law in force at the time prescribes for jurors serving in the courts, and selected from one of the lists in use by the courts. Peo. ex rel. Eckerson v. Village of Haverstraw, 151 N. Y. 75. Persons selected by village trustees to determine the damages to be awarded to landowners by reason of opening of a village street, selected pursuant to the act for the incorporation of villages, as amended by Laws of 1893, ch. 694, is not such a jury as is required by the Constitution. Id.

When compensation for private property taken for public use has been ascertained in the constitutional method, what review shall be permitted of the action or determination of the jury or commissioners, within their jurisdiction, rests in the discretion of the Legislature. In re De Camp, 151 N. Y. 557, revsg. 77 Hun 478.

The "jury" referred to means a body drawn in the ordinary way, but whose decision may be pronounced by a majority. Cruger v. Hudson R. R. Co., 12 N. Y. 190.

Where all the commissioners are notified and a majority act, it is sufficient. Astor v. Mayor, etc., 62 N. Y. 580.

An act (L. 1857, ch. 156, § 12) which provides that the court may increase or diminish the amount of compensation on an appeal from an award made by commissioners duly appointed, is unconstitutional. In re Malone W. W. Co., 15 N. Y. Supp. 649. 38 St. Rep. 95.

See, also, In re Townsend, 39 N. Y. 171.

ARTICLE XIII, § 5. **Public officers not to receive passes.** No public officer, or person elected or appointed to a public office, under the laws of this State, shall directly or indirectly ask, demand, accept, receive or consent to receive for his own use or benefit, or for the use or benefit of another, any free pass, free transportation, franking privilege or discrimination in passenger, telegraph or telephone rates, from any person or corporation, or make use of the same himself or in conjunction with another. A person who violates any provision of this section, shall be deemed guilty of a misdemeanor, and shall forfeit his office at the suit of the attorney-general. Any corporation, or officer or agent thereof, who shall offer or promise to a public officer, or person elected or appointed to a public office, any such free pass, free transportation, franking privilege or discrimination, shall also be

deemed guilty of a misdemeanor and liable to punishment except as herein provided. No person, or officer or agent of a corporation giving any such free pass, free transportation, franking privilege or discrimination hereby prohibited, shall be privileged from testifying in relation thereto, and he shall not be liable to civil or criminal prosecution therefor if he shall testify to the giving of the same.

New provisions, added in 1895.

A railroad policeman appointed pursuant to section 58 of the Railroad section, and a notary public who, before this provision of the Constitution went into effect, had rightfully received a free pass over a railroad, is, by said provision, prohibited from thereafter using it while he continues to hold such office. Peo. v. Rathbone, 145 N. Y. 434. For a violation of this provision by a notary public, an action by the people is maintainable against him to have his office adjudged to be forfeited. Id.

A railroad policeman appointed pursuant to section 58 of the Railroad Law, is a public officer and, therefore, prohibited from receiving for his own use and benefit a pass from any corporation. Dempsey v. N. Y. C. & H. R. R. R. Co., 146 N. Y. 290. But where a person made a contract with a railroad corporation whereby he agreed to render police services for it and to receive for such services a fixed salary and also an annual pass for transportation over its road and that of another corporation, which could be used by him when engaged in the business of the corporation or in his own private affairs, it was held, that the pass under the contract was not a "free pass" within the meaning of the Constitution; and that an action was maintainable to compel specific performance of the contract. Id.

ARTICLE XIII, § 6. **Duty of district-attorney.** Any district attorney who shall fail faithfully to prosecute a person charged with the violation in his county of any provision of this article which may come to his knowledge, shall be removed from office by the governor, after due notice and an opportunity of being heard in his defense. The expenses which shall be incurred by any county, in investigating and prosecuting any charge of bribery or attempting to bribe any person holding office under the laws of this State, within such county, or of receiving bribes by any such person in said county, shall be a charge against the State, and their payment by the State shall be provided for by law.

THE LABOR LAW

Provisions Relative to Corporations

§ 6. Hours of labor on street surface and elevated railroads. Ten consecutive hours' labor, including one-half hour for dinner, shall constitute a day's labor in the operation of all street surface and elevated railroads, of whatever motive power, owned or operated by corporations in this state, whose main line of travel or whose routes lie principally within the corporate limits of cities of the first and second class. No employee of any such corporation shall be permitted or allowed to work more than ten consecutive hours, including one-half hour for dinner, in any one day of twenty-four hours.

In cases of accident or unavoidable delay, extra labor may be performed for extra compensation.

Formerly L. 1897, ch. 415, § 5, as am'd by L. 1907, ch. 243, § 1.

§ 7. Regulation of hours of labor on steam surface and other railroads. Ten hours' labor, performed within twelve consecutive hours, shall constitute a legal day's labor in the operation of steam surface, electric, subway and elevated railroads operated within this state, except where the mileage system of running trains is in operation. No person or corporation operating any such railroad of thirty miles in length, or over, in whole or in part within this state, shall permit or require any conductor, engineer, fireman, trainman, motorman or assistant motorman, engaged in or connected with the movement of any train on any such railroad, to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such conductor, engineer, fireman, trainman, motorman or assistant motorman shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty, and no such conductor, engineer, fireman, trainman, motorman or assistant motorman who has been on duty sixteen hours in the aggregate in any twenty-four hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty,

except when by casualty occurring after he has started on his trip, and except when by accident or unexpected delay of trains scheduled to make connection with the train on which he is serving, he is prevented from reaching his terminal. The commissioner of labor shall appoint a sufficient number of inspectors to enforce the provisions of this section.

Formerly L. 1897, ch. 415, § 7, as am'd by L. 1913, ch. 462.

A corporation does not forfeit its charter by requiring employees to work more than ten hours per day in violation of this section. Peo. v. Atlantic Ave. R. R. Co., 125 N. Y. 513 (1891).

Proof of violation of this section is evidence of negligence. Pelin v. N. Y. C. & H. R. R. R., 102 A. D. 71 (1905); s. c., 115 A. D. 883, affd., 188 N. Y. 565 (1907); and see Koester v. Rochester Candy Works, 194 N. Y. 92 (1909).

§ 8. Regulation of hours of labor of block system telegraph and telephone operators and signalmen on surface, subway and elevated railroads. The provisions of section seven of this chapter shall not be applicable to employees mentioned herein. It shall be unlawful for any corporation or receiver, operating a line of railroad, either surface, subway or elevated, in whole or in part in the state of New York, or any officer, agent or representative of such corporation or receiver to require or permit any telegraph or telephone operator who spaces trains by the use of the telegraph or telephone under what is known and termed the "block system" (defined as follows): Reporting trains to another office or offices or to a train dispatcher operating one or more trains under signals, and telegraph or telephone levermen who manipulate interlocking machines in railroad yards or on main tracks out on the lines or train dispatchers in its service whose duties substantially, as hereinbefore set forth, pertain to the movement of cars, engines or trains on its railroad by the use of the telegraph or telephone in dispatching or reporting trains or receiving or transmitting train orders as interpreted in this section, to be on duty for more than eight hours in a day of twenty-four hours, and it is hereby declared that eight hours shall constitute a day of employment for all laborers or employees engaged in the kind of labor aforesaid; except in cases of extraordinary emergency caused by accident, fire, flood or danger to life or property, and for each hour of labor so performed in any one day in excess of such eight hours, by any such employee, he shall be paid in addition at least one-eighth of his daily compensation. Any per-

son who is employed as signalman, towerman, gateman, telegraph or telephone operator in a railroad signal tower or public railroad station to receive or transmit a telegraphic or telephonic message or train order for the movement of trains and who works eight hours or more in any twenty-four each and every day continuously, and all gatemen so employed must have at least two days of twenty-four hours each in every calendar month for rest with the regular compensation; subject to the foregoing provisions relating to extra service in cases of emergency. Any person or persons, company or corporation, who shall violate any of the provisions of this section, shall, on conviction, be fined in the sum of not less than one hundred dollars, and such fine shall be recovered by an action in the name of the state of New York, for the use of the state, which shall sue for it against such person, corporation or association violating this section, said suit to be instituted in any court in this state having appropriate jurisdiction. Such fine, when recovered as aforesaid, shall be paid without any deduction whatever, one-half thereof to the informer, and the balance thereof to be paid into the free school fund of the state of New York. The provisions of this section shall not apply to any part of a railroad where not more than eight regular passenger trains in twenty-four hours pass each way; provided, moreover, that where twenty freight trains pass each way generally in each twenty-four hours then the provisions of this section shall apply, notwithstanding that there may pass a less number of passenger trains than hereinbefore set forth, namely eight.

Formerly L. 1897, ch. 415, § 7a, as added by L. 1907, ch. 627. Thus am'd by L. 1913, ch. 466.

The Federal statute regulating the hours of labor of employees of railroads engaged in interstate commerce supersedes all State legislation on that subject and, therefore, a railroad corporation cannot be convicted of a violation of this section relative to railroad signalmen, as Congress has legislated upon that subject and has limited the number of hours to nine, it being conceded that the signalmen were engaged in interstate commerce. People v. N. Y. Central & H. R. R. R. Co., 163 A. D. 79 (1914).

This section is a valid exercise of the police power of the State and is not in conflict with but simply supplements Federal legislation on the same subject. Peo. v. Erie R. R. Co., 198 N. Y. 369 (1910), revsg. 135 A. D. 767.

§ 9. Payment of wages by receivers. Upon the appointment of a receiver of a partnership or of a corporation organized under the laws of this state and doing business therein, other than a moneyed corporation, the wages of the employees of such part-

nership or corporation shall be preferred to every other debt or claim.

Formerly L. 1897, ch. 415, § 8.

Section 2 of the Labor Law provides as follows: "Definitions. Employee. The term "employee," when used in this chapter, means a mechanic, workingman or laborer who works for another for hire."

Legislation of this character confers upon a class of persons having a specific contractual relation with corporations new and unusual privileges and securities at the expense of other creditors whose distributive share of the assets is diminished. It is in derogation of the common law and should not be extended to cases not within the reason as well as within the words of the statute. Matter of Stryker, 158 N. Y. 526 (1899).

The above section embodies the same subject-matter as was embodied in Laws of 1885, ch. 376, which was repealed by the Labor Law of 1897 (Laws of 1897, ch. 415).

Act of 1885.

This act provided that upon the appointment of the receiver "the wages of the employees, operatives and laborers thereof shall be preferred," etc. The act contained no definition of terms.

The general and comprehensive word "employees" must be limited by the more specific words "operatives and laborers". The word "wages" conveys the idea of subordinate occupation which is not very remunerative, of not much independent responsibility, but rather subject to intermediate supervision. Matter of Stryker, 158 N. Y. 526 (1899).

It is believed that as the word "employees" in the Act of 1885 is to be given this restricted meaning, many of the following decisions of the lower courts which preceded the Stryker case do not correctly interpret that act. The definition of "employees" contained in the present law also makes these decisions inapplicable. Such earlier decisions are as follows:

A clerk and bookkeeper of a manufacturing corporation, the superintendent, shop foreman and a draftsman who had been employed at salaries ranging from $100 to $225 a month were not entitled to a preference. Matter of Stryker, 158 N. Y. 526 (1899).

If the claimant is employed to go from place to place and unpack and set up mowing machines for farmers to whom they are sold, he is a laborer. The fact that he sometimes solicited orders as a mere incident of the principal employment does not affect his right to the preference. Palmer v. Van Santvoord, 153 N. Y. 612 (1897).

Neither the superintendent of a corporation employed at an annual salary, nor an attorney employed to render professional services, nor a foreign agent for the sale of the goods of the corporation in China who was to receive a commission on sales in addition to an annual salary of $2,000 are preferred. Peo. v. Remington, 45 Hun 329 (1887), affd. on op. below, 109 N. Y. 631 (1888).

A salesman for a piano company receiving fifteen dollars weekly and five per cent. of sales made is an employee entitled to a preference. Matter of Luxton & Black Co., 35 A. D. 243 (1898).

A manager acting under written agreement to faithfully serve the corporation as manager of every branch and department for a year and in such capacity to devote his entire time and service in supervision and management of the business and who exercised absolute control and supervision with-

out interference by any other person, and had a foreman under him, is not one to be preferred. Matter of American Lace Works, 30 A. D. 321 (1898).

A contractor who agrees to cut and haul logs for a fixed price and agrees to furnish workmen and necessary equipment is not an employee of the insolvent company entitled to preference. Matter of Charron v. Hale, 25 Misc. 34 (1898).

A traveling salesman employed under written contract upon an annual salary of $900 for a term of three years is an employee and therefore has a preference. Matter of Fitzgerald, 21 Misc. 222 (1896).

A bookkeeper is an employee. Peo. v. Beveridge Brewing Co., 91 Hun 313 (1895).

See too Hopkins v. Cromwell, 89 A. D. 481 (1903); and Matter of Kimberly, 37 A. D. 106 (1899), arising under the Assignment Act.

Present Act.

A bookkeeper is not entitled to a preference as he is not a mechanic, workingman or laborer. Cochran v. Baker Co., 30 Misc. 48 (1899).

In Foreclosure.

When a receiver, in proceedings to foreclose a mortgage given by a railroad corporation, is appointed pendente lite by an order which makes no provision to pay outstanding debts incurred for the current expenses of the railroad, but which requires him to operate the road, to keep the same in repair, and to pay out of the income of the road for all necessary supplies, such receiver is a mere temporary officer of the court, whose sole duty it is to preserve the property during the litigation. Franklin Trust Co. v. Northern Adirondack R. R. Co., 11 A. D. 249 (1896). A receiver having such powers is not bound by this provision. Id.

§ 10. Cash payment of wages. Every manufacturing, mining, quarrying, mercantile, railroad, street railway, canal, steamboat, telegraph and telephone company, every express company, every corporation engaged in harvesting and storing ice, and every water company, not municipal, and every person, firm or corporation, engaged in or upon any public work for the state or municipal corporation thereof, either as a contractor or a subcontractor therewith, shall pay to each employee engaged in his, their or its business the wages earned by such employee in cash. No such company, person, firm or corporation shall hereafter pay such employees in scrip, commonly known as store money-orders. No person, firm or corporation engaged in carrying on public work under contract with the state or with any municipal corporation of the state, either as a contractor or subcontractor therewith, shall, directly or indirectly, conduct or carry on what is commonly known as a company store, if there shall, at the time, be any store

selling supplies within two miles of the place where such contract is being executed. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor.

Formerly L. 1897, ch. 415, § 9, as am'd by L. 1906, ch. 316, § 1.

This section as applied to pre-existing corporations is constitutional and a valid exercise of the reserved legislative authority to amend the charters of corporations and also a valid exercise of the police power of the State, even though it operates as a limitation upon the exercise of the right of a corporation to contract with its employees. N. Y. Central & H. R. R. R. Co. v. Williams, 199 N. Y. 108 (1910).

Similar statutes in some States have been held unconstitutional as class legislation and interfering with the right of contract, while in others such statutes have been held constitutional as a valid exercise of legislative power. See Shortall v. Puget Sound B. & D. Co., 45 Wash. 290 (1907); Jordan v. State, 103 S. W. 633 (1907); State v. Missouri T. & T. Co., 181 Mo. 536 (1904), where the authorities pro and con are collated.

§ 11. When wages are to be paid. Every corporation or joint-stock association, or person carrying on the business thereof by lease or otherwise, shall pay weekly to each employee the wages earned by him to a day not more than six days prior to the date of such payment.

But every person or corporation operating a steam surface railroad shall, on or before the first day of each month, pay the employees thereof the wages earned by them during the first half of the preceding month ending with the fifteenth day thereof, and on or before the fifteenth day of each month pay the employees thereof the wages earned by them during the last half of the preceding calendar month.

Formerly L. 1897, ch. 415, § 10.

This section as applied to pre-existing corporations is constitutional and a valid exercise of the reserved legislative authority to amend the charters of corporations and also a valid exercise of the police power of the State, even though it operates as a limitation upon the exercise of the right of a corporation to contract with its employees. N. Y. Central & H. R. R. R. Co. v. Williams, 199 N. Y. 108 (1910).

A contract made by an employee with a corporation that he will forfeit the wages of the preceding week unless he gives a week's notice on leaving the employment of the corporation, is a violation of this statute and contrary to public policy. Opinion of Atty. Genl., March 18, 1913.

A corporation which has attempted to enter into a partnership with individuals is not exempt from the weekly payment of wages required by this statute. Opinion of Atty. Genl., April 16, 1913.

A sub-contractor from a corporation holding a contract for the construction of a section of the Barge canal or other public work, in doing such work is not carrying on the business of the contracting corporation and is not required to pay wages weekly. Opinion of Atty. Genl., March 21, 1911.

Under Laws of 1890, chapter 388, which applied to municipal corporations, a clerk in the mayor's office, the secretary of the park commissioner, a fireman, a school teacher and a patrolman were not employees. Peo. v. City of Buffalo, 57 Hun 577 (1890); nor were the property clerk and the assistant paymaster of the Department of Public Works. Peo. ex rel. Van Valkenburg v. Myers, 25 Abb. N. C. 368 (1890).

§ 12. Penalty for violation of preceding section. If a corporation or joint-stock association, its lessee or other person carrying on the business thereof, shall fail to pay the wages of all its employees, as provided in this article, it shall forfeit to the people of the state the sum of fifty dollars for each such failure, to be recovered by the commissioner of labor in his name of office in a civil action.

Thus am'd by L. 1909, ch. 206. Formerly L. 1897, ch. 415, § 11.
See, also, Penal Law, §§ 1271 and 1272, ante.

§ 13. Assignment of future wages. No assignment of future wages, payable weekly, or monthly in case of a steam surface railroad corporation, shall be valid if made to the corporation or association from which such wages are to become due, or to any person on its behalf, or if made or procured to be made to any person for the purpose of relieving such corporation or association from the obligation to pay weekly, or monthly in case of a steam surface railroad corporation. Charges for groceries, provisions or clothing shall not be a valid off-set for wages in behalf of any such corporation or association.

No such corporation or association shall require any agreement from any employee to accept wages at other periods than as provided in this article as a condition of employment.

Formerly L. 1897, ch. 415, § 12.
See cases cited under § 10, supra.

§ 21. Commissioner of labor to enforce provisions of article. The commissioner of labor shall enforce all the provisions of this article. He shall investigate complaints made to him of violations of such provisions and if he finds that such complaints are well founded he shall issue an order directed to the person or corporation complained of, requiring such person or corporation to comply with such provisions. If such order is disregarded the commissioner of labor shall present to the district attorney of the proper county all the facts ascertained by him in regard to the alleged

violation, and all other papers, documents or evidence pertaining thereto, which he may have in his possession. The district attorney to whom such presentation is made shall proceed at once to prosecute the person or corporation for the violations complained of, pursuant to this chapter and the provisions of the penal law. If complaint is made to the commissioner of labor that any person contracting with the state or a municipal corporation for the performance of any public work fails to comply with or evades the provisions of this article respecting the payment of the prevailing rate of wages, the requirements of hours of labor or the employment of citizens of the United States or of the state of New York, the commissioner of labor shall if he finds such complaints to be well founded, present evidence of such non-compliance to the officer, department or board having charge of such work. Such officer, department or board shall thereupon take the proper proceedings to revoke the contract of the person failing to comply with or evading such provisions.

Formerly L. 1897, ch. 415, § 21, added by L. 1899, ch. 192, § 2.

The functions of the Commissioner of Labor under this section are advisory to the contracting municipality, and the rights of the parties are not finally determined by his action. In re Keystone State Const. Co. v. Williams, 152 A. D. 575 (1912).

TAXATION OF CORPORATIONS

Provisions Relative to the Annual Taxes of Corporations

LAWS OF 1909, CHAPTER 62.— "An act in relation to taxation, constituting chapter sixty of the consolidated laws."

Became a law February 17, 1909; took effect immediately.

[The sections of the Consolidated Tax Law, published in this volume, include only so much thereof as regulate the taxation of corporations, other than banks and insurance companies.]

For the provisions of the Revised Tax Law of 1896, ch. 908, and the note of the Commissioners of Statutory Revision accompanying their report to the Legislature giving a history of the revision see "White on Corporations," Fifth and Sixth Editions.

§ 1. Short title. This chapter shall be known as the "Tax Law."

The Constitution of this State does not require that taxation upon property shall be general so as to embrace all taxable persons within the State, or within any district or territorial division thereof, or that it shall be equal, or that it shall be in proportion to the value of the property of the persons taxed, or that it shall be apportioned according to the benefit which each taxpayer is supposed to receive from the object on which the tax is expended. Peo. ex rel. Griffin v. Mayor of Bklyn., 4 N. Y. 419 (1851). The provisions of the Constitution declaring that no person shall be deprived of his property without due process of law, and that private property shall not be taken for public use without just compensation, have no application to the taxing power. Id.

The power of taxation is vested in the Legislature, and is practically absolute, except as restrained by the Federal and State Constitutions; yet a tax plainly departing from the principle of equality would be obnoxious as contrary to equity, and as practical confiscation. Genet v. Brooklyn, 99 N. Y. 296 (1885); Peo. v. Hagadorn, 36 Hun 610 (1885); Peo. v. Supervisors of Ulster Co., 36 Hun 491 (1885); Bowe v. U. S. Reflector Co., 36 Hun 407 (1885).

The Legislature has power, in the matter of assessments, to determine absolutely and conclusively the amount of tax to be raised and the property to be assessed, and its action cannot be reviewed by the courts upon the

ground that it acted unjustly or without adequate reason. Spencer v. Merchant, 100 N. Y. 585, aff'd., 125 U. S. 345 (1885).

There is no constitutional limitation upon the power of the Legislature to tax the persons and property of individuals within the State; the power may be exercised to pay debts contracted before the property-holder comes within the jurisdiction. Pumpelly v. Owego, 45 How. Pr. 219, Ct. of App. (1863).

In the absence of express constitutional restriction the power of taxation vested in the Legislature is unlimited, yet the Legislature is not sole, supreme and unrestrainable therein, and the courts are not debarred, but may, as a co-ordinate branch of the government, scrutinize and measure the act, always keeping in mind that the Legislature is the primary authority which is to inquire what is a proper purpose for the application of money to be raised by taxation, and the necessity of taxation to subserve it, and it must be clear that it erred before the courts can arrest the consequences of its action. Weismer v. Village of Douglas, 64 N. Y. 91 (1876); Town of Guilford v. Supervisors of Chenango, 13 N. Y. 143 (1855).

The power of taxation and of apportionment is vested in the Legislature, and includes the right of determining what portion of a public burden shall be borne by any individual or class of individuals. Peo. ex rel. Crowell v. Lawrence, 41 N. Y. 137 (1869). The power of apportionment is included in the power to impose taxes, and, in the absence of any constitutional restriction, its exercise cannot be reviewed by the courts. Gordon v. Cornes, 47 N. Y. 608 (1872). But a tax or assessment upon property arbitrarily imposed, without reference to some system of just apportionment, could not be upheld. Stuart v. Palmer, 74 N. Y. 183 (1878).

Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form and extent of taxation is unlimited where the subjects to which it applies are within her jurisdiction. Kirtland v. Hotchkiss, 100 U. S. 491 (1879).

The power of the Legislature to levy taxes for public purposes is limited only by the specific restrictions of the Constitution. In order to invalidate a statute imposing a tax, it is not enough to show that it is oppressive and unfair in its effect, provided it violates no express constitutional provision. Peo. v. Ulster Co. Supervisors, 36 Hun 491 (1885).

§ 2. Definitions. 1. "Tax district" as used in this chapter, means a political subdivision of the state having a board of assessors authorized to assess property therein for state and county taxes.

Under this definition the city of New York is a "tax district." Peo. ex rel. Moller v. O'Donnell, 183 N. Y. 9 (1905).

A village incorporated under the Village Law (L. 1897, ch. 414), whose board of assessors has no power to assess property for State or county taxes is not a "tax district." Peo. ex rel. Champlin v. Gray, 185 N. Y. 196 (1906).

2. "County treasurer" includes any officer performing the duties devolving upon such office under whatever name.

3. The terms "land," "real estate," and "real property," as used in this chapter, include the land itself above and under

water, all buildings and other articles and structures, substructures and superstructures, erected upon, under or above, or affixed to the same; all wharves and piers, including the value of the right to collect wharfage, cranage or dockage thereon; all bridges, all telegraph lines, wires, poles and appurtenances; all supports and inclosures for electrical conductors and other appurtenances upon, above and under ground; all surface, underground or elevated railroads, including the value of all franchises, rights or permission to construct, maintain or operate the same in, under, above, on or through, streets, highways or public places; all railroad structures, substructures and superstructures, tracks and the iron thereon; branches, switches and other fixtures permitted or authorized to be made, laid or placed in, upon, above or under any public or private road, street or ground; all mains, pipes and tanks laid or placed in, upon, above or under any public or private street or place for conducting steam, heat, water, oil, electricity or any property, substance or product capable of transportation or conveyance therein or that is protected thereby, including the value of all franchises, rights, authority or permission to construct, maintain or operate, in, under, above, upon, or through, any streets, highways or public places, any mains, pipes, tanks, conduits or wires, with their appurtenances, for conducting water, steam, heat, light, power, gas, oil or other substance, or electricity for telegraphic, telephonic or other purposes; all trees and underwood growing upon land, and all mines, minerals, quarries and fossils in and under the same, except mines belonging to the state. A franchise, right, authority or permission specified in this subdivision shall for the purpose of taxation be known as a "special franchise." A special franchise shall be deemed to include the value of the tangible property of a person, copartnership, association or corporation situated in, upon, under or above any street, highway, public place or public waters in connection with the special franchise. The tangible property so included shall be taxed as a part of the special franchise. No property of a municipal corporation shall be subject to a special franchise tax.

Thus am'd by L. 1899, ch. 712.

This section, as thus amended, is a portion of the Franchise Tax Law, and includes franchises in the definition of real estate. The scheme for the taxation of franchises is embodied in sections 21, 31, 37, 42–47, post.

Gas mains have been taxable as real estate ever since the amendment of 1881, chapter 293. Peo. ex rel. Keystone Gas Co. v. Martin, 48 Hun 193

(1888); Peo. ex rel. Equitable Gas Co. v. Barker, 81 Hun 22 (1894), revsd. on other grounds in 144 N. Y. 94.

The decisions here cited were rendered prior to the change in the statutory definition, and this fact should be considered in applying some of the cases.

The tracks, ties, etc., of a railroad are regarded as "land" for the purpose of taxation. Peo. ex rel. Dunkirk & F. R. R. Co. v. Assessors, 46 N. Y. 46 (1871); see, also, 80 N. Y. 573, 93 id. 313, 43 Hun 119.

The foundations, columns and superstructure of an elevated railroad are taxable as real estate. Peo. ex rel. N. Y. El. R. R. Co. v. Comrs. of Taxes, 82 N. Y. 459 (1880).

It makes no difference in respect to taxation, whether the rail is laid upon the surface of the ground or placed upon pillars or carried through a covered way or tunnel, as, in either case, the structures adopted to sustain it, or facilitate and protect its use are, within the meaning of the law, land, and taxable as such. Peo. ex rel. N. Y. & Harlem R. R. Co. v. Comrs. of Taxes, 101 N. Y. 322 (1886), revsg. 23 Hun 687.

The franchise of a railroad corporation does not have the character of realty, and is not real estate under the tax laws. Peo. ex rel. Panama Ry. Co. v. Comrs. of Taxes, 104 N. Y. 240 (1887); see, also, Williamson v. Field, 2 Sandf. Ch. 586 (1845); Sheldon v. Van Buskirk, 2 N. Y. 478 (1849); Goulet v. Asseler, 22 N. Y. 234 (1860); Phelps v. Bostwick, 22 N. Y. 243 (1860); Peo. ex rel. Dunkirk & Fredonia R. R. Co. v. Cassity, 2 Lans. 298; Gillilan v. Spratt, 41 How. Pr. 33 (1871); Peo. ex rel. Otto v. Assessors, 27 Hun 559 (1882); Peo. ex rel. The Mills Water Wks. Co. v. Forrest, 97 N. Y. 97 (1884).

The interest of a lessee for 990 years at a nominal rent is taxable as real estate, though such an estate would go to the executor or administrator for distribution as personalty under the statute. Trustees of Elmira v. Dunn, 22 Barb. 402 (1856).

4. The term "special franchise" shall not be deemed to include the crossing of a street, highway or public place outside the limits of a city or incorporated village where such crossing is less than two hundred and fifty feet in length, unless such crossing be the continuation of an occupancy of another street, highway or public place. This subdivision shall not apply to any elevated railroad.

Inserted by L. 1901, ch. 490.

5. The terms "personal estate," and "personal property," as used in this chapter, include chattels, money, things in action, debts due from solvent debtors, whether on account, contract, note, bond or mortgage; debts and obligations for the payment of money due or owing to persons residing within this state, however secured or wherever such securities shall be held; debts due by inhabitants of this state to persons not residing within the United States for the purchase of any real estate; public stocks, stocks

in moneyed corporations, and such portion of the capital of incorporated companies, liable to taxation on their capital, as shall not be invested in real estate.

Source of section: L. 1851, ch. 371, § 1; L. 1883, ch. 392.

The statute means such an interest in real estate as will protect the erection or affixing thereon, and the possession of buildings and fixtures, will bring those buildings and fixtures within the term "land," and hold them to assessment as the lands of whomsoever has that interest in the real estate, and owns and possesses the buildings and fixtures. Peo. ex rel. Dunkirk, etc., R. R. Co. v. Cassity, 46 N. Y. 46 (1871).

While a mere franchise is not taxable except by special statute, a pier built under a franchise to construct it and charge wharfage, may be taxed as real estate, notwithstanding the site belongs to the city taxing it. Smith v. Mayor, etc., of N. Y., 68 N. Y. 552 (1877). The foregoing case questions the following decision, to wit: That the interest of the grantee from a city, of a right to build and maintain a wharf on the city property, to be used as a public street or wharf, and to charge wharfage, is not a mere covenant, but real property, an incorporeal hereditament, though not subject to taxation. Boreel v. Mayor, etc., of N. Y., 2 Sandf. 552 (1849).

Where a grant from a city reserved a portion of the land for a public street, the grantee covenanting to build a wharf, always to be used as a public wharf, he to have the wharfage, his interest was taxable as land. Peo. ex rel. Smith v. Comrs. of Taxes, 10 Hun 207 (1877).

§ 3. Property liable to taxation. All real property within this state, and all personal property situated or owned within this state, is taxable unless exempt from taxation by law.

R. S., pt. 1, ch. 13, tit. 1, § 8, without change of substance.

Immunity from taxation will not be recognized unless granted in unmistakable terms. Chicago, B. & K. C. R. R. Co. v. Guffey, 120 U. S. 569 (1887); Same v. Same, 122 id. 561 (1887); Sioux City R. R. Co. v. Sioux City, 138 id. 98 (1891).

Exemptions from taxation, being in derogation of the sovereign authority and of common right, are not to be extended beyond the express requirements of the language used, when most rigidly construed. Yazoo, etc., R. R. Co. v. Thomas, 132 U. S. 174 (1889).

The general laws of the State require all property, both real and personal, no matter by whom owned, except in certain cases of special exemption, to be assessed for purposes of taxation. This requirement embraces all property owned by individuals as well as corporations, and includes all shares of stock held by individuals in corporations, except in cases where the capital stock of such corporations is itself liable to taxation as against the corporation. McMahon v. Palmer, 102 N. Y. 176, affg. 12 Daly 362 (1886).

See, also, the following cases: Bank of Utica v. City of Utica, 4 Paige 401; Williamson v. Field, 2 Sandf. Ch. 552; Sun Mut. Ins. Co. v. Mayor of N. Y., 8 Barb. 453; N. Y. & Harlem R. R. Co. v. Lyon, 16 Barb. 651; Trinity Church v. Mayor N. Y., 10 How. Pr. 138; Ins. Companies v. Comrs. of Taxes, 17 How. Pr. 208; s. c. as Int. Life Assn. Soc. v. Comrs. of Taxes, 28 Barb. 319; Peo. ex rel. Hoyt v. Comrs. of Taxes, 23 N. Y. 225, 21 How Pr. 385, Peo. ex rel. Bank of Commerce v. Comrs. of Taxes, 40 Barb. 335, revsd. on another point in 2 Wall. 400; Brit. Com. Ins. Co. v. Comrs. of Taxes, 28

How. Pr. 57; s. c., 1 Abb. Ct. App. 202; s. c., 18 Abb. Pr. 118; Peo. ex rel. Lincoln v. Ass'ors Town Barton, 44 Barb. 153; s. c., 29 How. Pr. 372; Barhyte v. Shepherd & Voss, 35 N. Y. 239; Excise Comrs. Delaware Co. v. Sackrider, 35 N. Y. 154; Peo. ex rel. Lockport City Bank v. Board Ed. Lockport, 46 Barb. 591; Foster v. Van Wyck, 41 How. Pr. 496; s. c., 2 Abb. Ct. App. 171; Peo. ex rel. Jefferson v. Gardner, 51 Barb. 354; Peo. ex rel. Erie R. R. Co. v. Beardsley, 52 Barb. 106; Peo. v. Barker, 48 N. Y. 74; Clark v. Norton, 58 Barb. 436; Pacific S. S. Co. v. Comrs. Taxes, 46 How. Pr. 319, 343; Barlow v. St. Nicholas Bank, 63 N. Y. 401; Peo. ex rel. Trowbridge v. Comrs., 4 Hun 596; s. c., 62 N. Y. 630; Petition N. Y. Catholic Protectory, 77 N. Y. 342, affg. 8 Hun 91; Peo. ex rel. N. Y. El. R. R. v. Comrs. Taxes, etc., 19 Hun 460; Matter Ulster Co. Savings Bank, 20 Hun 481.

§ 4. Exemption from taxation. The following property shall be exempt from taxation:

The provisions of the Federal Constitution prohibiting legislation impairing the obligation of contracts are not violated by the repeal of a tax exemption, since the State Constitution and statutes provide for alteration or repeal of any act, general or special, creating a corporation, and those provisions must be read into corporation charters, thus preventing them from becoming irrevocable. Pratt Institute v. City of New York, 183 N. Y. 151 (1905).

A presumption that the Legislature intended to surrender its right of taxation in the future by a present exemption therefrom, cannot be entertained unless such intention is clearly expressed. Peo. ex rel. Cunningham v. Roper, 35 N. Y. 629 (1866).

An exemption from taxation must be described in clear and unambiguous language, and appear to be indisputably within the intention of the Legislature. Peo. ex rel. Westchester Fire Ins. Co. v. Davenport, 91 N. Y. 574 (1883).

An intent to exempt any property is not to be presumed. Peo. ex rel. Twenty-third Street R. R. Co. v. Comrs. of Taxes, 95 N. Y. 554 (1884).

Assessors have no authority to enter upon the assessment-roll the name of any person whose property is by law exempt from taxation, nor to impose an assessment thereon, and they are liable in damages if they do so. Prosser v. Secor, 5 Barb. 607 (1849).

The office of assessor in determining what property is subject to, and what is exempt from, taxation, is judicial, and the assessor is not liable in damages for errors committed in arriving at his conclusion. Barhyte v. Shepherd, 35 N. Y. 238 (1866).

Personal property of residents within their town or ward is within the jurisdiction of the assessors, who act judicially in determining what is exempt, and an assessment on such property, though clearly erroneous in overruling a claim of exemption, is not void, nor does it lay the foundation for an action at law against the assessors personally. Foster v. Van Wyck, 2 Abb. Ct. App. Dec. 167 (1867), 41 How. Pr. 493.

A law containing an exemption clause is to be strictly construed. Land Co. v. Minnesota, 159 U. S. 526 (1895).

Exemptions must be expressed in clear and unmistakable terms, and not be left to implication. Schurz v. Cook, Sec't'y of State, 148 U. S. 397 (1893); Railroad Co. v. New Orleans, 143 U. S. 192 (1891); Keokuk, etc., R. R. Co. v. Missouri, 152 U. S. 301 (1893); see, also, 120 U. S. 569; Yazoo, etc., R. R. Co. v. Thomas, 132 U. S. 174 (1889); Same v. Levee Comrs., 132 U. S. 190 (1889).

A provision in a special act which exempts the property of a corporation from "local taxation," includes all taxation, except for State purposes; such exemption extends to taxation for county as well as for city purposes. Peo. ex rel. Pratt Institute v. Assessors of Bklyn., 141 N. Y. 476 (1894), revsg. 74 Hun 18.

1. Property of the United States.

R. S., pt. 1, ch. 13, tit. 1, § 4, subd. 2.

Property of the United States is exempt from taxation by the authority of a State, though it be land lying within that State, and jurisdiction over it has not been ceded. Van Brocklin v. State of Tennessee, 117 U. S. 151 (1886).

The general rule of law is that property owned by a State or by the United States, or by a municipality for public use, is not subject to taxation except by express legislation. Peo. ex rel. Mayor, etc., of N. Y. v. Assessors of Bklyn., 19 Abb. N. C. 158 (1887).

The cession by the State of Kansas to the United States of exclusive jurisdiction of certain lands, saving to such State the right of taxation therein, leaves the right of the State to subject property therein to taxation the same as before. Fort Leavenworth R. R. Co. v. Low. 114 U. S. 525 (1885).

2. Property of this state other than its wild or forest lands in the forest preserve.

R. S., pt. 1, ch. 13, tit. 1, § 4, subd. 2. See Forest, Fish and Game Law (ch. 19, Consolidated Laws).

3. Property of a municipal corporation of the state held for a public use, including real property held or used for cemetery purposes, and all lots and plats therein conveyed by the municipal corporation as places for the burial of the dead, except the portion of municipal property not within the corporation.

R. S., pt. 1, ch. 13, tit. 1, § 4, subds. 3, 4; R. S., pt. 1, ch. 20, tit. 1, § 72.

The term municipal corporation is defined by the General Corporation Law, § 3, as including "a county, town, school district, village and city and any other territorial division of the State established by law with powers of local government." This subdivision is intended to include the exemptions of the property of municipal corporations made by R. S., pt. 1, ch. 13, tit. 1, § 4, subds. 3, 4, which are as follows: "Every school-house, court-house and jail used for either of such purposes; and the several lots whereon such buildings are situated and the furniture belonging to each of them, and every poor-house, alms-house, house of industry, and the real and personal property used for such purposes belonging to or connected with the same." The subdivision is further extended to include all the property of a municipal corporation in accordance with the decisions of the courts, that such property is not taxable. See City of Rochester v. Town of Rush, 80 N. Y. 302 (1880), holding that municipal water-works are not taxable. See, also, Peo. ex rel. Murphy v. Kelly, 76 N. Y. 479, 486–89 (1879), as to what constitutes a municipal purpose generally.

4. The lands in any Indian reservation owned by the Indian nation, tribe or band occupying them.

Source Indian L., § 6 (L. 1892, ch. 679).

5. All property exempt by law from execution, other than an exempt homestead. But real property purchased with the proceeds of a pension granted by the United States for military or naval services, and owned and occupied by the pensioner, or by his wife or widow, is subject to taxation as herein provided. Such property shall be assessed in the same manner as other real property in the tax districts. At the meeting of the assessors to hear the complaints concerning assessments, a verified application for the exemption of such real property from taxation may be presented to them by or on behalf of the owner thereof, which application must show the facts on which the exemption is claimed, including the amount of pension money used in or toward the purchase of such property. If the assessors are satisfied that the applicant is entitled to the exemption, and that the amount of pension money used in the purchase of such property equals or exceeds the assessed valuation thereof, they shall enter the word "exempt" upon the assessment-roll opposite the description of such property. If the amount of such pension money used in the purchase of the property is less than the assessed valuation, they shall enter upon the assessment-roll the words "exempt to the extent of.....dollars" (naming the amount) and thereupon such real property, to the extent of the exemption entered by the assessors, shall be exempt from state, county and general municipal taxation, but shall be taxable for local school purposes, and for the construction and maintenance of streets and highways. If no application for exemption be granted, the property shall be subject to taxation for all purposes. The entries above required shall be made and continued in each assessment of the property so long as it is exempt from taxation for any purpose. The provisions herein, relating to the assessment and exemption of property purchased with a pension, apply and shall be enforced in each municipal corporation authorized to levy taxes.

Thus am'd by L. 1897, ch. 347.

All of the foregoing subdivision after the first sentence was added by the amendment of 1897.

Source of the first sentence: R. S., pt. 1, ch. 13, tit. 1, § 4, subd. 9; Code of Civil Procedure, § 1397.

The amendment of 1897, chapter 347, was not retroactive in its effect. Peo. ex rel. Jones v. Feitner, 157 N. Y. 363 (1898), aff'g. 32 A. D. 23. Prior to the enactment of said amendment the exemption was personal and did not extend to property belonging to the wife. Id. See, also, as to bounty money, Peo. ex rel. Kenny v. Reilly, 41 A. D. 378 (1899).

6. Bonds of this state to be hereafter issued by the comptroller to carry out the provisions of chapter seventy-nine of the laws of eighteen hundred and ninety-five, chapter one hundred and forty-seven of the laws of nineteen hundred and three, chapter four hundred and sixty-nine of the laws of nineteen hundred and six, chapter seven hundred and eighteen of the laws of nineteen hundred and seven, and bonds of a municipal corporation heretofore issued for the purpose of paying up or retiring the bonded indebtedness of such corporation.

Gen. Municipal Law (L. 1892, ch. 685), § 7. The exemption of such bonds has not been extended to future issues.

7. The real property of a corporation or association organized exclusively for the moral or mental improvement of men or women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, scientific, literary, library, patriotic, historical or cemetery purposes, or for the enforcement of laws relating to children or animals, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes, and the personal property of any such corporation shall be exempt from taxation. But no such corporation or association shall be entitled to any such exemption if any officer, member or employee thereof shall receive or may be lawfully entitled to receive any pecuniary profit from the operations thereof, except reasonable compensation for services in effecting one or more of such purposes, or as proper beneficiaries of its strictly charitable purposes; or if the organization thereof for any such avowed purposes be a guise or pretense for directly or indirectly making any other pecuniary profit for such corporation or association, or for any of its members or employees, or if it be not in good faith organized or conducted exclusively for one or more of such purposes. The real property of any such corporation or association entitled to such exemption held by it exclusively for one or more of such purposes and from which no rents, profits or income are derived, shall be so exempt, though not in actual use therefor by reason of the absence of suitable buildings or improvements thereon, if the construction of such buildings or improvements is in progress, or is in good faith contemplated by such corporation or association; or if such real property is held by such corporation or association upon condition that the title thereto shall revert in case any building not intended and suitable for one or more of such purposes shall be erected upon said premises or

some part thereof. The real property of any such corporation not so used exclusively for carrying out thereupon one or more of such purposes but leased or otherwise used for other purposes, shall not be exempt, but if a portion only of any lot or building of any such corporation or association is used exclusively for carrying out thereupon one or more such purposes of any such corporation or association, then such lot or building shall be so exempt only to the extent of the value of the portion so used, and the remaining or other portion, to the extent of the value of such remaining or other portion, shall be subject to taxation; provided, however, that a lot or building owned and actually used for hospital purposes, by a free public hospital, depending for maintenance and support upon voluntary charity, shall not be taxed as to a portion thereof leased or otherwise used for the purposes of income, when such income is necessary for, and is actually applied to the maintenance and support of such hospital, and further provided that the real property of any fraternal corporation, association or body created to build and maintain a building or buildings for its meeting or meetings of the general assembly of its members, or subordinate bodies of such fraternity and for the accommodation of other fraternal bodies or associations, the entire net income of which real property is exclusively applied or to be used to build, furnish and maintain an asylum or asylums, a home or homes, a school or schools, for the free education or relief of the members of such fraternity, or for the relief, support and care of worthy and indigent members of the fraternity, their wives, widows or orphans, shall be exempt from taxation, and provided also that the real estate owned by a free public library, situate in any village of the third or fourth class, shall not be taxed as to that portion thereof leased or otherwise used for purposes of income, when such income is necessary for and actually applied to the maintenance and support of such library. Property held by any officer of a religious denomination shall be entitled to the same exemptions, subject to the same conditions and exceptions, as property held by a religious corporation.

L. 1896, ch. 908, as am'd by L. 1897, ch. 371; L. 1903, ch. 204.

8. Real property of an incorporated association of present or former volunteer firemen actually and exclusively used and occupied by such corporation and not exceeding in value fifteen thousand dollars.

R. S., pt. 1, ch. 13, tit. 1, § 4, subd. 10, as added by L. 1891, ch. 163, without change.

9. All dwelling-houses and lots of religious corporations while actually used by the officiating clergymen thereof, but the total amount of such exemption to any one religious corporation shall not exceed two thousand dollars. Such exemption shall be in addition to that provided by subdivision seven of this section.

R. S., pt. 1, ch. 13, tit. 1, § 4, subd. 11, as added by L. 1892, ch. 565, without change of substance, except the last sentence, which is new.

10. The real property of an agricultural society permanently used by it for exhibition grounds.

L. 1856, ch. 183, without change.

11. The real property of a minister of the gospel or priest who is regularly engaged in performing his duties as such, or permanently disabled by impaired health from the performance of such duties, or over seventy-five years of age, and the personal property of such minister or priest, but the total amount of such exemption on account of both real and personal property shall not exceed fifteen hundred dollars.

R. S., pt. 1, ch. 13, tit. 1, § 4, subd. 8; R. S., pt. 1, ch. 13, tit. 1, § 5, without change of substance, except that after the word "age" the words "when occupied as a home by such minister or priest" were stricken out.

12. All vessels registered at any port in this state and owned by an American citizen, or association, or by any corporation, incorporated under the laws of the state of New York, engaged in ocean commerce between any port in the United States and any foreign port, are exempted from all taxation in this state, for state and local purposes; and all such corporations, all of whose vessels are employed between foreign ports and ports in the United States, are exempted from all taxation in this state, for state and local purposes, upon their capital stock, franchises and earnings, until and including December thirty-first, nineteen hundred and twenty-two.

Am'd., May 24, 1923, ch. 792.

L. 1881, ch. 433; R. S., as am'd by L. 1892, ch. 661, § 2, without change, except that the period of exemption is extended from May 17, 1922, to Dec. 31, 1922.

13. A bond, mortgage, note, contract, account or other demand, belonging to any person not a resident of this state, sent to or deposited in this state for collection; the products of another state, owned by a nonresident of this state and consigned to his agent

in this state for sale on commission for the benefit of the owner; moneys of a nonresident of this state, under the control or in the possession of his agent in this state, when transmitted to such agent for the purpose of investment or otherwise.

R. S., pt. 1, ch. 13, tit. 2, § 5; R. S., pt. 1, ch. 13, tit. 5, § 3, re-enacted in part, without change of substance. See Williams v. Supervisors of Wayne, 78 N. Y. 561 (1879).

14. The deposits in any bank for savings which are due depositors, the accumulations in any domestic life insurance corporation, held for the exclusive benefit of the insured, other than real estate and stocks, now liable to taxation; the accumulations of any incorporated co-operative loan association upon the shares of such association held by any person; and personal property of any corporation, person, company or association transacting the business of fire, casualty or surety insurance in this state equal in value to the unearned premiums required by the laws of this state, or the regulations of its insurance department, to be charged as a liability.

L. 1857, ch. 456, § 4; Banking L. (L. 1892, ch. 689), § 191, as am'd by L. 1901, ch. 618.

15. Moneys collected in the course of the business of any corporation, association or society doing a life or casualty insurance business or both, upon the co-operative or assessment plan, and which are to be used for the payment of assessments, or for death losses or for benefits to disabled members.

L. 1884, ch. 353, § 1.

16. The owner or holder of stock in an incorporated company liable to taxation on its capital, shall not be taxed as an individual for such stock.

R. S., pt. 1, ch. 13, tit. 1, § 7.

17. The personal property in excess of one hundred thousand dollars of a mutual life insurance corporation incorporated in this state before April tenth, eighteen hundred and forty-nine.

L. 1853, ch. 469; L. 1855, ch. 83.

18. Property real, from which no income is derived, and personal property, situated within any city of the first class and belonging to the medical society of any county, which county is either wholly or partly within such city and which society was heretofore incorporated under the provisions of chapter ninety-

four, laws of eighteen hundred and thirteen, entitled "An act to incorporate medical societies for the purpose of regulating the practice of physic and surgery in this state," provided that such property is used for the purposes of such a society and not otherwise, and provided that such exemption of property for any society in the counties of Kings or New York shall not exceed one hundred and fifty thousand dollars, and in any other county affected hereby shall not exceed fifty thousand dollars.

Added by L. 1903, ch. 199.

19. Property real from which no rent is derived and personal property, situated within any city of the first class and belonging to any incorporated pharmaceutical society of any county which is either wholly or partly within such city, which society has heretofore been or may hereafter be authorized and empowered by act of the legislature to establish and which has established or may hereafter establish, a college of pharmacy in such city; provided that such property is used for the purposes of such college and not otherwise, and provided also that the exemption of such property for any society in the counties of Kings and New York shall not exceed one hundred thousand dollars, and in any other county affected hereby shall not exceed fifty thousand dollars.

Added by L. 1905, ch. 446.

20. The commissioners of the sinking fund or other chief financial board of any city of the first class, may, in their discretion, by resolution, exempt from taxation for local purposes the real and personal property, or any part of it, of a corporation or association organized to maintain an academy of music, if, in the opinion of such board, the interests of such city require the maintenance of such academy of music, and it shall appear that the property so exempted represents or was purchased with the proceeds of popular or general subscription for the erection of such academy of music. No property of such corporation or association shall be exempt, except the real property consisting of such academy of music and the furniture thereof, or personal property so subscribed and held for the purpose of constructing such academy of music. No such exemption shall be made for any year unless it shall appear that, during the preceding year, the corporation or association has not earned a net annual income upon the net cost of such academy and the furniture thereof.

Added by L. 1907, ch. 478.

§ 6. The assessment of real and personal property. All real and personal property subject to taxation shall be assessed at the full value thereof, provided, however, that the owner of personal property shall be allowed a deduction from the full value of all his taxable personal property to the extent of the just debts owing by him but no such deduction shall be allowed by reason of the indebtedness of the owner contracted or incurred in the purchase of nontaxable property or securities owned by him or held for his benefit, nor for or on account of any indirect liability as surety, guarantor, indorser or otherwise, nor for or on account of any debt or liability contracted or incurred for the purpose of evading taxation.

Formerly L. 1902, ch. 202, as am'd by L. 1914, ch. 277.

§ 7. When property of nonresidents is taxable. 1. Nonresidents of the state doing business in the state, either as principals or partners, shall be taxed on the capital invested in such business, as personal property, at the place where such business is carried on, to the same extent as if they were residents of the state.

2. The personal property of nonresidents of the state having an actual situs in the state, and not forming a part of capital invested in business in the state, shall be assessed in the name of the owner thereof for the purpose of identification and taxed in the tax district where such property is situated, unless exempt by law. This subdivision shall not apply to money, or negotiable collateral securities, deposited by, or debts owing to, such nonresidents nor shall it be construed as in any manner modifying or changing the law imposing a tax on real estate mortgage securities.

Subd. 1, L. 1855, ch. 37; subd. 2, added by L. 1906, ch. 248.

Object and Scope.

A personal tax cannot be assessed against a non-resident, nor can a tax be assessed against his property, unless it has an actual situs within the State and thus is under the protection of its laws. City of New York v. McLean, 170 N. Y. 374 (1902), affg. 57 A. D. 601.

Prior to 1855, numbers of persons doing business in this State, and having large amounts of moneys invested here, nevertheless chose to reside just outside. Although these persons were non-residents, they came here daily for the purpose of doing business, and yet under our laws they could not be reached for taxation. Their names could not be put upon an assessment-roll because they did not reside in any town or ward where an assessment could be made, and they had no resident agents or trustees against whom assessment could be made. To reach the non-resident for the purpose of subjecting such property

to taxation was the object of chapter 37, Laws of 1855. Hoyt v. Comrs. of Taxes, 23 N. Y. 224 (1861).

Foreign corporations are included within the act subjecting non-residents doing business in this State to assessment and taxation on sums invested in such business. A person or corporation liable to assessment and taxation under the act is not entitled to a deduction of debts. Peo. ex rel. Thurber, Whyland & Co. v. Barker, 141 N. Y. 118 (1894).

Foreign corporations are included within the act of 1855, ch. 37. Life Ins. Co. v. Comrs. of Taxes, 1 Keyes 303, cited in Peo. ex rel. Bay State, etc. v. McLean, 80 N. Y. 254–259 (1880). Hence it was said that a foreign corporation doing business in New York was properly taxable in the city of New York, where its principal place of business or office of the agency existed. In this last cited case in 80 N. Y., it is said that the act of 1855 points out the mode of taxation, viz., "the same as if they were residents of the State;" and in referring to the mode of taxing a resident corporation it is found that it is to be taxed in the town or ward where it has a principal office or place for the transaction of its financial concerns. The foreign corporation is not to be taxed exactly the same as if it were a resident, because the statute expressly provides that it is only to be taxed for the sum invested in business in this State, and in order to tax it upon that sum no indebtedness should be allowed. The percentage, the form, the mode of the assessment and taxation upon the specific sum invested in business in this State are to be the same as if the person were a resident, but inasmuch as all the subjects of assessment against a non-resident are not within the jurisdiction of the State, but only the sum here invested, it is plain that it was never contemplated by the Legislature that such non-resident should have the right to deduct debts, while the taxing authorities would have no right to balance such deductions by an assessment of other property of the non-resident not situated within the State. Peo. ex rel. Thurber, Whyland & Co. v. Barker, 141 N. Y. 118 (1894).

Laws 1855, ch. 37, which is superseded by the foregoing section, was held not to be in violation of the provisions of the Federal Constitution guaranteeing equal privileges and immunities to the citizens of each State in the several States; nor of those forbidding the imposition of duties on imported goods by a State. Duer v. Small, 4 Blatchf. 269, 17 How. Pr. 201 (1859); Id.; Brown v. Houston, 114 U. S. 633 (1884).

Application to Foreign Corporations.

A foreign corporation is doing business in this State and liable to taxation under this statute where it is continuously engaged, within the State, in the importation and sale of foreign goods and maintains an office in the city of New York at which the proceeds of its sales are received and deposited in bank, out of which the expenses of the busisess are defrayed and the surplus only remitted to the home office. People ex rel. Farcy & Oppenheim Co. v. Wells, 183 N. Y. 264 (1905).

The act was intended to reach the capital of non-residents employed within this State in continuous trade, and not property sent here only for sale; so where a foreign corporation engaged in manufacturing transmitted to its agent here its product for sale, the proceeds being remitted at once, with the securities received for sales on credit, to the home office, it was not doing business in this State within the meaning of the act. Peo. ex rel. Parker Mills Co. v. Comrs. of Taxes, 23 N. Y. 242 (1861).

This provision applies only to the personalty of foreign corporations, and not to their real estate. Peo. ex rel. Keystone Gas Co. v. Assessors of Olean, 15 St. Rep. 462 (1888).

Securities, other than United States stock, deposited by a foreign insurance company with the Comptroller, as security for policy-holders, are liable to taxation. Internat'l Life Assur. Soc. v. Comrs. of Taxes, 28 Barb. 318 (1858).

A foreign corporation is liable to be taxed upon bonds of a municipality within this State, deposited with the State Comptroller under statutory requirements. Such bonds are personal property, and are to be regarded as invested in its business. The place of assessment of a foreign corporation is where the principal business of the corporation is carried on, not at the residence of the State Comptroller, even as to securities deposited with him. British Commercial Life Ins. Co. v. Comrs. of Taxes, 31 N. Y. 32, 28 How. Pr. 41 (1864).

That bonds and mortgages deposited by a foreign insurance company with the Superintendent of Insurance, may be reached by taxation, see Smyth v. International Life Assurance Co., 35 How. Pr. 126; s. c., 4 Abb. Pr. N. S. 11 (1868).

The fact that a foreign insurance corporation has ceased to issue new policies within the State, and confines its business to receiving yearly premiums and paying losses on outstanding policies only, does not exempt it from taxation. Smyth v. International Life Assurance Co., 35 How. Pr. 126 (1868).

Where, at the time of making the assessment-roll, the agent of a non-resident has moneys of his principal in bank, it is liable to taxation, though before the time for correcting the roll it has been withdrawn and used. Peo. ex rel. Westbrook v. Village of Ogdensburgh, 48 N. Y. 390 (1872).

Where a foreign banking company had a permanent agency in New York city to which it sent funds to be used in temporary loans, subject at all times to its control and drafts, it was not liable to taxation for the funds so employed, and the exemption from taxation of foreign capital sent to agents here for investment, etc., under Laws of 1851 (ch. 176, § 2), was not removed by the act of 1855, ch. 37. Peo. ex rel. Bank of Montreal v. Comrs. of Taxes, 59 N. Y. 40 (1874).

Bills receivable of a foreign corporation with a New York office for the sale of products imported and sold in the original packages are taxable as capital employed within the State provided such bills are not in transitu, but are, in the regular course of business, held within the State until maturity for the convenience of such corporation and the proceeds in part then remitted to the home office. Peo. ex rel. Burke v. Wells, 184 N. Y. 275, affg. 107 A. D. 15 (1906).

The assessment of a domestic corporation is made after a deduction for debts, because its capital and surplus are to be assessed at their actual value, which cannot be arrived at without deducting debts. A foreign corporation is not thus taxed, and no inquiry is made as to the actual value of such capital or surplus, and as such value is not to be assessed or taxed, the debts should not be deducted from specific property here. Peo. ex rel. Thurber, Whyland & Co. v. Barker, 141 N. Y. 118 (1894).

A foreign corporation, having property in this State, can claim no exemption from taxation on account of the laws of its own State. Peo. ex rel. Savings Bk. of New London v. Coleman, 135 N. Y. 231 (1892).

The proofs submitted by a foreign corporation to be used for the purpose of assessing the valuation of personal estate within the State are conclusive upon such corporation, and even if shown to be false, cannot be corrected by

proof on a reference to reduce or cancel the assessment; and no grievance will be considered upon a proceeding to review the action of assessors in assessing the value of personal property of a foreign corporation, not urged upon the assessors in the application to them for the reduction and correction of the assessment under review. Peo. ex rel. Hecker-Jones-Jewell Milling Co. v. Barker, 86 Hun 148 (1895), affd., 147 N. Y. 31, citing Peo. ex rel. German Looking Glass Plate Co. v. Barker, 75 Hun 6.

Goods owned by a foreign corporation on sale in the State of New York the proceeds of which are at once remitted to the home office, are not taxable. Peo. ex rel. Sherwin-Williams Co. v. Barker, 5 A. D. 246, affd., 149 N. Y. 623 (1896), overruling Peo. ex rel. Martin Bros. Mfg. Co. v. Barker, 14 Misc. 382.

A foreign corporation doing business in this State, and having a principal office here, is taxable for moneys invested in such business, in the town or ward of such office, and the assessment at such place must be exclusive, embracing all its personal property liable to taxation within this State. Assessment of personal property of a foreign corporation in the possession of an agent in a town, other than that of such office, by the assessors of that town, is void. Peo. ex rel. Bay State, etc., Co. v. McLean, 80 N. Y. 254 (1880), affg. 17 Hun 204, 5 Abb. N. C. 137.

Deduction of Indebtedness.

In order that a non-resident owner of personal property invested in business in this State may obtain exemption from such tax, he must show that his indebtedness to citizens of the State of New York (such indebtedness not having been incurred in the purchase of the property assessed) is in excess of all the other personal property owned by him taxable under our laws. Peo. ex rel. Barney v. Barker, 16 A. D. 266, affd., 154 N. Y. 762 (1898), distg. Peo. ex rel. Milling Co. v. Barker, 147 N. Y. 34 (1895).

The fact that the State of his domicile does not permit him to deduct the amount of his indebtedness from the property there taxed is immaterial where it does not appear that he has not other property subject to taxation sufficient to pay his indebtedness. Id.

When a foreign corporation doing business in this State purchases property here for its business, and pays cash for a portion of it, and incurs an indebtedness for the balance, the amount unpaid is to be deducted from the value of the property to ascertain the sums invested in this State. Peo. ex rel. Hecker-Jones-Jewell Milling Co. v. Barker, 147 N. Y. 31 (1895), limiting Peo. ex rel. Thurber-Whyland Co. v. Barker, 141 N. Y. 118, and revsg. 86 Hun 148.

Where the evidence submitted to the assessors as to the nature and value of the property of a corporation and the amount of its indebtedness is not so clear and convincing as to leave no doubt, and there is some evidence to support the determination of the assessors, it will not be reviewed and reversed by the Court of Appeals on certiorari. Peo. ex rel. Hecker-Jones-Jewell Milling Co. v. Barker, 147 N. Y. 31 (1895).

§ 9. Place of taxation of real property. Real property shall be assessed in the tax district in which it is situated. In all cases the assessment shall be deemed as against the real property itself, and the property itself shall be holden and liable to sale for any tax levied upon it.

Thus am'd by L. 1902, ch. 171; L. 1911, ch. 315.

The only fact necessary to give assessors jurisdiction as to real estate is that it be situated within the town or ward of the assessors' office. In making an assessment upon such land they have jurisdiction of the subject-matter, and while an error committed by them may be subject to review, it will not make their proceedings void. Van Rensselaer v. Cottrell, 7 Barb. 127, affd. in Seld. Notes 25 (1849).

If assessors have, in form, sufficiently assessed a lot to a person as owner, personally, the court will assume that the circumstances necessary to give them jurisdiction to make the assessment existed. Johnson v. Learn, 30 Barb. 616 (1859).

The lands of railroad companies are to be assessed the same as those of residents in the towns in which they lie, and not as non-resident lands. Peo. ex rel. Dunkirk, etc., R. R. Co. v. Cassity, 46 N. Y. 46 (1871).

A railroad corporation is, for the purposes of taxation of its real estate, a resident of each town and county through which it passes, and is properly assessed in personam therefor. Buffalo & State Line R. R. Co. v. Supervisors of Erie, 48 N. Y. 93 (1871).

For purposes of taxation, railroad companies are residents of the towns through which the roads pass. Peo. ex rel. Buffalo & State Line R. R. Co. v. Barker, 48 N. Y. 70 (1871); Peo. ex rel. Buffalo & State Line R. R. Co. v. Fredericks, 48 Barb. 173; see, also, Mygatt v. Washburn, 15 N. Y. 319; Bissell v. Mich. South. & Northern Indiana R. R., 22 N. Y. 285; Whitney v. Thomas, 23 N. Y. 285; Peo. ex rel. Hoyt v. Comrs. of Taxes, 23 N. Y. 231; s. c., 21 How. Pr. 385; Brit. Com. Ins. Co. v. Comrs. of Taxes, 18 Abb. Pr. 130; Peo. ex rel. Stephens v. Halsey, 53 Barb. 552; s. c., 36 How. Pr. 502; Dorn v. Fox, 6 Lans. 163; Barlow v. St. Nich. Nat. Bk., 63 N. Y. 401; Trowbridge v. Horan, 78 N. Y. 439; Stewart v. Crysler, 100 N. Y. 378.

Occupied lands owned by persons not residents of the town or ward in which they were situated, in the absence of statutory provision, may be assessed against either owner or occupant. Van Rensselaer v. Cottrell, 7 Barb. 127 (1849).

When real estate is assessed to the owner the name of the owner must be inserted in the roll; when it is assessed to the occupant, the name of the occupant should appear. Where real estate was assessed in the name of one not the owner, adding the words "or occupant" rendered the roll fatally defective, and would not support process against property in the possession of the occupant. Du Bois v. Webster, 7 Hun 371 (1876).

The roll should show all the facts necessary to justify the action of the collector. Id.

The corporation owning an elevated railway may be assessed therefor as real estate, though the fee of the land upon which it stands is in another person or corporation which may be exempt from taxation. Peo. ex rel. N. Y. Elevated R. R. Co. v. Comrs. of Taxes. 82 N. Y. 459 (1880), affg. 19 Hun 460.

While the assessors of a town have no jurisdiction of the person of a non-resident so as to charge him personally with a tax on land owned but not occupied by him, where the agent of such owner had appeared before the assessors and procured a reduction, without protest against the assessment against the owner, this was such a waiver as would bar an action by the owner for damages for an illegal assessment. Hilton v. Fonda, 86 N. Y. 348 (1881).

Assessment to occupant need not indicate that the lands are non-resident. Peo. ex rel. Hoffman v. Bug, 13 Abb. N. C. 169 (1883).

Where by contract between the parties one owns the land and another the buildings upon it, each interest may be assessed to its owner. Where the owner of the buildings is lessee of the land, the fact that the lessor has a right of re-entry does not affect the lessee's present interest, or his liability to assessment. Peo. ex rel. Muller v. Assessors of Brooklyn, 93 N. Y. 308 (1883).

Where lands of a non-resident of the county are occupied by a resident of the town where they are situated they must be assessed to the occupant. An assessment of them to the owner, or as non-resident lands, is void. Stewart v. Crysler, 100 N. Y. 378 (1885), revsg. in effect, 21 Hun 285; followed in Calkins v. Chamberlain, 28 W. D. 292 (1888).

An assessment of land to a person who is neither owner nor occupant is void. Whitney v. Thomas, 23 N. Y. 281 (1861).

Non-resident lands are unoccupied lands not owned by a person residing in the town or ward in which the same are situated. Hampton v. Hamsher, 46 Hun 147 (1887).

§ 10. Taxation of real property divided by line of tax district. If a farm or lot is divided by a line between two or more tax districts it shall be assessed in the tax district in which the dwelling-house or other principal buildings are located, in the manner provided by section nine of this chapter, the same as though such farm or lot was wholly in such tax district, except that if the land is unoccupied or has not buildings thereupon, or if the farm or lot consists of two or more parcels, with separate dwelling-houses or other principal buildings, the portion of such farm, lot or tract of land lying in each district shall be separately assessed therein. If such land is situated in two or more counties and is wild or uncultivated and not occupied and used for agricultural purposes, the portions of such land lying in each county shall be separately assessed therein. If the boundary line of a tax district passes through a building, any portion of which is used as a dwelling, the owner of such building, if occupying the same or residing in either tax district, and otherwise, the person occupying such building as a dwelling-house, may elect in which district such building and the adjacent land, owned, occupied and connected therewith shall be assessed, by serving a written notice of such election on the assessors of each tax district during the month of May; but if such election is not made, the property shall be assessed in the tax districts in which it is located.

L. 1896, ch. 908, as am'd by L. 1898, ch. 537; L. 1902, ch. 200; L. 1903, ch. 305; L. 1914, ch. 66.

§ 11. Place of taxation of property of corporations. The real estate of all incorporated companies liable to taxation shall be assessed in the tax district in which the same shall lie, in the

same manner as the real estate of individuals. All the personal estate of every incorporated company liable to taxation on its capital shall be assessed in the tax district where the principal office or place for transacting the financial concerns of the company shall be, or if such company have no principal office, or place for transacting its financial concerns, then in the tax district where the operations of such company shall be carried on. In the case of a toll bridge, the company owning such bridge shall be assessed in the tax district in which the tolls are collected; and where the tolls of any bridge, turnpike, or canal company are collected in several tax districts, the company shall be assessed in the tax district in which the treasurer or other officer authorized to pay the last preceding dividend resides.

L. 1896, ch. 908.

See cases cited under section 9, relative to real property, several of which are applicable under this section.

Stock corporations which pay an annual tax to the Comptroller of the State as a franchise or license tax, are exempt from the payment of State taxes assessed by local authorities. See § 205, post.

In case the statute under which a corporation is organized requires that its principal place of business be designated in its certificate of incorporation, the statement is, as against the corporation, conclusive evidence of its residence, unless it has been changed pursuant to statute. Peo. ex rel. Knickerbocker Press v. Barker, 87 Hun 341 (1895); Peo. ex rel. Edison Electric Lt. Co. v. Barker, 91 Hun 594 (1895).

The statement of location of its principal office or place of business is a condition precedent to the organization of a business corporation, and, should it appear that the location was wilfully misstated in the certificate, or in case the corporation should change its principal place of business, without effecting a legal change of residence, for the purpose of evading taxation, it might present a case for the attention of the Attorney-General. Peo. ex rel. Knickerbocker Press v. Barker, 87 Hun 341 (1895).

Where a certificate of incorporation definitely states the location of the principal office of the company and adds a clause, "or at such other place as the stockholders of the company might determine," the additional clause has no force, touching the residence of the corporation for the purposes of taxation, and must be treated as surplusage. Peo. ex rel. Edison Elec. Lt. Co. v. Barker, 91 Hun 594 (1895).

Residence of a corporation for the purposes of taxation cannot be inferred from the mere place of filing its certificate of incorporation. When the law under which it was formed does not fix its residence or require the location of its principal office to be stated in the certificate, its residence is deemed to be where its principal place of business is actually situated. Austen v. Hudson River Telephone Co., 73 Hun 96 (1893); Austen v. Westchester Telephone Co., 8 Misc. 11 (1894): Oswego Starch Factory v. Dolloway, 21 N. Y. 454 (1860); Conroe v. Natl. Protection Ins. Co., 10 How. Pr. 403 (1855); Hubbard v. Same, 11 id. 149 (1855).

Railroad companies are residents of the towns through which the road runs. Buffalo & State L. R. R. Co. v. Supervisors, etc., 48 N. Y. 93 (1871);

Peo. ex rel. Dunkirk & F. R. R. Co. v. Assessors, 46 N. Y. 46 (1871); Peo. ex rel. Buffalo & St. L. R. R. Co. v. Barker, 48 N. Y. 70 (1871); Peo. ex rel. D. L. & W. R. R. Co. v. Reid, 64 Hun 553 (1892).

When a law under which a corporation is organized requires the certificate of incorporation to state the location of the principal office, and such location is stated in the certificate, the statement is conclusive evidence of the residence of the corporation for the purposes of taxation under this section. Austen v. Hudson Riv. Telephone Co., 73 Hun 96 (1893); Western Transportation Co. v. Scheu, 19 N. Y. 408 (1859); Oswego Starch Factory v. Dolloway, 21 id. 449 (1860); Chesebrough Mfg. Co. v. Coleman, 44 Hun 545 (1887); Union Steamboat Co. v. Buffalo, 82 N. Y. 351 (1880).

The issue as to the residence of a corporation for the purposes of taxation is sufficiently raised by a denial that its principal place of business was fixed in its certificate, and an allegation that all its property, franchises, rights and business were outside the county. Austen v. Westchester Telephone Co., 8 Misc. 11 (1894).

A denial on information and belief of the allegations of the complaint in an action to collect personal taxes as to the proceedings for the assessment and levy of such tax, and that demand had been made therefor, raises no issue and is frivolous. Id.

A receiver of taxes of New York city need not make a demand of the officer of a corporation before bringing an action to collect a tax levied against it. Id. But, see to the contrary U. S. Trust Co. v. Mayor, etc., of New York, 77 Hun 182; McLean v. Manhattan Medicine Co., 54 N. Y. Super. Ct. 371 (1887).

A tax for school purposes, of that part of a toll-bridge lying within a school district, assessed as real estate, is valid. Hudson River Bridge Co. v. Patterson, 74 N. Y. 365 (1878), affg. 11 Hun 527.

The general provision of 1 R. S., 389, § 5, authorizing the assessment of personal estate in the hands of an agent, against him, in the same manner as if he were owner, does not apply to corporations liable to taxation on their capital, which have a principal office within this State. Peo. ex rel. Bay State, etc., Co. v. McLean, 80 N. Y. 254 (1880), affg. 17 Hun 204.

The location of the principal financial office of a corporation doing business in different places, indicated in its certificate, determines the place where it should be taxed. Peter Cooper's Glue Factory v. McMahon, 15 Abb. N. C. 314 (1885).

Cars on a railroad, the owner of which is domiciled in another State, are not exempt from local taxation by reason of being used exclusively for interstate commerce. Pullman Palace Car Co. v. Twombly, 29 Fed. 658 (1887).

As to the situs of rolling stock for purposes of taxation, see Marye v. Balt. & Ohio R. R. Co., 127 U. S. 117 (1888).

The personal property of corporations, both domestic and foreign, is taxable at the place where the principal office within this State is located, without regard to the particular situs of the property within this State. Peo. ex rel. Keystone Gas Co. v. Assessors of Olean, 15 St. Rep. 461 (1888).

§ 12. Taxation of corporate stock. The capital stock of every company liable to taxation, except such part of it as shall have been excepted in the assessment-roll or shall be exempt by law, together with its surplus profits or reserve funds exceeding ten per centum of its capital, after deducting the assessed value of its

real estate, and all shares of stock in other corporations actually owned by such company which are taxable upon their capital stock under the laws of this state, shall be assessed at its actual value.

L. 1857, ch. 456, § 3, as revised by L. 1896, ch. 908.

Meaning of "Capital Stock."

"Capital stock," as used in the statute, means not stock held by the stockholders, but the capital owned by the corporation and paid in and used as a basis of the enterprise. Peo. ex rel. Union Trust Co. v. Coleman, 126 N. Y. 434 (1891); Peo. ex rel. Trust & Deposit Co. v. Norton, 53 A. D. 557 (1900).

"Capital stock" means not the share stock, but the capital owned by the corporation, the fund required to be paid in and kept intact as the basis of the business enterprise. In taxing corporations, therefore, the subject of valuation and assessment is never the share stock, but always the company's capital and surplus which should be assessed at its actual value when tha is known or ascertainable. U. S. Trust Co. v. New York City, 77 Hun 182; Peo. ex rel. Union Trust Co. v. Coleman, 126 N. Y. 433 (1891), distg. Oswego Starch Co. v. Dolloway, 21 N. Y. 449; Peo. ex rel. Bk. of Commonwealth v. Comrs. of Taxes, 23 id. 192; Peo. ex rel. Cagger v. Dolan, 36 id. 59; Peo. ex rel. Glens Falls Ins. Co. v. Ferguson, 38 id. 89; Peo. ex rel. Citizens Gas Lt. Co. v. Bd. of Assrs., 39 id. 81; Peo. ex rel. 23d St. R. R. Co. v. Comrs. of Taxes, 95 id. 554; Peo. ex rel. Panama R. R. Co. v. Same, 104 id. 240; Peo. ex rel. Butchers' Hide & Melting Co. v. Asten, 100 id. 597; Peo. ex rel. Knickerbocker Fire Ins. Co. v. Coleman, 107 id. 541.

The market value of the shares is an erroneous basis for determining the amount of capital liable to taxation. It is the corporate assets that are the subject of taxation. Peo. ex rel. Bleecker St. and Fulton Ferry R. R. Co. v. Barker, 85 Hun 210 (1895).

In assessing capital stock under this act its actual value, not the market value of its share stock, is to be considered. In other words, its actual tangible personal property is taxed and not its franchises. Peo. ex rel. Manhattan Ry. Co. v. Barker, 146 N. Y. 304 (1895). In making an assessment the earnings of a corporation may be considered, and where they are such as to enable the company to pay expenses, repairs, interest charges and a dividend of 6 per cent. and still have a surplus, it may be assumed that its capital stock remains unimpaired, and that there are surplus assets sufficient to pay its outstanding indebtedness. Id.

The franchise of a company, which may be deemed its business opportunity and capacity, is the property of the corporation, but constitutes no part or element of its capital stock; while the same franchise does enter into and form part, and a very essential part, of the shareholder's capital stock. The capital stock of a company may be wholly in cash or in property, or both, which may be counted and valued. It may have in addition a surplus, consisting of some accumulated and reserved fund, or of undivided profits, or both, but that surplus is no part of the company's capital stock, and, therefore, is not itself capital stock. The capital cannot be divided and distributed; the surplus may be. But that surplus does enter into and form part of the share stock, for that represents and absorbs into its own value surplus as well as capital, and the franchise in addition. So that the property of every stock corporation may consist of three separate and distinct

things, which are its capital stock, its surplus, if any, and its franchise; but these three things, several in the ownerhsip of the company, are united in the ownership of the shareholders. The share stock covers, embraces and represents all three in their totality, for it is a business photograph of all the corporate possessions and possibilities. A corporation also may have no surplus, but, on the contrary, a deficiency which works an impairment of its capital stock. Its actual value is then less than its nominal or par value, while yet the share stock, strengthened by hope of the future and the support of earnings, may be worth its par, or even more. Peo. ex rel. Union Trust Co. v. Coleman, 126 N. Y. 433 (1891).

Exemptions and Deductions.

Although the State may not directly tax imported goods and the right to sell them, or impose license fees upon importers for the privilege of selling, so long as the goods remain in the original packages and are not mixed with the general property, yet when the article has lost its distinctive character as an import and becomes mingled with other property, it is subject to the taxing power of the State. N. Y. ex rel. Burke v. Wells, 208 U. S. 14 (1907), aff'g 184 N. Y. 275.

It may be stated as the result of decisions that as to imported goods the State may not impose taxes directly upon the goods or upon the right to sell them, or impose license fees upon importers for the privilege of selling, so long as the goods remain in the original package unincorporated into general property. All such attempts at taxation are violative of the Federal Constitution and void. N. Y. ex rel. Burke v. Wells, 208 U. S. 14 (1907), aff'g 184 N. Y. 275.

The provision that in assessing personal property for taxation "no deduction shall be made or allowed for or on account of any debt or liability contracted or incurred in the purchase of non-taxable property," applies to debts incurred in the purchase of imported goods not taxable by the State. Peo. ex rel. Bijur v. Barker, 155 N. Y. 330 (1898), affg. 21 A. D. 480. Imported tobacco in original packages, which has been subjected to a duty under the United States Revenue Laws, is non-taxable property. Id. The above provision, as quoted, is not confined to cases where the debt was fraudulently contracted to evade taxation. Id. This provision is not unconstitutional as working a discrimination in taxation. Id.

Letters-patent of the United States are not subject to State or local taxation where it is found that the patent rights are owned by the corporation, even though not the original patentee. Peo. ex rel. Edison Electric Illg. Co. v. Assessors of Brooklyn, 156 N. Y. 417 (1898), affg. 19 A. D. 599; N. Y. & N. J. Telephone Co. v. Neff, 15 A. D. 13.

Patent rights granted by the United States are not within the taxing power of the State. Peo. ex rel. Edison Electric Illg. Co. v. Assessors of Brooklyn, 156 N. Y. 417 (1898), affg. 19 A. D. 599.

Capital invested in United States bonds and shares of stock owned in such other corporations as are taxed in this State may be deducted from the amount of taxable capital. Peo. ex rel. Commonwealth Ins. Co. v. Coleman, 112 N. Y. 565 (1889); Peo. ex rel. Pacific Mail Steamship Co. v. Comrs. of Taxes, 64 N. Y. 541 (1876); Peo. ex rel. Bk. of Commerce v. Same, 23 id. 192 (1861); International Life Assur. Soc. v. Same, 28 Barb. 318 (1858).

A corporation cannot be taxed for the value of stock which it owns in another company where it is shown that such other company is taxed in the same city upon its own property. Peo. ex rel. Edison Electric Illg. Co. v. Neff, 19 A. D. 599, affd., 156 N. Y. 417 (1898).

Assessors can only make such deductions from the gross value of the personal assets of the corporation as are expressly authorized by the statute. Peo. ex rel. Nat. Surety Co. v. Feitner, 166 N. Y. 129 (1901), affg. 54 A. D. 633.

A patent is an incorporeal right — a franchise conferred by the sovereign power upon and belonging to the patentee, and like other personal rights attends his person and exists where he is or where he puts it in use. Peo. ex rel. Edison Electric Lt. Co. v. Campbell, 138 N. Y. 543 (1893).

Money permanently kept by a domestic corporation in an English bank, as a fund to defray expenses incurred in England, is not taxable. Peo. ex rel. Kursheedt Mfg. Co. v. Feitner, 32 Misc. 84 (1900).

Deduction of Debts.

The cost of furnishing magazines to subscribers who have paid in advance is deductible from the assessment for the unexpired terms of such subscriptions as it constitutes a debt. Peo. ex rel. Butterick Pubg. Co. v. Purdy, 153 A. D. 665 (1912), as modified by 207 N. Y. 771 (1913).

The word "person" as mentioned in sections 21 and 37 of the Tax Law, providing for deduction of debts from personal property, includes a corporation by virtue of Statutory Construction Law, section 5, and a corporation is entitled, therefore, to have its debts deducted from the value of the property, in an assessment of its personal property for town, county or municipal purposes. Peo. ex rel. Cornell Steamboat Co. v. Dederick, 161 N. Y. 195 (1900), modifying 41 A. D. 617.

The assessment of a domestic corporation is made after a deduction for debts, because its capital and surplus are to be assesssed at their actual value, which cannot be arrived at without considering and deducting debts. Peo. ex rel. Thurber, Whyland & Co. v. Barker, 141 N. Y. 118 (1894).

The provision for the assessment of capital stock at its actual value under this section does not conflict with or prohibit a deduction of the company's indebtedness in determining such value. Peo. ex rel. Cornell Steamboat Co. v. Dederick, 161 N. Y. 195 (1900), modifying 41 A. D. 617.

The provision, that the capital of a corporation "shall be assessed at its actual value," requires the deduction of the debts of the corporation when the assessment is made. Peo. ex rel. Rochester Ry. Co. v. Pond, 37 A. D. 330 (1899).

In the assessment of taxes upon a corporation under Laws of 1857, chapter 456, section 3, it is entitled to have its indebtedness deducted from the value of its corporate assets. Peo. ex rel. Second Ave. R. R. Co. v. Barker, 141 N. Y. 196 (1894); Peo. ex rel. Edison Elec. Illg. Co. v. Same, 139 N. Y. 55 (1893); Peo. ex rel. Union Trust Co. v. Coleman, 126 N. Y. 433 (1891).

Indebtedness must be taken into consideration in arriving at the value of the capital of a corporation. When it is seen that indebtedness of a corporation is double the amount of all its assets, it follows upon the system adopted by the State for the assessment of corporations that the actual value of the capital of such a corporation is zero. Peo. ex rel. Edison Elec. Illg. Co. v. Barker, 139 N. Y. 55 (1893), revsg. 68 Hun 513.

In assessing the personal property of a trust and safe deposit company there should be taken from the gross assets all debts, including amounts due to depositors, and from the balance there should be deducted that part of its capital invested in United States bonds, the stock of other corporations taxable upon their capital stock and 10 per cent. of its capital stock. Peo. ex rel. Trust & Deposit Co. v. Norton, 53 A. D. 557 (1900); Peo. ex rel. Bridgeport Sav. Bk. v. Barker, 154 N. Y. 128 (1897).

Indebtedness incurred by a street railway company in the purchase of franchises cannot be deducted from its assets for the purpose of determining the proper assessment for municipal taxes for the year 1894, since such franchises were not then taxable and consequently fell within the provision prohibiting the deduction of indebtedness incurred in the purchase of non-taxable property. Peo. ex rel. Manhattan Ry. Co. v. Barker, 165 N. Y. 305 (1901), revsg. 48 A. D. 248.

Indebtedness incurred for the purchase of the good will cannot be deducted from the value of the taxable personal property under section 6 of the Tax Law, which prohibits the deduction of indebtedness incurred in the purchase of non-taxable property, since good will, though it constitutes property, is not taxable as such for general town, county, or municipal purposes. Peo. ex rel. Cornell Steamboat Co. v. Dederick, 161 N. Y. 195 (1900), modifying 41 A. D. 617.

Real Estate.

In determining the actual value of assets of a corporation, real estate should be included at its actual and not at its assessed valuation, and in determining the value of the shares of the corporation, the assessed value of the real estate and not the actual value is to be deducted from the total value of the capital stock. Peo. ex rel. Jenkins v. Neff, 29 Misc. 59 (1899).

In fixing the value of the personal property of a corporation the assessor was not bound by a previous assessed value of the corporation's real estate for the purpose of local taxation, but may legally disregard it and estimate the real estate at its actual value, although this exceeds the assessed valuation. Peo. ex rel. N. Y. & Queens Gas & Elec. Co. v. Feitner, 58 A. D. 555 (1901).

The tax commissioners in valuing the whole property owned by a corporation, whether real or personal, from which aggregate is to be deducted the assessed value of the real estate, are not bound to value such real estate at its assessed value. Peo. ex rel. N. Y. Clearing House Bldg. Co. v. Barker, 31 A. D. 315, affd., 158 N. Y. 709 (1899).

In determining the actual value of the property to be taxed, the commissioners are justified in deducting only the assessed value of the real estate and taxing as capital and surplus the difference between the assessed and actual value as represented by the cost. Peo. ex rel. Equitable Gas Light Co. v. Barker, 144 N. Y. 94 (1894); Peo. ex rel. N. Y. Clearing House Co. v. Barker, 23 Misc. 192, affd., 31 A. D. 315, and 158 N. Y. 709 (1899); Jenkins v. Neff, 163 N. Y. 320 (1900), affg. 47 A. D. 394.

Real estate, located outside the State of New York, and held by a railroad corporation, is to be entirely excluded from the assets in assessing its capital. Peo. ex rel. D. & H. C. Co. v. Barker, 23 Misc. 188 (1897).

The tax commissioners, in deducting the valuation of real estate, are not limited by the assessed valuation and may, if they deem proper, estimate it at its full value. Peo. ex rel. N. Y. Clearing House Bldg. Co. v. Barker, 23 Misc. 192, affd., 31 A. D. 315, and 158 N. Y. 709 (1899).

In determining the value of the real estate the assessors are not bound by the assessed valuation. This does not necessarily show the full value and the assessors may legally disregard it, and estimate the real estate at its actual value, even if it exceeds the assessed valuation. Equitable Gas Light Co. v. Barker, 143 N. Y. 94 (1894), and cases therein cited.

Under the foregoing section, the assessed value of real estate owned by the corporation in this State must be deducted from the amount of taxable

capital. Peo. ex rel. Butchers' Hide & M. Co. v. Asten, 100 N. Y. 597 (1885); Peo. ex rel. Twenty-third St. R. R. Co. v. Comrs. of Taxes, 95 N. Y. 554 (1884); see, also, Peo. ex rel. Central Park, etc., R. R. Co. v. Comrs. of Taxes, 21 St. Rep. 350 (1889). When the real estate is situated in another State or country the measure of the deduction is the actual value of such real estate, and if better evidence is not obtainable the price paid may be taken as representing that value, or the assessed value, if other evidence is lacking. Peo. ex rel. Panama R. R. Co. v. Comrs. of Taxes, 104 N. Y. 240 (1887); Peo. ex rel. Fairfield Chemical Co. v. Coleman, 115 N. Y. 179 (1889).

In assessing the capital stock of a corporation which owns real estate subject to a mortgage, and the value of the equity of redemption alone has been included in determining the value of its capital stock, the company is entitled to have deducted from the valuation only the value of such equity, and not the whole assessed value of its real estate. Peo. ex rel. Weber Piano Co. v. Wells, 180 N. Y. 62, revsg. 95 A. D. 574 (1904).

Real property condemned for the use of the city of New York is subject to taxation until the final confirmation of the report of the commissioners of estimate. Matter of Board of Education, 59 A. D. 258 (1901), revsd., 169 N. Y. 456 (1902).

Lands of a religious corporation used for producing revenue for maintaining a school belonging to the corporation are exempt. Peo. ex rel. Blackburn v. Barton, 63 A. D. 581 (1901).

Surplus.

The surplus profits or reserve funds contemplated by the Tax Law are the accumulations of the company of moneys or property in excess of the par value of the stock issued by it, and if after the real estate and personal property is assessed at its actual value, no surplus over the par value of the stock is shown, or if such surplus does not exceed 10 per cent. of the capital stock, there is nothing to assess as surplus and nothing from which the 10 per cent. of the capital can be deducted. Peo. ex rel. Manhattan Ry. Co. v. Barker, 165 N. Y. 305 (1901), revsg. 48 A. D. 248.

A corporation is not entitled to a deduction upon the ground that its surplus exceeds 10 per cent. of its capital stock, where it appears that the alleged surplus may have resulted from an enhancement of the value of its franchise, which is exempt from taxation. If such surplus is from savings or accumulations from its business, that fact should be affirmatively shown. Peo. ex rel. Citizens' Elec. Illg. Co. v. Neff, 26 A. D. 542 (1898).

A corporation is entitled to a reductin of 10 per cent. of the amount of its capital stock only when its surplus profits or reserve fund, as returned for taxation, equal 10 per cent. of its capital stock. Peo. ex rel. Citizens' Elec. Illg. Co. v. Neff, 26 A. D. 542, explained, 165 N. Y. 340 (1901).

Good Will.

Good will, as such, is not taxable for general town, county, or municipal purposes. Peo. ex rel. Cornell Steamboat Co. v. Dederick, 161 N. Y. 195 (1900), modifying 41 A. D. 617.

The good will of a corporation is taxable with its franchise as a part of the value of its capital stock. A corporation which claims that the value of its franchise was included in the assessment of its personal property must prove the value of such franchise before it can claim a deduction therefor. Peo. ex rel. N. Y. & Queens Gas & Electric Co. v. Feitner, 58 A. D. 555 (1901).

The commissioners of taxes have no right to consider the good will of a business as property subject to taxation. Peo. ex rel. Brokaw Bros. v. Feitner, 44 A. D. 278 (1899).

Declared Dividends.

A corporation declared a dividend on December 7, 1893, and made it payable January 10, 1894. The tax authorities fixed upon January 8, 1894, as the day upon which the taxable status of the corporation should be determined. Held, that the dividend was not a part of the "surplus profits or reserved funds" of the corporation, and was not taxable as property of the corporation under the foregoing section. Peo. ex rel. U. S. Trust Co. v. Barker, 86 Hun 131 (1895). Dividends declared, but payable in the future, belong to the shareholders of the corporation. Id.

Dividends declared by a corporation, but retained in its business, are taxable. Peo. ex rel. Hawley Box & Lumber Co. v. Barker, 23 A. D. 532 (1897).

Assessment.

A corporation which, on application for a review of its assessment, merely alleges that it has a certain surplus, notwithstanding the fact that its own sworn statement as to its assets and its capital stock demonstrates that it had no surplus, is not entitled to prove by its books or otherwise that it had a surplus, and that its sworn statement was false or erroneous. Peo. ex rel. McClure Publications Inc. v. Purdy, 161 A. D. 541 (1914).

When a corporation applies for a reduction of its assessment and files a verified statement showing its financial condition, if the commissioners are not satisfied with such statement, they may require further information, but if they neglect to do so, they may not disregard the statement merely because they believe it to be untrue. Peo. ex rel. Bhumgara v. Wells, 93 A. D. 212 (1904), affd., 179 N. Y. 529; Peo. ex rel. Cons. Water Co., etc. v. Odell, 129 A. D. 475 (1908).

If tax officers having jurisdiction over the person and subject-matter proceeded upon a wrong basis, and thus made an erroneous assessment, as distinguished from an illegal one, it will not render the assessment void. Assessors cannot acquire jurisdiction to make asssessments by determining that they have it; their authority to act always depends upon the existence of the jurisdictional facts described in the statute. An erroneous assessment is one where the officers making the same have power to act but err in the exercise of their power, and an illegal assessment is one where such officers have no power to act at all, and they are not aided by their decision that they have. U. S. Trust Co. v. Mayor, etc., of New York, 77 Hun 182 (1894).

When the value of the assets of a corporation cannot be definitely ascertained, the method to establish a valuation for taxation is to deduct the assessed value of its real estate from the market value of its stock, but no deduction from the result should be made for good will of the business where it is shown that no good will of any value enters into the market value of the stock. Peo. ex rel. Malcolm Brewing Co. v. Neff, 19 A. D. 596, affd., 154 N. Y. 437 (1897).

Where a domestic corporation furnishes the tax commissioners with a full and complete statement of its assets and liabilities, together with its balance sheet supporting such statements, the commissioners are, in the absence of any other evidence, bound to make such statement the basis of their assessment against the corporation. Peo. ex rel. E. Seidenberg, Stiefel & Co. v. Comrs. of Taxes, 41 A. D. 571 (1899).

It is error on the part of the assessors to take the market value of shares as the "actual value" of the capital stock and base their assessment thereon, when the corporation presented to them a sworn statement of its assets and liabilities, the truth of which was not questioned and which showed that there was nothing subject to assessment. Peo. ex rel. Union Trust Co. v. Coleman, 126 N. Y. 433 (1891).

It seems, when the amount of capital and surplus are undisclosed and unknown, the assessors may consider the market value of the share stock and general condition of the company, not as the thing to be valued and assessed, but as an aid in discovering the value of that which is to be assessed; it seems, also, further resort may be had to such means of information when the amount of capital and surplus is stated, but the assessors have sufficient reason, founded upon competent proof, to disbelieve the statement. Peo. ex rel. Union Trust Co. v. Coleman, 126 N. Y. 433 (1891).

When a corporation makes supplemental and inconsistent verified statements as to its liability to taxation the commissioners are to act judiciously upon such statements, and their conclusion, based upon the first statement, will not be disturbed. Peo. ex rel. McShane Mfg. Co. v. Barker, 23 A. D. 530, affd., 155 N. Y. 665 (1898).

The validity of an assessment, levied by town assessors, is not affected by the fact that the columns of the assessment-roll were not arranged just as directed by the statute, or that the corporation was erroneously designated. Peo. ex rel. Mohawk & Malone Ry. Co. v. Garmon, 63 A. D. 530 (1901).

In fixing the value of a lease of the property and franchise of one railroad corporation to another, the assessors, for the purpose of assessing the capital and stock surplus of the lessee corporation, have the right to consider the nature of the estate granted, its duration and the profits, if any, realized from operating the leased property, but should deduct therefrom the value of the leased franchise, as that is taxable under another statute. Peo. ex rel. D. & H. C. Co. v. Feitner, 61 A. D. 129, affd., 171 N. Y. 641 (1902).

The tax commissioners are justified in assuming that the capital stock of a corporation, which pays annual dividends of 6 per cent., is unimpaired, but evidence may be introduced showing that it has been impaired by the existence of debts, which evidence, if believed, overcomes the presumption that might otherwise exist. Peo. ex rel. Manhattan Ry. Co. v. Barker, 165 N. Y. 305 (1901), revsg. 48 A. D. 248.

A corporation assessed by the commissioners of taxes submitted a verified statement of its assets and liabilities, by which it appeared that the property subject to taxation amounted to $52,334.11. The commissioners then examined the officers of the corporation, but secured no evidence to contradict the verified statement. The treasurer of the corporation, however, stated that the corporation had paid a dividend of 5 per cent.; that he considered its stock worth par, and that its capital was substantially unimpaired. The commissioners thereupon assumed that the surplus property of the company above its debts was equal to its capital stock, and on that basis assessed the property at the sum of $199,300. Held, that the assessment should be reduced to the sum appearing in the verified statement as the amount on which the corporation was taxable; that the treasurer's statement, that he considered the stock worth par, and the capital unimpaired, was a mere conclusion and not sufficient to impeach the uncontradicted evidence as to the actual amount of the company's assets and liabilities. Peo. ex rel. Brokaw Bros. v. Feitner, 44 A. D. 278 (1899).

When assessing the capital stock and surplus of a corporation whose chief asset is a building erected on leased ground, the assessors may estimate the

building at its actual value, and then add the value of the personal property, and from this amount deduct the assessed value of the building. Peo. ex rel. Eden Musee Co. v. Feitner, 60 A. D. 282 (1901). Where on a hearing it appears that the building was erected at a cost of $243,329, and was carried on the books at that price, and the corporation, instead of furnishing evidence as to the value of the building, merely shows that the assessed value of the building was $105,000, and that the price of its stock had ranged from 40 to 60 for several years, the assessors are justified in finding that the cost of the building represented its actual value. Id.

Where a New Jersey corporation, which does a large portion of its business in this State, makes an application to tax commissioners to correct an assessment upon the property which it had invested in business in this State, the commissioners may take into consideration in disposing of the application the willful refusal of the president of the corporation to testify in regard to business of the company in New Jersey. Peo. ex rel. H. B. Claflin Co. v. Feitner, 58 A. D. 468 (1901).

The tax commissioners of New York city have no power to increase the assessed valuation after the assessment books are open for correction without giving the property-owner the notice required by section 896 of the Greater New York charter nor have they authority to increase the assessed valuations after March thirty-first and when the books are closed. Peo. ex rel. Littman v. Wells, 91 A. D. 172 (1904).

The provision re-enacted in section 31 of the Tax Law, requiring an assessment of the amount of the capital stock of a corporation "paid in or secured to be paid in" is superseded by the provision re-enacted in section 12, which requires capital stock to be assessed at its actual value. Peo. ex rel. Cornell Steamboat Co. v. Dederick, 161 N. Y. 195 (1900), modifying 41 A. D. 617.

Proceedings for the assessment of property are of a judicial character, and assessors in making assessments act judicially. McLean v. Wyandance Brick & Terra Cotta Co., 138 N. Y. 158 (1893). Therefore, where a party who deems himself aggrieved by the proposed action of assessors, appears before them, submits proof in support of his claims, asks and obtains a reduction of his assessment, without making other objection, he is precluded from thereafter claiming that the assessors had no jurisdiction to tax him at all. Id.

In case the statute under which a corporation is organized requires that its principal place of business, or its principal office, be designated in its certificate of incorporation, the statement is, as against the corporation, conclusive evidence of its residence, unless it has been changed pursuant to some statute. Peo. ex rel. Knickerbocker Press v. Barker, 87 Hun 341, affd., 147 N. Y. 715 (1895). The statement of location of its principal office or place of business is a condition precedent to the organization of a business corporation, and, should it appear that the location was willfully misstated in the certificate, or in case the corporation should change its principal place of business, without effecting a legal change of residence, for the purpose of evading taxation, it might present a case for the attention of the Attorney-General. Id. The latter statement is dictum.

Tangible personal property which once had its situs within the State, and which has been sent temporarily without the State, is taxable. Kursheedt Mfg. Co. v. Feitner, 32 Misc. 84 (1900).

A domestic corporation having its general office in New York city and engaged in mining and selling copper in Arizona is taxable here upon deposits made by it in various banks outside of the State, and on bills and accounts receivable for copper sold outside the State, all of which are payable at the

New York office. United Verde Copper Co. v. Feitner, 54 A. D. 217 (1900), affd., 165 N. Y. 645.

Fee damages paid by an elevated railroad company to abutting owners represent property that may be assessed, but damages paid on account of past interference with their use of easements of light, air and access do not form a basis for assessment. Peo. ex rel. Manhattan Ry. Co. v. Barker, 165 N. Y. 305 (1900), revsg. 48 A. D. 248.

Review by Certiorari.

The provisions of the Code of Civil Procedure govern as to the four months' time within which a writ of certiorari may be issued, but as to all proceedings relating to the mode and scope of the review of assessments, alleged to be erroneous for excessive valuation or inequality, the provisions of the Tax Law are controlling and exclusive. Peo. ex rel. Kendall v. Feitner, 51 A. D. 196 (1900).

The question on review of an assessment is, whether irrespective of the method whereby the result was reached, the assessment imposed was in excess of the actual value of the property sought to be taxed. Peo. ex rel. Eden Musee Co. v. Feitner, 60 A. D. 282 (1901); Peo. ex rel. United States Verde Copper Co. v. Feitner, 54 A. D. 217, affd., 165 N. Y. 645 (1900); Peo. ex rel. Equitable Gas Co. v. Barker, 66 Hun 21, affd., 137 N. Y. 544 (1893).

It need not appear from the return to a writ of certiorari to review an assessment for taxation that the relator has been aggrieved before the court has jurisdiction to grant the writ, since, under the provision of section 253 of the Tax Law that the court may take testimony itself, or by a referee, if upon the hearing it shall appear necessary to the disposition of the matter, the return is not conclusive. Peo. ex rel. Thomson v. Feitner, 168 N. Y. 441 (1901), affg. 61 A. D. 117.

The right of relator to have testimony taken on certiorari to review an assessment for taxation is not an appeal to the discretion of the court as on a motion for a new trial; but is a substantial right which must be granted, where issues of fact are framed by the petition and return, and evidence is necessary for their proper disposition, since the provision of section 253 of the Tax Law, that the court may take such testimony when necessary for the proper disposition of the matter, must be regarded as mandatory. Peo. ex rel. Thomson v. Feitner, 168 N. Y. 441 (1901), affg. 61 A. D. 117.

The system for the review and correction of assessments by writ of certiorari under chapter 269, Laws of 1880, furnishes an exclusive remedy to the dissatisfied taxpayer where the illegality complained of consists, not in the lack of jurisdiction, but in the commission of errors on the part of the taxing officers, vitiating the assessment and laying it open to cancellation or reversal. United States Trust Co. v. City of New York, 144 N. Y. 488 (1895).

While the petition for a writ of certiorari under chapter 269, Laws of 1880, must specify "the grounds of the alleged illegality," only the conclusions of fact need be stated, not the evidence necessary to support them; the petition is in this respect, in the nature of a pleading. Peo. ex rel. Commercial Mutual Ins. Co. v. Tax Comrs., 144 N. Y. 483 (1895).

Where the review of an assessment upon the ground of its illegality is sought under the provisions of L. 1880, ch. 269, while the petition must specify "the grounds of the alleged illegality" only the conclusions of fact need be stated; the petition is in the nature of a pleading. Peo. ex rel. Com'l Mut. Ins. Co. v. Comrs. of Taxes, 144 N. Y. 483 (1895), revsg. 83 Hun 11.

By chapter 269, Laws of 1880, power is given to review the valuation of property or the legality of placing it on the rolls for the purpose of taxation,

The word "assessment" in that statute is used in the sense of valuation, not in the sense of final imposition of a specific sum for taxes. Peo. ex rel. Spencer v. New Rochelle, 83 Hun 185 (1895).

A petition for a writ of certiorari is sufficient prima facie to establish overvaluation and inequality of assessment when it alleges that the assessment of the relator's property was increased 66 2-3 per cent. during the year, while the increase of all other real estate is only 15 9-10 per cent., and when it further alleges that the other real estate was assessed at a lower proportionate valuation than the petitioner's real estate. Broadway Realty Co. v. Feitner, 61 A. D. 156, affd., 168 N. Y. 661 (1901).

When a corporation has obtained from the taxing officers a reduction of its original assessment upon a verified statement seasonably made, it is precluded from thereafter obtaining from the courts, in certiorari proceedings, a further reduction upon a claim, then interposed for the first time, that the statement was erroneous. Peo. ex rel. German Looking Glass Plate Co. v. Barker, 75 Hun 6 (1894), explained, 21 A. D. 121 (1897).

Where in certiorari proceedings to review action of assessors, it appeared that the assessment was based solely upon statements made in answer to questions put by the assessors showing that the capital was impaired and that the indebtedness exceeded the value of assets exclusive of real estate, and did not disclose any fact or circumstance justifying a disbelief of the answers made, except that a dividend has been paid shortly previous, it was held that this did not authorize a disbelief in the statement of the impairment of capital. Peo. ex rel. Edison General Elec. Co. v. Barker, 141 N. Y. 251 (1894), revsg. 74 Hun 418. The directors in paying unearned dividends merely subject themselves to the penalty imposed by statute. Id.

When the evidence as to actual value of the capital stock and surplus of the corporation are uncontradicted and is full and complete, all the necessary facts having been established beyond any fair dispute, and no reason appearing for doubting the truth of such evidence, a refusal of tax officers to decide in accordance with it amounts to legal error, and may be reviewed and corrected on certiorari. Edison General Elec. Co. v. Barker, 141 N. Y. 251 (1894); Peo. ex rel. Edison Elec. Illg. Co. v. Barker, 139 N. Y. 55 (1893), revsg. 68 Hun 513.

The provision of the New York City Consolidation Act (§ 822, ch. 410, L. 1882), giving to the commissioners of taxes and assessments power to remit or reduce taxes after delivery of the books to the receiver of taxes, provided the party aggrieved shall satisfy them that he was prevented by absence from the city or illness from making his application within the time limited by the prior provisions of the act for correction, applies to domestic corporations. Peo. ex rel. N. Y. Hotel & Restaurant Co. v. Barker, 140 N. Y. 437 (1893).

An application made under the charter of the city of New York (L. 1897, ch. 378, §§ 875, 906), to its tax commissioners for correction of an assessment of real estate upon the grounds of overvaluation and of inequality must, to entitle the applicant to a review by certiorari, be in writing and state the marketable value of real estate, as well as the facts, relative to other real estate, which are deemed to show overvaluation and inequality. Peo. ex rel. Marlborough Hotel Co. v. Feitner, 33 Misc. 293 (1900).

In ascertaining the capital stock subject to taxation both real and personal property shall be valued, and from the aggregate the assessed value of the real estate must be deducted, but in determining the value of the real estate the commissioners are not bound by the assessed valuation but may estimate the real estate at its actual value. Peo. ex rel. Equitable G. L. Co. v. Barker, 144 N. Y. 94 (1894), revsg. 81 Hun 22.

Under section 895 of the New York charter, which provides that an application for the correction of an assessment relating to real estate must be made in writing, stating the ground of objection thereto, the complaining taxpayer must do something more than make a claim. He must state the facts. If he neglects to do this he cannot, upon obtaining a writ of certiorari, require the court to enter upon a new and original inquiry. Sutphen v. Feitner, 45 A. D. 542 (1899).

Where the tax board of New York assesses a railroad corporation upon its roadbed lying in a city street, which has been assessed by the State board as a part of the special franchise of the corporation, the remedy of the corporation is by certiorari and not by mandamus. Peo. ex rel. N. Y. & Harlem R. R. Co. v. Tax Board, 55 A. D. 544, appeal dismissed, 166 N. Y. 154 (1901).

Where the return to a writ of certiorari, issued to review assessment on real property in New York city upon the ground of excessive valuation and inequality, raises an issue of fact, the proceeding should be heard at Special Term pursuant to the provisions of the Tax Law, and not at the Appellate Division, under section 2138 of the Code. Peo. ex rel. Kendall v. Feitner, 51 A. D. 196 (1900).

Franchises of a street railroad are not subject to local taxation. Peo. ex rel. Brooklyn City R. R. Co. v. Neff, 19 A. D. 590. Where the return to a writ of certiorari shows that the paid-up capital of a street railroad corporation is $12,000,000, and the actual value of all its assets $8,000,000, and that the lawful deductions to be made therefrom for the assessed value of its real estate and debts exceed that sum, the corporation is not taxable for personal estate, notwithstanding the fact that the market value of its stock is 180. Peo. ex rel. Brooklyn City R. R. Co. v. Neff, 19 A. D. 590, affd., 154 N. Y. 765 (1898).

Recovery of Erroneous Payments,

Where an assessment is illegal and void, or money is paid upon an illegal or erroneous assessment, to prevent an illegal seizure of his person or property by one claiming authority to seize the same, the amount may be recovered back in an action on the ground that the payment was compulsory, or by duress or extortion. U. S. Trust Co. v. City of New York, 77 Hun 182, affd., 144 N. Y. 488 (1894).

But where the payment is voluntary a protest with notice of an intent to reclaim is not sufficient to sustain a recovery in an action brought to recover back the amount thereof, as the voluntary character of the payment still remains, notwithstanding the notice, and is fatal to the action. Id., distg. Peo. ex rel. Warren v. Carter, 119 N. Y. 557 (1890).

Where assessors have jurisdiction to impose a tax, which is paid, it cannot be recovered back without first setting aside the assessment, and where, without first taking proceedings for such purpose, a voluntary payment is made, no recovery can be had, even though it be held that the assessment was excessive and erroneous. A tax voluntarily paid cannot, as a general rule, be recovered back, and it is immaterial that it has been illegally laid, the presumption being that all payments are voluntary until the contrary is shown. U. S. Trust Co. v. Mayor, etc., of New York, 77 Hun 182, affd., 144 N. Y. 488 (1894); see, also, Trimmer v. Rochester, 130 N. Y. 401 (1892).

When an assessment has been made with jurisdiction, and the property-owner has paid, he cannot recover back the payment until the assessment has been vacated or set aside in some appropriate proceeding. But this rule does not apply to defects in the proceeding which render the assessment void

for want of jurisdiction. Mutual Life Ins. Co. v. City of New York, 144 N. Y. 494 (1894).

Where a domestic corporation is entitled under the State Tax Law to exemption from taxation upon its capital stock and personal property and has, for several years, paid to the State such tax, and also paid, during the same period, taxes levied upon its personal property by a city in ignorance of the fact that any amount for State purposes was included therein, the latter payment cannot be considered to have been voluntary and the corporation may obtain an order requiring the city to refund amounts unjustly collected. Matter of Edison Electric Illg. Co., 22 A. D. 371 (1898), affd., 155 N. Y. 699.

Foreign Corporations.

A personal tax cannot be assessed against a non-resident, nor can a tax be assessed against his property, unless it has actual situs within the State and thus is under the protection of its laws. City of New York v. McLean, 170 N. Y. 374 (1902). The tax may be enforced only against property within the jurisdiction of the taxing officers and only against the property actually assessed. Id.

Where the business of a foreign corporation carried on in this State is intended by it to be a permanent and continuous business, including both the manufacture and sale of goods, the value of its merchandise at the place designated by it as its principal place of business in the State is properly assessed for taxation under section 7 of this law, as being invested in the business in this State, although the business conducted at that place consists wholly of selling, and, while a portion of the goods held there for sale was manufactured by the corporation within this State, a large portion was manufactured at the corporation's domicile in another State, to which the proceeds of sales are remitted. Peo. ex rel. Armstrong Cork Co. v. Barker, 157 N. Y. 159 (1898), modifying 31 A. D. 263.

The taxation of the capital of a foreign corporation was not intended to apply to goods sent here for the purpose of sale, but to funds used in the prosecution of continuous business. When a foreign manufacturing corporation with a depot and agent in New York sends its goods here for sale, its only business in this State, consisting in the making of such sales, the proceeds of which are remitted to the corporate office in another State, and when sales are made on credit, the securities are sent to the home office for collection it is not liable for a local tax on its goods in this State. Parker Mills v. Comrs., 23 N. Y. 242 (1861). The rule is the same under present law. Peo. ex rel. Armstrong Cork Co. v. Barker, 157 N. Y. 159 (1898).

A foreign corporation, which is liable for personal sums invested in business in this State, is taxable upon credits and bills receivable which are in this State and are due the corporation for merchandise sold by it in the transaction of its business in this State. Peo. ex rel. Yellow Pine Co. v. Barker, 23 A. D. 524, affd., 155 N. Y. 665 (1898).

When a foreign corporation has only a sales agency and a small bank account for the payment of office expenses in the State, the proceeds of sales not being reinvested here, but at once remitted to home office, and none of the officers being residents, it is liable for a tax based only on such bank account, and the value of office furniture, and is not liable for a tax on the value of goods kept on hand. Peo. ex rel. Sherwin Co. v. Barker, 5 A. D. 246 affd., 149 N. Y. 623 (1896); Peo. ex rel. Nat. Sew. M. Co. v. Feitner, N. Y. Law Journal, March 15, 1899.

For the purpose of taxation by a foreign corporation, under the provisions of section 7 of this law, the value of notes and open accounts, owed to the corporation for merchandise sold by it in the course of its business in this State, is properly included in the assessment. Peo. ex rel. Armstrong Cork Co. v. Barker, 157 N. Y. 159 (1898), modifying 31 A. D. 263.

The taxability of open accounts and bills receivable of a foreign corporation with a sales agency in this State, depends upon whether or not the goods which they represent, if still unsold, would have been taxable. Peo. ex rel. Nat. Sew. M. Co. v. Feitner, N. Y. Law Journal, March 15, 1899.

In assessing the capital of a foreign corporation, the market value of its share stock is immaterial, unless, perhaps, all of its business is done in this State. Peo. ex rel. Oswego C. Co. v. City of Oswego, 5 Hun 117 (1875). The market value of shares is an erroneous basis. Peo. ex rel. Bleecker St. & Fulton Ferry R. R. Co. v. Barker, 85 Hun 210 (1895).

It seems, when a foreign corporation, having a certificate of authority to do business in this State, has a sales depot here which it intends to maintain permanently, a managing agent, traveling salesman, and a bank account for the payment of local expenses, the management of the local office being practically controlled here, it is liable for a tax on its capital invested here. Peo. ex rel. Crane Co. v. Feitner, 49 A. D. 108 (1900). In such cases it is liable for a tax even if the proceeds of sales are at once remitted to the home office in another State. Peo. ex rel. Reversible Collar Co. v. Feitner, 31 Misc. 553 (1900).

A foreign corporation which has for six successive years carried on business in this State under the statutory certificate permitting it to do so, keeping on hand in New York city a stock of goods, having there a regular bank account for the purpose of defraying expenses, fixing there the terms of sale and credit for its New York business, and making collections there for that business is taxable upon the value of such goods, the amount receivable in this State on notes and open accounts, the value of its fixtures, etc., in New York State and upon its bank balance. Peo. ex rel. Reversible Collar Co. v. Feitner, 31 Misc. 553 (1900).

A foreign corporation, with capital invested in a continuous business in this State and liable for local taxation, is not entitled to a general deduction of its debts from the amount of property subject to local taxation. Peo. ex rel. Humber Co. v. Barker, 141 N. Y. 118 (1894). But when such a corporation purchases property in this State, partly for cash and partly on credit, the capital invested in this State for the purpose of local taxation is the amount actually paid and not the value of the property — that is to say, the company is entitled to deduct from the value of the property the amount still due. Peo. ex rel. Hecker Milling Co. v. Barker, 147 N. Y. 31 (1895).

A foreign corporation, which has obtained a certificate of authority, which manufactures goods here and elsewhere and sells same, is engaged in a permanent and continuous business in this State and is liable for a tax on value of merchandise on hand, the notes and accounts due the corporation for property sold in this State, the bank accounts, office furniture and other property here, after deducting debts owing for expenses incurred for items included in such sales and assets, notwithstanding that one-half of the business consists in selling goods manufactured elsewhere, the proceeds of which, after deducting expenses, are sent to the main office in another State. Peo. ex rel. Armstrong Cork Co. v. Barker, 157 N. Y. 159 (1898), modifying 31 A. D. 263.

§ 27. Reports of corporations. The president or other proper officer of every moneyed or stock corporation deriving an income or profit from its capital or otherwise shall, on or before June fifteenth, deliver to one of the assessors of the tax district in which the company is liable to be taxed and, if such tax district is in a county embracing a portion of the forest preserve, to the comptroller of the state, a written statement specifying:

1. The real property, if any, owned by such company, the tax district in which the same is situated and, unless a railroad corporation, the sums actually paid therefor.

2. The capital stock actually paid in and secured to be paid in, excepting therefrom the sums paid for real property and the amount of such capital stock held by the state and by any incorporated literary or charitable institution, and

3. The tax district in which the principal office of the company is situated or in case it has no principal office, the tax district in which its operations are carried on.

Such statement shall be verified by the officer making the same to the effect that it is in all respects just and true. If such statement is not made within twenty days after the fifteenth day of June, or is insufficient, evasive or defective, the assessors may compel the corporation to make a proper statement by mandamus.

L. 1896, ch. 908.

For form of report, see post, Form No. 440.

The valuation of the capital stock made by the secretary of a company in the statement to the assessors is sufficient evidence of value upon which to base the assessment, notwithstanding the company sought by certiorari to correct the assessment by deducting the amount of debts owed by it from the sum indicated in the statement, since the value of the franchises might make up the difference. Peo. ex rel. Buffalo Mut. Gas Light Co. v. Steele, 1 Buff. Super. Ct. 345.

Corporations may be assessed though no statement is made by them to the assessors as required by law, and such a statement when made is not conclusive upon the assessors: it is the judgment of the assessors that the law requires. Peo. ex rel. Manhattan Fire Ins. Co. v. Comrs. of Taxes, 76 N. Y. 64 (1879).

Assessors have jurisdiction to assess a corporation that omits to make a statement of its financial condition. If such a corporation omits to appear and demand a correction of the preliminary assessment, it can obtain no relief from the overvaluation by certiorari. Peo. ex rel. The Mutual Union Tel. Co. v. Comrs. of Taxes, 99 N. Y. 254 (1884).

Nor does the failure to file such a statement prevent a party aggrieved from appearing before the assessors. Id.

This case is distinguished from Peo. ex rel. Mutual Un. Tel. Co. v. Comrs., 99 N. Y. 254 (1884), because in the latter case the relator did not appear before the commissioners on the grievance day, and hence was deemed to have waived any right of review. Id.

It is the duty of a company to make the statement required, but the courts have no power to impose any other punishment than that prescribed by the statute, and a writ of certiorari will not be quashed on the ground that the return shows that no such statement has been made. Peo. ex rel. West Shore R. R. Co. v. Pitman, 9 St. Rep. 469.

§ 28. Penalty for omission to make statement. In case of neglect to furnish such statements within thirty days after the time above provided, the company so neglecting shall forfeit to the people of this state for each statement so omitted to be furnished, the sum of two hundred and fifty dollars, and it shall be the duty of the attorney-general to prosecute for such penalty upon information which shall be furnished him by the comptroller. Upon such statement being furnished and the costs of the suit being paid, the comptroller, if he shall be satisfied that such omission was not wilful, may, in his discretion, discontinue such suit.

L. 1896, ch. 908.

§ 29. County clerks to furnish data respecting corporations. Between the first and fifteenth days of June in each year the county clerk in each county of the state, excepting counties containing a city of the second class and counties wholly situate within the corporate limits of a city, shall prepare from the records in his office and mail to each of the town clerks in his said county, a certified statement containing the names of every stock corporation, whose certificate of incorporation has been filed with him since his last preceding annual statements to said several town clerks, whose principal business office or chief place of business is designated in its certificate of incorporation as being in such town or in any village or hamlet therein, together with the fact of such designation and the names and addresses of the directors of each such corporation so far as said county clerk can discover the same from the certificate of incorporation or from the latest certificate of election of directors of such corporation filed in his office. Each town clerk receiving such statement shall forthwith file the same in his office and mail a notice of such filing to each of the assessors of his town.

Added to ch. 908, L. 1896, by L. 1906, ch. 425.

§ 32. Corporations, how assessed. (Repealed by L. 1911, ch. 315.)

For collection of authorities heretofore cited under the above section, see the seventh edition of "White on Corporations," pages 1004–1006.

§ 34. Assessment of omitted property. The assessors of any tax district shall, upon their own motion, or upon the application of any taxpayer therein, enter in the assessment-roll of the current year any property shown to have been omitted from the assessment-roll of the preceding year, at the valuation of that year, or if not then valued, at such valuation as the assessors shall determine for the preceding year.

Thus am'd by L. 1914, ch. 277.

Formerly § 33, ch. 908, L. 1896, revising L. 1865, ch. 453.

Under L. 1865, ch. 453, the duty of the assessors is ministerial, and they have no discretionary power; if the property was valued the year it was omitted, they must enter it at such valuation; if not, and it was upon the roll of the year next preceding the year it was omitted, they must enter it at the valuation upon the roll of the earlier year; if it was not valued in one of those years they have no power to enter it. The valuation required is that upon the previous roll. The assessors cannot increase it. Peo. ex rel. Oswald v. Goff, 52 N. Y. 434.

The provisions of L. 1865, ch. 453, do not authorize reassessment of omitted taxes without notice, nor after the completion of the roll for the current year. Overing v. Foote, 65 N. Y. 263.

A corporation liable to taxation under L. 1880, ch. 542, having been inadvertently omitted from assessment for city and county purposes, for one year, it could be taxed therefor under the provisions of L. 1865, ch. 453, upon the roll of the succeeding year. Peo. ex rel. Brooklyn City R. R. Co. v. Assessors of Brooklyn, 92 N. Y. 430.

A tax against a resident returned as unpaid, is chargeable, in the subsequent year, against the land assessed only. Jewett v. Lamphear, 20 N. Y. Weekly Dig. 232.

The provisions of L. 1865, ch. 453, being a part of the general system of taxation, are not subject to the constitutional objection that they do not require a notice or hearing, since the general notice of the completion of the assessment-roll covers them. Peo. ex rel. Brooklyn City R. R. Co. v. Assessors, 92 N. Y. 430.

§ 35. Debts owing to nonresidents of the United States, how assessed. Every agent in any county of a nonresident creditor having debts owing to him, taxable in any county of the state, shall annually, on or before June first furnish to the county treasurer of the county where the debtor resides, a true and accurate statement verified by his oath, of such debts owing on the first day of May next preceding in each town or ward in such county. The county treasurer shall, immediately upon the receipt

of such statement, make out and transmit to the assessors of every tax district in the county in which any such debtor resides, a copy of as much of such statement as relates to the tax district of such assessors, with the name of the creditor. The assessors on receipt of such statement from the county treasurer shall, within the time in which they are required to complete the assessment-roll, enter therein the name of such nonresident creditor, and the aggregate amount due him in such tax district on the first day of May next preceding, in the same manner as other personal property is entered on the roll, adding the name of the debtor owing such debt. Any agent neglecting or refusing without good cause to furnish such statement to the county treasurer shall forfeit to the county in which the debtor resides the sum of five hundred dollars, recoverable by the district attorney, if the existence of such debts was known to the agent.

Formerly § 34, ch. 908, L. 1896, revising L. 1851, ch. 371, §§ 2–5.

Cooley lays down the rule broadly that "Debts owing to foreign creditors by either corporations or individuals are not the subject of taxation. The creditor cannot be taxed, because he is not within the jurisdiction, and the debts cannot be taxed in the debtors' hands, through any fiction of the law, which is to treat them as being for this purpose, the property of the debtor." Cooley on Taxation, Third Ed., p. 25.

The leading case upon the subject is reported in 15 Wall. 300, in which an attempt was made to tax in the State of Pennsylvania the bonds of a Pennsylvania railroad company, secured by mortgage, and held by non-residents of the State. The Supreme Court of the United States laid down the rule unequivocally that credits of that sort were not within the jurisdiction of the State, so as to render them subject to taxation; and again in Kirkland v. Hotchkiss, 100 U. S. 491, the Supreme Court laid down the reverse proposition "that a debt for the purpose of taxation is situated at the domicile of the creditor, although secured by mortgage upon real estate situated in another State."

The Supreme Court of Ohio, in Myers v. Seaberger, 45 Ohio St. 232, held "that a loan of money secured by mortgage on real estate is a credit within the meaning of the statutes of this State, providing for taxation of property, and that where the creditor resides in another State, is not subject to taxation in this, although the securities are in the hands of an agent here who collects interest."

The State of Michigan has a law, however, which provides for the taxation of mortgages upon real property within the State, wherever and by whomever held. The Supreme Court of the State, in Common Council v. Assessors, 91 Mich. 78 (1892), upheld the law upon the argument that the interest of the mortgagee was a tangible interest within the State, enjoying the protection of the laws of the State. The court attempts to distinguish the decision of the Supreme Court of the United States, in 15 Wallace, on the ground that that case referred to the taxation of credits generally and not to an interest which the State could tax as real property within its jurisdiction.

The law has stood upon the statute books for so many years, apparently

never having been seriously questioned, that the commissioners have deemed it best to include it within their revision, leaving to the Legislature the responsibility of repealing it without re-enactment, if such course is deemed desirable.

§ 36. Notice of completion of assessment-roll. The assessors shall complete the assessment-roll on or before the first day of August, and make out a copy thereof, to be left with one of their number, and forthwith cause a notice to be conspicuously posted in three or more public places in the tax district, stating that they have completed the assessment-roll, and that a copy thereof has been left with one of their number at a specified place, where it may be seen and examined by any person until the third Tuesday of August next following, and that on that day they will meet at a time and place specified in the notice to review their assessments. Upon application by a nonresident owner of real estate, having real estate in more than one tax district, the assessors may fix a time subsequent to the third Tuesday in August, but not later than the thirty-first day of August, for a hearing and to review their assessment. In any city the notice shall conform to the requirements of the law regulating the time, place and manner of revising assessments in such city. During the time specified in the notice the assessor with whom the roll is left shall submit it to the inspection of every person applying for that purpose.

Formerly § 35, ch. 908, L. 1896, as am'd by L. 1904, ch. 385.

The next to the last sentence does not apply to the assessment of bank shares in New York city. Peo. ex rel. Bridgeport Savings Bank v. Feitner, 191 N. Y. 88 (1908), revsg. 120 A. D. 838.

§ 37. Hearing of complaints. The assessors shall meet at the time and place specified in such notice, and hear and determine all complaints in relation to such assessments brought before them, and for that purpose they may adjourn from time to time. Such complainants shall file with the assessors a statement, under oath, specifying the respect in which the assessment complained of is incorrect, which verification must be made by the person assessed or whose property is assessed, or by some person authorized to make such statement, and who has knowledge of the facts stated therein. The assessors may administer oaths, take testimony and hear proofs in regard to any such complaint and the assessment to which it relates. If not satisfied that such assessment is erroneous, they may require the person assessed, or his agent or

representative, or any other person, to appear before them and be examined concerning such complaint, and to produce any papers relating to such assessment with respect to his property or his residence for the purpose of taxation. If any such person, or his agent or representative, shall wilfully neglect or refuse to attend and be so examined, or to answer any material question put to him, such person shall not be entitled to any reduction of his assessments. Minutes of the examination of every person examined by the assessors upon the hearing of any such complaint shall be taken and filed in the office of the town or city clerk. The assessors shall, after said examination, fix the value of the property of the complainant and for that purpose may increase or diminish the assessment thereof.

Formerly § 36, ch. 908, L. 1896, revising L. 1857, ch. 176, §§ 6, 7.

A complaint is sufficient where it states that the assessment was erroneous for overvaluation and inequality, because made at a higher proportionate valuation than other property. Peo. ex rel. N. Y., O. & W. Ry. Co. v. Wakeman, 143 A. D. 816 (1911).

§ 38. Correction and verification of tax-roll. When the assessors or a majority of them shall have completed their roll, they shall severally appear before any officer of their county authorized by law to administer oaths and shall severally make and subscribe before such officer an oath in the following form: "We, the undersigned, do severally depose and swear that we have set down in the foregoing assessment-roll all the real estate situated in the tax district in which we are assessors, according to our best information; and that, with the exception of those cases in which the value of the said real estate has been changed by reason of proof produced before us, and with the exception of those cases in which the value of any special franchise has been fixed by the state board of tax commissioners, we have estimated the value of the said real estate at the sums which a majority of the assessors have decided to be the full value thereof; and, also, that the said assessment-roll contains a true statement of the aggregate amount of the taxable personal estate of each and every person named in such roll over and above the amount of debts due from such persons, respectively, and excluding such stocks as are otherwise taxable, and such other property as is exempt by law from taxation, at the full value thereof, according to our best judgment and belief," which oath shall be written or printed on said roll, signed by the assessors and certified by the officer.

Formerly § 37, ch. 908, L. 1896, as am'd by L. 1899, ch. 712.

§ 39. Filing of roll and notice thereof. In cities the assessment-roll when thus completed and verified shall be filed on or before September first, in the office of the city clerk, there to remain for fifteen days for public inspection. The assessors shall forthwith cause a notice to be posted conspicuously in at least three public places in the tax district and to be published in one or more newspapers, if any, published in the city, that such assessment-roll has been finally completed and stating that it has been so filed and will be open to public inspection. At the expiration of such fifteen days, the city clerk shall deliver such roll to a supervisor of the tax district embraced therein. In towns, when the assessment-roll shall have been thus completed and verified, the assessors shall make two copies thereof, one of which shall be retained by them for the use of themselves and their successors in office, and the other of which, duly certified by the said assessors to be a copy of said assessment-roll, shall, on or before the fifteenth day of September, be filed in the office of the town clerk, and shall thereupon become a public record. The assessors shall forthwith cause a notice to be posted conspicuously in at least three public places in the tax district and to be published in one or more newspapers, if any, published in the town, that such assessment-roll has been finally completed and stating that such certified copy has been so filed. The said original assessment-roll shall on or before the first day of October be delivered to a supervisor of the tax district embraced therein. Notwithstanding the provisions of this section, the board of supervisors of any county may determine the number of copies of the town assessment-rolls of the towns of such county to be made, by whom such copies shall be made, the date when the certified copy of the town assessment-roll shall be filed in the office of the town clerk, and the date when the original assessment-roll shall be delivered to the supervisor of the town.

Formerly § 38, ch. 908, L. 1896, as am'd by L. 1901, ch. 358.

§ 40. Assessors to apportion valuation of railroad, telegraph, telephone, pipe line, or gas companies and of special franchises among school and special districts. The assessors of each town in which a railroad, telegraph, telephone, pipe line company, or gas company, including a company engaged in the business of supplying natural gas, is assessed by them, upon property lying in

more than one school district therein or in one or more special districts therein in which a tax is levied for district purposes, shall, prior to the final completion of the roll pursuant to section thirty-nine of this chapter, apportion the assessed valuation of the property of each of such corporations among such school and special districts. Such apportionments shall be entered by the assessors in the appropriate column of the assessment-roll and a certificate thereof signed by the assessors or a majority of them filed with the town clerk within five days thereafter, and thereupon the valuations so apportioned shall become the valuations of such property in such districts for the purpose of taxation. In case of failure of the assessors to act, the supervisors of the town shall make such apportionment on request of either the trustee of any school district or the officers of any special district or of the corporation assessed. In case of any alteration in any school district affecting the valuation of such property, the officer making the same shall fix and determine the valuations in the districts affected for the current year. The assessors of each town in which an assessment has been made by the state board of tax commissioners in gross, upon a special franchise, lying in more than one school or other special district therein, shall within fifteen days after the receipt by the town clerk of the certified statement of the equalized valuation of such special franchise, as provided in section forty-five-a of this chapter, apportion the assessed valuation of each special franchise among such school and special districts. The apportionment shall be signed by the assessors or a majority of them and be filed, within five days thereafter, with the clerk of the board of supervisors and a duplicate thereof shall be filed with the town clerk. Such apportionments shall be entered by the board of supervisors at their annual meeting in the appropriate column of the assessment-roll for each town before the warrant is annexed thereto. The valuations so apportioned shall be the valuations of the special franchise in such school and special districts for the purpose of taxation. The town clerk shall furnish the trustees of school districts a certified statement of the valuations apportioned to their respective districts. Provided, however, that the valuations of special franchises as determined by the state board of tax commissioners and included in the town assessment-rolls completed and filed in the town clerk's offices for the year nineteen hundred and eleven shall be taken by the boards

of assessors as the basis of the apportionment for school district purposes for the levy of any school taxes which may be made prior to the receipt by the town clerk of the statement of the assessments of special franchises as finally fixed and equalized for the year nineteen hundred and twelve.

Formerly § 39, ch. 908, L. 1896, as am'd by L. 1912, ch. 271; L. 1913, ch. 556.

Apportionment of Special Franchises.

The provision regulating the time within which the certificate of apportionment must be filed is merely directory. Peo. ex rel. Troy Gas Co. v. Hall, 143 A. D. 756 (1911), aff'd., 203 N. Y. 312.

Where certain territory in a city constitutes a separate school district, not subject to taxation for general school purposes, the city assessors are authorized to apportion a special franchise, the full value of which has been determined by the State board, between such school district and the territory under the control of the board of education of such city. Peo. ex rel. Troy Gas Co. v. Hall, 203 N. Y. 312 (1911).

§ 43. Assessment of special franchises. The state board of tax commissioners shall annually fix and determine the valuation of each special franchise subject to assessment in each city, town or village. The value so fixed and determined shall be the full and actual value of such special franchise.

Formerly § 42, added by L. 1899, ch. 712, as am'd by L. 1900, ch. 254; L. 1902, ch. 112; L. 1904, ch. 382; L. 1909, ch. 275; L. 1910, ch. 7; L. 1910, ch. 458; L. 1911, ch. 804.

Presumption of Validity of Assessment.

On certiorari to review a special franchise tax the assessment is presumed to be valid, and will be sustained unless it is shown that it cannot be sustained on any theory or rule of valuation which the assessors might lawfully adopt or apply. If the evidence leave the matter in doubt the determination of the assessing officers cannot be disturbed. Peo. ex rel. Hudson & Manhattan R. R. Co. v. State Tax Comrs., 143 A. D. 26 (1911), revsd. on other grounds, 203 N. Y. 120.

In proceedings to review taxes the burden is upon the relator to prove that the assessment is excessive. Peo. ex rel. Jamaica W. S. Co. v. Tax Comrs., 196 N. Y. 39 (1909), modfg. 128 A. D. 13.

Assessment at Full Value.

There is no authority to assess special franchises at less than their full value, or to consider the general rate of taxation in any particular taxing district. In the absence of a finding to the contrary it must be assumed that the State board assessed property at its full value, and the court should equalize such assessment with that of other property when the latter is not assessed at full value. Peo. ex rel. Hudson & Manhattan R. R. Co. v. Tax Comrs., 203 N. Y. 119 (1911).

Net Earnings Rule.

In determining the value of a special franchise under the net earnings rule, it is necessary to ascertain the gross earnings, the gross operating expenses deductible therefrom, as well as a reasonable return on the portion of the capital invested in tangible property. The balance, if any, capitalized at a fair rate, represents the value of the special franchise. Peo. ex rel. Queens Co. Water Co. v. Woodbury, 143 A. D. 618 (1911), affd. 202 N. Y. 619, following Peo. ex rel. Jamaica Water Supply Co. v. Tax Comrs., 196 N. Y. 39, 56 (1909).

Where several railroads constituting one system had long been operated under normal conditions it was proper to apply the net earnings rule and to ascertain the value of the intangible rights of the system as a whole and then apportion the aggregate among the constituent companies in proportion to the value of their tangible property in the streets. Peo. ex rel. Met. St. Ry. Co. v. State Tax Comrs., 159 A. D. 136 (1913).

An assessment on a railroad made under the net earnings rule will not be disturbed because a holding company charged such railroad for power furnished, etc., under an agreement unless the agreement is shown to be in bad faith. Peo. ex rel. Brooklyn Heights R. R. Co. v. Tax Comrs., 146 A. D. 372 (1911), affd. 204 N. Y. 648.

Railroad Operating upon Its Own Right of Way.

When a railroad is operating its own road upon its own right of way, and what is done therein is done because of the ownership of the soil or of some interest therein, although the right of way may be included within parallel lines upon either side thereof, constituting the boundaries of a street, the right is not a special franchise subject to taxation. Peo. ex rel. Long Island R. R. Co. v. State Tax Comrs., 148 A. D. 751 (1912), affd. 207 N. Y. 683.

Application of Section to Steam Railroads.

The statutes taxing special franchises apply to steam surface roads. Peo. ex rel. N. Y. C. & H. R. R. R. Co. v. Woodbury, 203 N. Y. 167 (1911).

Reproduction Cost, Consideration of.

Reproduction cost of indestructible tangible property may be considered in assessing a franchise tax. Peo. ex rel. Third Ave. R. R. Co. v. Tax Comrs., 136 A. D. 155 (1909), affd., 198 N. Y. 608. In determining net earnings, the franchise taxes and moneys paid for personal injuries should be deducted. A fund for replacement of equipment may also be set aside. Id. The fair return to which the corporation would be entitled is to be determined upon the actual value of all its property, tangible and intangible, and, where the evidence fails to show what would be a fair return, the court is justified in fixing the rate at six per cent. Id.

The cost of reproduction is, for tax purposes, the maximum value, and it seems if the road is operating at a loss the fair value may be less than the cost of reproduction. Peo. ex rel. N. Y., Ont. & Westn. Ry. Co. v. Shaw, 143 A. D. 811 (1911), affd. 202 N. Y. 556.

In ascertaining the cost of reproduction, interest on the money invested until the road is in operation should not be added, nor the cost of condemnation proceedings, there being no real basis upon which it could be computed. Only the actual value of land taken should be considered. Peo. ex rel. N. Y., Ont. & Westn. Ry. Co. v. Shaw, 143 A. D. 811 (1911), affd. 202 N. Y. 556; see also Peo. ex rel. Del., Lack. & W. R. R. Co. v. Clapp, 152 N. Y. 490.

Valuation by State Board; Apportionment by Local Authorities.

The intention of the law is to give the State Board of Tax Commissioners exclusive power to determine the valuation of each special franchise subject to assessment in each city, town and tax district, and to lodge in local boards and officers the power to apportion the valuation of a single special franchise for the purpose of assessment among school districts and where for other special reason it is required. Peo. ex rel. Troy Gas Co. v. Hall, 203 N. Y. 312 (1911).

Special Franchise Defined.

A special franchise, respecting railroads, is the right or permission to construct, maintain and operate the same in, under, above, on or through streets, highways or public places. Peo. ex rel. Hudson & Manhattan R. R. Co. v. Tax Comrs., 203 N. Y. 119 (1911).

The words "each special franchise" defined and held not to require the commissioners to determine separately the value of each highway crossing, bridge or other special privilege. Peo. ex rel. N. Y. Central & H. R. R. R. Co. v. Gourley, 64 Misc. 605 (1909).

The words "each special franchise", means the aggregate of the franchises and special privileges which the corporation possesses in each city, town or tax district. In making up the assessment the commissioners are not required to separately fix the valuation of each highway crossing, bridge or other special privilege. Peo. ex rel. N. Y. Central & H. R. R. R. Co. v. Gourley, 64 Misc. 605 (1909).

The occupation of the canal lands of the State by a railroad corporation is a special franchise and taxable as such. Opinion of Atty. Genl., Mar. 23, 1911.

Tunnel Railroad under Hudson River.

The Hudson river is a highway in the broad sense of that term, and its waters being subject to the ebb and flow of the tide, the title to the river bed is in the State, but navigable streams do not fall within the ordinary nomenclature of highways, unless the intent to include them is apparent. Peo. ex rel. Hudson & Manhattan R. R. Co. v. Tax Comrs., 203 N. Y. 119 (1911). Where the relator acquired land from the State by grant for the purpose of building a railroad under the Hudson river, its tunnels and railroads constructed in this part of its route are constructed on its own right of way and are not to be deemed the exercise of a special franchise. Id. This principle does not apply to tunnels constructed under a grant of the Rapid Transit Commission as a part of a continuous subway road. Id.

Method of Computing Value of Special Franchise.

The value of a special franchise which relates only to a point or portion of a railroad system must be determined by a consideration of the surrounding facts and circumstances in each case. It cannot be determined by a comparison of the mileage with the mileage of a right of way or franchise in another city. Peo. ex rel. N. Y. C. & H. R. R. R. Co. v. Priest, 206 N. Y. 274 (1912).

In assessing a special franchise tax the object is not necessarily to tax the intangible rights of the corporation, but to determine the value of the special franchise, and, if the basis of computation is right, it is immaterial whether a tax on the intangible part of the franchise results or not. Peo. ex rel. Brooklyn Heights R. R. Co. v. Tax Comrs., 146 A. D. 372 (1911), affd. 204 N. Y. 648 (1912).

When Estopped from Claiming Streets are not Public.

A steam railroad which maintains and operates its road over certain streets, by permission of the municipal authorities, and acquiesces in the contention of the city that such streets have been dedicated to public use, is, on a proceeding for the taxation of its special franchise, estopped from claiming that such streets are not public, and the assessment of its capital franchise should be affirmed. Peo. ex rel. East River Terminal R. R. v. Bd. Tax Comrs., 160 A. D. 771 (1914).

Credit for Depreciation.

In determining whether a railroad company is to be allowed credit for depreciation in excess of amounts actually expended for renewals the rule laid down in Peo. ex rel. Manhattan Ry. Co. v. Woodbury, 203 N. Y. 231, should be applied. Peo. ex rel. Met. St. Ry. Co. v. State Tax Comrs., 159 A. D. 136 (1913).

Deduction of Rents for Use of Streets, Car Licenses, etc.

From the income of a railroad company there should be deducted payments made to a municipality on their franchises, consisting of percentages of gross earnings, rents for the use of streets, fees for car licenses or special ordinances and the toll, if any paid, for the use of municipal bridges, as such items are in the nature of taxes. Peo. ex rel. Met. St. Ry. Co. v. State Tax Comrs., 159 A. D. 136 (1913).

Deduction for Unused Real Estate.

Where a railroad company has acquired real property and used it for railroad purposes but has wholly or partially abandoned the same, a reasonable time should be allowed the company to make some disposition of it, and in the meantime it is entitled to an allowance for the full value of the property. Peo. ex rel. Met. St. Ry. Co. v. State Tax Comrs., 159 A. D. 136 (1913).

Costs of Corporate Organization, etc., to be Excluded from Tax.

In assessing a special franchise the cost of corporate organization, obtaining franchises, consents, etc., together with engineering expenses and the expense of issuing and marketing securities and other intangible elements of expense should be excluded. Met. St. Ry. Co. v. State Tax Comrs., 159 A. D. 136 (1913).

Cash and Receivables Constitute Working Capital.

In assessing a special franchise tax of a railroad the court should allow the corporation to include cash, prepaid insurance and accounts receivable as working capital upon which the benefit of a return was allowed. Met. St. Ry. Co. v. State Tax Comrs., 159 A. D. 136 (1913).

Pavement, When not Liable to Special Franchise Tax.

Although the cost of paving may properly be considered by assessing officers in the valuation of the intangible privilege enjoyed by a corporation in the streets, the pavement which a street railroad corporation is obliged to construct between and near its tracks under section 178 of the Railroad Law is not to be treated as its tangible property in assessing the value of its

special franchise. Peo. ex rel. Buf. & L. E. Traction Co. v. State Tax Comrs., 209 N. Y. 496 (1913), affg. 156 A. D. 923.

The cost of relaying pavements is part of the initial cost of building a street railway within a city and must be considered in arriving at the tangible property upon which the company is entitled to a return. The cost of renewing and keeping such pavement in repair is a proper item of cost of maintenance of the right of way and as such chargeable to operating expenses. Met. St. Ry. Co. v. State Tax Comrs., 159 A. D. 136 (1913).

Railroad Viaduct as a Special Franchise.

Where a railroad company constructed a viaduct pursuant to an agreement with the town in which it is located and the cost was apportioned between them, and it appears that the viaduct is essential to the operation of the railroad, it is taxable as a part of the special franchise of the corporation, although the public enjoy part of the use thereof. Peo. ex rel. Buf. & L. E. Traction Co. v. State Tax Comrs., 209 N. Y. 502 (1913), affg. 156 A. D. 466.

Fund Accumulated for Maintenance.

The creation of a fund for keeping the plant in good condition and for improvements, if accumulated in good faith and not to avoid taxation, is permissible. Peo. ex rel. Brooklyn Heights R. R. Co. v. Tax Comrs., 146 A. D. 372 (1911), affd. 204 N. Y. 648.

New Streets Across Railroad.

When new streets are laid out across the tracks of a railroad, this is not such a crossing as subjects the railroad to the franchise tax, for the road acquired no new right from the State. Rather, the State took away a right from the railroad. Peo. ex rel. N. Y. C. Ry. Co. v. Woodbury, 203 N. Y. 167 (1911), modfg. 145 A. D. 900.

Water Pipe for Private Use.

Where a corporation obtained from the city water purveyor a permit to tap the city water main, and thereafter and with the consent of the abutting property owners laid a pipe from the city main to its factory for private use only, such permit is not taxable as a special franchise. Peo. ex rel. Cooper's Glue Factory v. Tax Comrs., 143 A. D. 174 (1911).

Taxation of Canal of Water Power Company.

Respecting the special franchise of a power company in the maintenance of its canal across public streets and bridges over the same, see Peo. ex rel. Niagara Falls Hyd. Power & Mfg. Co. v. Tax Comrs., 202 N. Y. 426 (1911); same v. same, 65 Misc. 213 (1909).

Special Franchise Exercised by Trespassers.

When a street railroad company occupies the highway under color of right it may not escape the special franchise tax by alleging that it is a trespasser. Peo. ex rel. East River Terminal Ry. v. Tax Comrs., 79 Misc. 134 (1913).

A foreign pipe line company which during seventeen years has maintained and operated its pipes under the surface of a highway cannot avoid a special franchise tax on the ground that no written consent of the proper local authorities was obtained. Peo. ex rel. United Natural Gas Co. v. Priest, 70 Misc. 69 (1910). It will be presumed that a right has been acquired which is taxable as a special franchise. Id.

§ 44. Report to state board of tax commissioners. Every person, copartnership, association or corporation subject to taxation on a special franchise, shall, within thirty days after such special franchise is acquired, make a written report to the state board of tax commissioners containing a full description of every special franchise possessed or enjoyed by such person, copartnership, association or corporation, a copy of the special law, grant, ordinance or contract under which the same is held, or if possessed or enjoyed under a general law, a reference to such law, a statement of any condition, obligation or burden imposed upon such special franchise, or under which the same is enjoyed, together with any other information relating to the value of such special franchise, required by the state board. The state board of tax commissioners may from time to time require a further or supplemental report from any such person, copartnership, association or corporation, containing information and data upon such matters as it may specify. Every report required by this section shall have annexed thereto the affidavit of the president, vice-president, secretary or treasurer of the association or corporation, or one of the persons or one of the members of the copartnership making the same, to the effect that the statements contained therein are true. Such board may prepare blanks to be used in making the reports required by this section. Every person, copartnership, association or corporation failing to make the report required by this section, or failing to make any special report required by the state board of tax commissioners within a reasonable time specified by it, shall forfeit to the people of the state the sum of one hundred dollars for every such failure and the additional sum of ten dollars for each day that such failure continues, and shall not be entitled to review the assessment by certiorari, as provided by section forty-six of this chapter.

Formerly § 43, added by L. 1899, ch. 712.

Special franchise tax upheld. Peo. ex rel. Met. St. Ry. Co. v. Tax Comrs., 174 N. Y. 417, affd. 199 U. S. 1 (1904).

§ 45. Hearing on special franchise assessment. On making the full and actual valuation of a special franchise, the state board of tax commissioners shall immediately give notice in writing to the person, copartnership, association or corporation affected stating in substance that such valuation has been made, the total valuation of such special franchise, and the valuation thereof in

each city, town or village; and that the board will meet at its office in the city of Albany on a day specified in such notice, which must not be less than twenty nor more than thirty days from the date of the notice, to hear and determine any complaint concerning such valuation. Such notice must be served at least ten days before the day fixed for the hearing; and it may be served on a copartnership, association or corporation, by mailing a copy thereof to it at its principal office or place of business and on a person, either personally or by mailing it to him at his place of business or last known place of residence. Section thirty-seven of this chapter applies so far as practicable to a hearing by the state board of tax commissioners under this section.

Formerly § 44, added by L. 1899, ch. 712, as am'd by L. 1906, ch. 458; L. 1911, ch. 804.

§ 45-a. Fixing final valuation; final delivery of statement; information by local officers. 1. After the time fixed for hearing complaints the state board of tax commissioners shall, after making allowance for overvaluation, if any, in respect to the special franchise valued, inquire into and ascertain, as near as may be, the percentage of the full and actual value at which other real property in the city, town or village for which such valuation has been made is being assessed, and shall equalize the valuation of such special franchise to such amount as in their judgment will place it upon the same basis as the assessment of such other real property in such locality, and shall give notice in the manner provided in section forty-five of this chapter to the person, copartnership, association or corporation affected, and to each city, town or village in which such special franchise is subject to assessment that such equalization has been made, which motive shall state the full and actual value of such special franchise as finally fixed, and the value thereof as so equalized, and that the board will meet at a place and time to be specified in such notice, to hear and determine any complaint concerning such equalization. The board shall keep a record which shall show separately the amount of the full and actual value of each special franchise as finally fixed and determined and the amount to which it has been equalized. In ascertaining the basis of assessment of other real property or determining the final full and actual valuation, as provided in this section, the board may, in its discretion, take testimony and hear proof under oath or otherwise, and may avail

itself of all information on the subject appearing of record in its office and all information which it may acquire in the discharge of its duties, and may employ its confidential agents, experts or other persons in procuring any information it may require for such purpose. After the hearing of complaints as to such equalization, and after decision thereon, the board shall file with the clerk of the city or town in which such special franchise is subject to assessment, a written statement duly certified by the secretary of the board of the valuation of each special franchise assessed therein as finally fixed and equalized. In a town, said statement shall specify the total amount of the assessment of each special franchise, and the amount thereof in any village or villages therein. In the city of New York said statement shall be filed with the department of taxes and assessments. Such statement shall be filed with the clerk of the town not later than the first day of November, and with the clerk of the city, or the department of taxes and assessments in the city of New York, not later than thirty days before the final completion, verification and filing of the assessment-roll. The board on filing said statement of the equalized valuation of a special franchise, shall give to the person, copartnership, association or corporation affected written notice thereof, which notice shall contain a statement of the full and actual value of such special franchise as finally fixed and determined and the amount to which it has been equalized, and such notice may be served on a copartnership, association or corporation by mailing a copy thereof to it at its principal office or place of business, and on a person either personally or by mailing it to him at his place of business or last known place of residence.

2. Each city clerk shall, within five days after the receipt by him of the statement of the equalized valuation of a special franchise as fixed by the board, deliver a copy of such statement, certified by him, to the assessors or other officers charged with the duty of making local assessments in the said city. Each town clerk shall, within five days after the receipt by him of the statement of the equalized valuation, deliver copies of such statement certified by him, to the clerk of the board of supervisors of the county, to the supervisor of the town, and to the assessors of the village or villages within the town for which assessments have been made. The equalized valuation of every special franchise in a city or village as so fixed by the board shall be entered by the assessors or other officers thereof in the proper column of the

assessment-roll before the final revision and certification of such roll by them and become part thereof with the same force and effect as if such assessment had been originally made by such assessors. The equalized valuation of every special franchise assessed in a town shall be entered by the county board of supervisors at their annual meeting in the proper column of the assessment-roll for each town before the warrant is annexed thereto, and become part thereof with the same force and effect as if such assessment had been originally made by the town assessors.

3. The final and equalized valuation of every special franchise as fixed by the board, shall be the assessed valuation on which all taxes, based on such special franchise for city, town, village, school, highway or other district purposes shall be levied for the ensuing year.

4. The assessors or other taxing officers, or other local officers in any city, town, village or district, or any state or county officer, shall on demand furnish to the state board of tax commissioners any information required by such board for the purpose of determining the value of a special franchise.

Added by L. 1911, ch. 804.

§ 46. **Certiorari to review assessment.** An assessment of a special franchise by the state board of tax commissioners may be reviewed in the manner prescribed by article thirteen of this chapter, and that article applies so far as practicable to such an assessment, in the same manner and with the same force and effect as if the assessment had been made by local assessors; a petition for a writ of certiorari to review the assessment in a city or village must be presented within fifteen days after the final completion and filing of the assessment-roll, and the first posting or publication of the notice thereof as rquired by law, and in towns within thirty days after the final revision of the roll by the county board of supervisors and the annexation of their warrant thereto. Such writ must run to and be answered by said state board of tax commissioners and no writ of certiorari to review any assessment of a special franchise shall run to any other board or officer unless otherwise directed by the court or judge granting the writ. An adjudication made in the proceeding instituted by such writ of certiorari shall be binding upon the local assessors and any ministerial officer who performs any duty in the collection of said

assessment in the same manner as though said local assessors or officers had been parties to the proceeding.

Formerly § 45, added by L. 1899, ch. 712, as am'd by L. 1900, ch. 254; L. 1911, ch. 804.

Payment by a street surface railway company to a municipality under an agreement whereby a percentage of gross receipts previously payable had been reduced in consideration of the granting of transfers to passengers, is, under this section, in the nature of a tax, and the amount thereof should be deducted from its special franchise tax as assessed by the tax commissioners. Heerwagen v. Crosstown St. Ry. Co., 179 N. Y. 99 (1904).

§ 46-a. Effect of L. 1911, ch. 804. Nothing in the tax law as amended by chapter eight hundred and four of the laws of nineteen hundred and eleven contained shall require the making and filing of new or further valuations of special franchises in cities, towns or villages for which valuations have already been made and certified for the year nineteen hundred and eleven, nor affect in any manner the special franchise valuations made and certified to cities before this act takes effect, in accordance with the schedule of dates of certification set forth in section forty-three of the tax law before the same was amended by chapter eight hundred and four of the laws of nineteen hundred and eleven and when the assessment-roll of any city of this state for the year nineteen hundred and twelve shall be required by the charter of such city, to be finally completed, verified and filed on or before the fifteenth day of December, nineteen hundred and eleven, the assessors or other officer or officers whose duty it is to make local assessments for said city, shall, before the final completion, verification and filing of said assessment-roll, enter in the proper column of the assessment-roll the valuations of the special franchises subject to assessment in such city which were certified to the city clerk of such city in accordance with the shedule of dates of certification set forth in section forty-three of the tax law before said amendment of nineteen hundred and eleven, with the same force and effect as if said valuations had been made as provided by sections forty-three, forty-five and forty-five-a of the tax law as amended by chapter eight hundred and four of the laws of nineteen hundred and eleven, and such assessments may be reviewed in the manner prescribed by article thirteen of this chapter, and that article applies so far as practicable to such assessments in the same manner and with the same force and effect as if the assessment had been made by local assessors; a petition for a writ of certiorari

to review the assessment of such special franchises in such city must be presented within fifteen days after the final completion and filing of such assessment-roll. Such writ must run to and be answered by said state board of tax commissioners and no writ of certiorari to review such assessment of a special franchise shall run to any other board or officer unless otherwise directed by the court or judge granting the writ. An adjudication made in the proceeding instituted by such writ of certiorari shall be binding upon the local assessors and any ministerial officer who performs any duty in the collection of said assessment in the same manner as though said local assessors or officers had been parties to the proceeding.

Added by L. 1911, ch. 875.

§ 47. Tax commissioners to appear by counsel; employment of experts. In any proceeding for the review of an assessment of a special franchise made by the state board of tax commissioners, said state board of tax commissioners is authorized to appear by counsel to be designated by the attorney-general. The attorney-general or such counsel may employ experts and the compensation of such counsel and experts and their necessary and proper expenses and disbursements, incurred or made in such proceeding, and upon any appeals therein, shall when audited and allowed as are other charges against such tax district, be a charge upon the tax district upon whose rolls appears the assessment sought to be reviewed. Where, in one proceeding, there is reviewed the assessment of a special franchise in more than one tax district, separate accounts shall be rendered for said costs, expenses and disbursements to the proper officer of each of said tax districts and audited and allowed by him as aforesaid. For the purposes of this section, the city of New York shall be deemed one tax district. If provision shall not have been made for the payment of such expense in any year, then the officers who are empowered by law to make such provision in any county, city, town or other political subdivision of the state, are hereby authorized and directed to raise money to such an amount as may be necessary, in any manner provided by law for meeting expenses in anticipation of the collection of taxes and to pay such expense therefrom. The amount so raised shall be included in the amount to be raised by tax in the ensuing year.

Formerly § 45-a, added by L. 1906, ch. 155, as am'd by L. 1911, ch. 471; L. 1913, ch. 134.

§ 48. Deduction from special franchise tax for local purposes. If, when the tax assessed on any special franchise is due and payable under the provisions of law applicable to the city, town or village in which the tangible property is located, it shall appear that the person, copartnership, association or corporation affected has paid to such city, town or village for its exclusive use within the next preceding year, under any agreement therefor, or under any statute requiring the same, any sum based upon a percentage of gross earnings, or any other income, or any license fee, or any sum of money on account of such special franchise, granted to or possessed by such person, copartnership, association or corporation, which payment was in the nature of a tax, all amounts so paid for the exclusive use of such city, town or village except money paid or expended for paving or repairing of pavement of any street, highway or public place, shall be deducted from any tax based on the assessment made by the state board of tax commissioners for city, town or village purposes, but not otherwise; and the remainder shall be the tax on such special franchise payable for city, town or village purposes. The chamberlain or treasurer of a city, the treasurer of a village, the supervisor of a town, or other officer to whom any sum is paid for which a person, copartnership, association or corporation is entitled to credit as provided in this section, shall, not less than five nor more than twenty days before a tax on a special franchise is payable, make and deliver to the collector or receiver of taxes or other officer authorized to receive taxes for such city, town or village, his certificate showing the several amounts which have been paid during the year ending on the day of the date of the certificate. On the receipt of such certificate the collector, receiver or other officer shall immediately credit on the tax-roll to the person, copartnership, association or corporation affected the amount stated in such certificate, on any tax levied against such person, copartnership, association or corporation on an assessment of a special franchise for city, town or village purposes only, but no credit shall be given on account of such payment or certificate in any other year, nor for a greater sum than the amount of the special franchise tax for city, town or village purposes, for the current year; and he shall collect and receive the balance, if any, of such tax as required by law.

Formerly § 46, added by L. 1899, ch. 712.

The benefits of this section may be waived. Such is the case where a corporation agrees to pay a city $500 annually in addition to all franchise

or other taxes, and the $500 may not be deducted. City of Ithaca v. Ithaca St. Ry. Co., 145 A. D. 675 (1911).

Where a city grants the right to construct a surface railroad across streets in return for fixed annual payments, this constitutes its special franchise so far as the city is concerned. Each crossing does not constitute a special franchise, and the total amount paid must be deducted from the value fixed by the State Tax Commissioners. Peo. ex rel. N. Y., Westchester & B. Ry. Co. v. Hyde, 143 A. D. 321 (1911), affd., 204 N. Y. 666.

§ 49. Special franchise tax not to affect other tax. The imposition or payment of a special franchise tax as provided in this chapter shall not relieve any association, copartnership or corporation from the payment of any organization tax or franchise tax or any other tax otherwise imposed by article nine of this chapter, or by any other provision of law; but tangible property subject to a special franchise tax situated in, upon, under or above any street, highway, public place or public waters, as described in subdivision three of section two, shall not be taxable except upon the assessment made as herein provided by the state board of tax commissioners.

Formerly § 47, added by L. 1899, ch. 712.

§ 56. Correction of errors by board of supervisors. If it shall be made to appear to the board of supervisors of any county, upon the verified petition of the assessors of any tax district:

First. That any property taxable therein has, by any mistake in transcribing or copying the assessment-roll of the preceding year, been placed on the assessment-roll delivered to the supervisor at a valuation less than that actually appearing upon the original roll signed by the assessors, such board shall insert in the assessment-roll of the current year an assessment of the property upon the valuation equal to the difference between the actual valuation made by the assessors and the amount at which, by such mistake, the property was placed upon the roll of the preceding year, and tax the same at the rate per centum imposed upon property in such tax district in the year in which the mistake occurred.

Second. That any taxable property therein has been omitted from the assessment-roll of the preceding year, such board shall place the same on the roll of the current year at its valuation for the preceding year, to be fixed by the assessors in their petition, and shall tax the same at the rate per centum of the preceding year.

Third. That taxable property has been omitted from the assessment-roll for the current year, such board shall place the same thereon at a valuation to be fixed by the assessors in their petition, and shall tax the same at the rate per centum of the current year.

A copy of the petition under the second or third subdivision of this section, with a notice of the presentation thereof to the board of supervisors, shall be served personally on the person alleged to be liable to taxation for the land omitted from the assessment-roll, at least ten days before the meeting of the board of supervisors; and the board of supervisors shall take no action on such petition, unless proof of the personal service of such petition and notice be made to them by affidavit. The board of supervisors shall give to the person alleged to be liable to taxation for such omitted land, an opportunity to be heard, and on such hearing and review the board of supervisors shall have, as to such omitted property, all the powers of the assessors of a tax district in reviewing and correcting the assessment-roll. The whole amount of tax levied upon land or property omitted in the tax levy of the preceding year shall be deducted from the aggregate of taxation to be levied on the tax district for the current year before such tax is levied.

Formerly § 53, ch. 908, L. 1896.

§ 57. Reassessment of property illegally assessed. Whenever by the final judgment of a court of competent jurisdiction, it appears to the board of supervisors that any property liable to taxation in any year was erroneously or illegally assessed, and that by reason of such erroneous or illegal assessment, such property did not become subject to taxation for such year, the board shall place the same on the roll of the current year at the valuation thereof, if any, fixed by the assessors for such preceding year; and in case no valuation was fixed by the assessors, such property shall be assessed by the board at such valuation as they may determine for the preceding year. Before fixing such valuation, the board of supervisors shall give to the owners of such property, at the time of the assessment by the board, a notice of at least five days and an opportunity to be heard, and on such hearing, the board shall have, as to such property, all the powers of the assessors of a tax district in reviewing and correcting an assessment-roll. Such property shall be taxed at the rate per centum

of such preceding year. The whole amount of tax on property levied in pursuance of this section shall be deducted from the aggregate of taxation to be levied on the tax district for the current year, before such tax is levied.

Formerly § 54, ch. 908, L. 1896.

§ 60. Statement of taxes upon certain corporations by clerk of supervisors. The clerk of each board of supervisors shall, within five days after the tax warrant is completed, deliver to the county treasurer a statement showing the names, valuation of property and the amount of tax of every railroad corporation and telegraph, telephone and electric light line and gas company including a company engaged in the business of supplying natural gas in each tax district in the county, and on refusal or neglect so to do, shall forfeit to the county the sum of one hundred dollars, to be sued for by the district attorney in the name of the county.

Formerly § 57, ch. 908, L. 1896, as am'd by L. 1913, ch. 556.

§ 61. Statement of valuation to be forwarded to state board of tax commissioners. The clerk of each board of supervisors shall, on or before the second Monday in December, transmit to the state board of tax commissioners in the form to be prescribed by such state board of tax commissioners a certificate or return of the aggregate assessed and equalized valuation of the real and personal estate in each tax district as the valuation of such real estate has been corrected by such board, and the amount of tax assessed thereon for town, city, school, county and state purposes. Also the aggregate assessed valuation of personal property classified as follows:

1. Property of resident natural persons assessed pursuant to section twenty-one.

2. Property held by agents, trustees, guardians, executors, or administrators assessed pursuant to sections eight and thirty-three.

3. Property of domestic corporations assessed pursuant to section twelve.

4. Property of nonresident natural persons assessed pursuant to subdivision one of section seven.

5. Property of nonresident natural persons assessed pursuant to subdivision two of section seven.

6. Property of foreign corporations assessed pursuant to section seven.

In the city of New York such report shall be made by the department of taxes and assessments.

The state board of tax commissioners shall certify to the comptroller, on his request, before the thirty-first of December in each year, such extracts or items, from the returns above mentioned, as he may desire.

Formerly § 58, ch. 908, L. 1896, as am'd by L. 1908, ch. 307; L. 1911, ch. 118.

§ 69. Notice by collector. Every collector, upon receiving a tax-roll and warrant, shall forthwith cause notice of the reception thereof to be posted in five conspicuous places in the tax district, specifying one or more convenient places in such tax district, where he will attend from nine o'clock in the forenoon until four o'clock in the afternoon, at least three days, and if in a city, at least five days, in each week for thirty days from the date of the notice, which shall be the date of the posting or first publication thereof, which days shall be specified in such notice, for the purpose of receiving the taxes assessed upon such roll. The collector shall attend accordingly, and any person may pay his taxes to such collector at the time and place so designated, or at any other time or place. In a city, the notice in addition to being posted shall be published once in each week, for two weeks successively, in a newspaper published in such city. On the written demand of a nonresident owner of real property included in such tax-roll, and the payment by such owner to the collector of the sum of twenty-five cents, the collector shall within twenty-four hours after the receipt of such demand mail in a postpaid envelope directed to such nonresident owner, to the address to be furnished in such demand, a statement of the amount of taxes assessed against such property with a notice of the dates and places fixed by him for receiving taxes.

Formerly § 70, ch. 908, L. 1896, as am'd by L. 1899, ch. 342.

§ 71. Collection of taxes. After the expiration of such period of thirty days, the collector shall call, at least once, on every person taxed upon such roll whose taxes are unpaid, at his usual place of residence, if he is an actual inhabitant of such tax district, and demand payment of the taxes charged to him on his property.

If any person shall neglect or refuse to pay any tax imposed on him, the collector shall levy upon any personal property in the county belonging to or in the possession of any person who ought to pay the tax, and cause the same to be sold at public auction for the payment of such tax, and the fees and expenses of collection; and no claim of property to be made thereto by any other person shall be available to prevent such sale. Public notice of the time and place of sale of the property to be sold shall be given by posting the same in at least three public places in the tax district where the sale is to be made, at least six days previous thereto. If the proceeds of such sale shall be more than the amount of such tax, the fees of the collection and the expenses of the sale, the surplus shall be paid to the person against whom the tax was assessed. If any other person shall claim the surplus, on the ground that the property sold belonged to him, and such claim be admitted by the person for the payment of whose tax the sale was made, such surplus shall be paid to such other person. If such claim be contested by the person for the payment of whose tax the property was sold, such surplus shall be paid over by the collector to the supervisor of the town, who shall retain the same until the rights of the parties thereto shall be determined by due course of law, or by agreement in writing made by them and filed with the supervisor. The collector upon payment of the taxes shall state in the column of the tax-roll provided therefor, the date of such payment, and shall write his name after such date.

Formerly § 71, ch. 908, L. 1896, as am'd by L. 1901, ch. 159.

§ 73. Payment of taxes by railroad and certain other corporations. Any railroad, telegraph, telephone, electric-light or gas company including a company engaged in the business of supplying natural gas, may, within thirty days after receipt of notice by the county treasurer from the clerk of the board of supervisors, pay its tax, with one per centum fees, to the county treasurer, who shall credit the same with such fees to the collector of the tax district, unless otherwise required by law. If not so paid the county treasurer shall notify the collector of the tax district where it is due, and he shall then proceed to collect under his warrant. Until such notice from the treasurer the collector shall not enforce payment of such taxes, but may receive the same, with the fees allowed by law, at any time.

Formerly § 73, ch. 908, L. 1896, as am'd by L. 1912, ch. 221.

To sustain a suit to collect a tax production of the assessment-roll and warrant is not sufficient. A previous demand and default should be proved. Thompson v. Gardner, 6 Wend. 404.

§ 74. Enforcement of tax against telegraph, telephone and electric-light lines. Collection of tax against a telegraph, telephone or electric-light line may be enforced by sale of the instruments and batteries connected with such line, and in case there is not sufficient personal property, together with such instruments and batteries, to pay such tax and the percentage due the collector, he shall return a statement thereof to the county treasurer as other unpaid taxes are returned, and the county treasurer shall proceed to sell such part of the line in the tax district where the tax was levied as may be necessary to satisfy the unpaid taxes and percentage, in the manner now provided by law for the sale of lands on execution, and upon such sale shall execute to the purchaser a conveyance of such part of said line, and the purchaser shall thereupon become the owner thereof. Nothing herein contained shall be construed to prevent collection of such taxes by any procedure now provided by law.

Formerly § 74, ch. 908, L. 1896.

Organization Tax. 180 .

The tax prescribed by section 180 is not an annual tax, but a tax imposed upon new corporations for the privilege of organization. For the full text of this section, decisions thereunder and table showing the tax payable upon various amounts, see pages 287–290, ante.

License Tax on Foreign Corporations. § 181.

For the text of the foregoing section and decisions thereunder, see pages 290–293, ante.

§ 182. Franchise tax on corporations. For the privilege of doing business or exercising its corporate franchises in this state every corporation, joint-stock company or association, doing business in this state, shall pay to the state treasurer annually, in advance, an annual tax to be computed upon the basis of the amount of its capital stock, employed during the preceding year within this state, and upon each dollar of such amount. The measure of the amount of capital stock employed in this state shall be such a portion of the issued capital stock as the gross assets employed in any business within this state bear to the gross assets wherever employed in business. For purposes of

taxation, the capital of a corporation invested in the stock of another corporation shall be deemed to be assets located where the physical property represented by such stock is located. If the dividends upon the capital stock amount to six, or more than six per centum upon the par value of the capital stock, during any year ending with the thirty-first day of October, the tax shall be at the rate of one-quarter of a mill for each one per centum of dividends made or declared upon the par value of the capital stock during said year. If such dividend or dividends amount to less than six per centum on the par value of the capital stock, and

(1) The assets do not exceed the liabilities, exclusive of capital stock, or

(2) The average price at which such stock sold during said year did not equal or exceed its par value, or

(3) If no dividend was declared,

Then each dollar of the amount of capital stock employed in this state, determined as hereinbefore provided, shall be taxed at the rate of three-fourths of one mill. If such dividend or dividends amount to less than six per centum on the par value of the capital stock, and

(1) The assets exceed the liabilities, exclusive of capital stock, by an amount equal to or greater than the par value of the capital stock, or

(2) The average price at which such stock sold during said year is equal to or greater than the par value,

Then the amount of capital stock, determined as hereinbefore provided to be employed in this state, shall be taxed at the rate of one and one-half mills on each dollar of the valuation of the capital stock employed in this state, but such valuation shall not be less than

(1) The par value of such stock,

(2) The difference between the assets and liabilities, exclusive of capital stock,

(3) The average price at which such stock sold during said year.

If such corporation, joint-stock company or association shall have more than one kind of capital stock, and upon one of such kinds of stock a dividend or dividends amounting to six or more than six per centum upon the par value thereof, has been

made or declared, and upon the other no dividend has been made or declared, or the dividend or dividends made or declared thereon amount to less than six per centum upon the par value thereof, then the tax shall be at the rate of one-quarter of a mill for each one per centum of dividends made or declared upon the capital stock upon the par value of which the dividend or dividends made or declared amount to six or more than six per centum, and in addition thereto a tax shall be charged upon the capital stock

(1) Upon which no dividend was made or declared, or

(2) Upon which the dividend or dividends made or declared did not amount to six per centum upon the par value,

At the rate as hereinbefore provided for the taxation of capital stock upon which no dividend was made or declared, or upon which the dividend or dividends made or declared did not amount to six per centum on the par value.

All corporations not taxable under the preceding paragraphs of this section shall be taxed in an amount not less than would be produced by an assessment of one and one-half mills on each one dollar of the actual value of its capital stock, determined to be employed in this state as hereinbefore provided, or one and one-half mills upon each dollar of such capital stock at the average price at which said stock sold during the said year.

Formerly § 182, ch. 908, L. 1896, as am'd by L. 1901, ch. 558; L. 1906, ch. 474; L. 1907, ch. 734.

The last sentence was added in 1907. It was intended to supply a method of taxing certain corporations which were not provided for in the amendatory legislation of previous years.

Source of Section.

The foregoing section is derived from L. 1880, ch. 542, § 3, as am'd by L. 1882, ch. 361, and L. 1890, ch. 522. The method of taxing corporations declaring less than 6 per cent. dividends was changed by the revision of the Tax Law in 1896. For a discussion of the former method see Peo. v. D. & H. Canal Co., 54 Hun 598, affd., 121 N. Y. 666 (1890).

Constitutionality of Act.

The Tax Law has been declared constitutional under both the State and the Federal Constitution. The Legislature has undoubted right, by virtue of its jurisdiction over domestic corporations, to levy such taxes upon their business and privileges, aside from all property taxation, as in its discretion it might deem just and proper in order to provide revenue for the State. Peo. v. Home Ins. Co., 92 N. Y. 328, affd., Home Ins. Co. v. New York, 134 U. S. 509; Peo. ex rel. William J. Matheson & Co., Ltd. v. Roberts, 158 N. Y. 162; Peo. ex rel. Am. Contracting & Dredging Co. v. Wemple, 129 N. Y. 558;

Matter of Tiffany & Co., 80 Hun 486; Peo. v. Gold & Stock Tel. Co., 98 N. Y. 67; Peo. v. Equitable Trust Co., 96 N. Y. 387.

As to foreign corporations, a State may impose such terms and conditions for the privilege of doing business within the State as it may deem expedient. It may entirely exclude a foreign corporation from its limits, and may restrict its business to particular localities, and it may also discriminate in favor of corporations organized under its own laws. Pembina Mining Co. v. Penn., 125 U. S. 181; Horn Silver Mining Co. v. New York, 143 N. Y. 305; Philadelphia Fire Assn. v. New York, 119 U. S. 110; New York State v. Roberts, 171 U. S. 658; Norfolk & W. R. R. Co. v. Penn., 136 U. S. 114; Paul v. Virginia, 8 Wall. 168; Bank of Augusta v. Earle, 13 Pet. 519; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727; Christian Union v. Yount, 101 U. S. 352; Wm. J. Matheson & Co., Ltd. v. Roberts, 158 N. Y. 162, affg. 27 A. D. 632; American Soda Fountain Co. v. Roberts, 158 N. Y. 168, revsg. 29 A. D. 585; Peo. ex rel. Southern Cotton-Oil Co. v. Wemple, 131 N. Y. 64; Peo. v. Formosa, 131 N. Y. 478; Demarest v. Flack, 128 N. Y. 205.

Nature of the Tax.

The tax imposed upon corporations under the Tax Law is a tax upon the "corporate franchise or business," and is not a tax upon property. The tax when imposed on a domestic corporation is a tax on its corporate franchises, and when imposed on a foreign corporation is a tax on its business, a distinction based on the fact that corporate franchises are only taxable within the jurisdiction which creates them, and where alone they can be said to have a situs. Peo. ex rel. Penn. R. R. Co. v. Wemple, 138 N. Y. 1; Peo. v. Home Ins. Co., 92 N. Y. 345; Home Ins. Co. v. People, 134 U. S. 594; Peo. v. Equitable Trust Co., 96 N. Y. 387; Peo. ex rel. Chicago Junction Rys. & Union Stockyards Co. v. Roberts, 154 N. Y. 1; Peo. ex rel. Am. Contracting & Dredging Co. v. Wemple, 129 N. Y. 558; Peo. ex rel. United Verde Copper Co. v. Roberts, 156 N. Y. 585 (1898).

In respect to foreign corporations, we do not grant them their franchises, but we permit them to do business here; and, as we should not accord them superior advantages over domestic corporations, we try to impose the same rate of taxation upon them, and thus we tax them upon their business, upon the same basis and scale. Peo. ex rel. Niagara River Hydraulic Co. v. Roberts, 30 A. D. 180, affd., 157 N. Y. 676 (1898).

Difference in Method of Taxation When Dividends are 6 per cent. and 5 per cent. Respectively.

Where stock pays dividends amounting to six per cent. or more, the franchise tax is based on the amount of dividends, but if less than six per cent. then the tax is computed on the value of the stock, and the rates of taxation prescribed by the statute are such that, if computed on the basis of six per cent. dividends the tax is exactly the same in amount as if computed on the value of the stock at par. This leads at times to very queer results. Not only a safe six per cent. stock, but even a safe five per cent. stock is apt to be worth more than par, and hence it is that the same corporation, when it is able to pay stockholders only five per cent. may be subject to a greater tax than in a more prosperous year when it is able to pay six per cent. Also as between two corporations, if both are of the highest financial standing, the five per cent. corporation may have to pay a greater tax than the six per cent. one. Peo. ex rel. N. Y. C. & H. R. R. R. Co. v. Gaus, 200 N. Y. 328 (1911).

Franchise Tax a Lien upon Corporate Property.

Where the franchise tax is levied while corporate property is being operated by a receiver in foreclosure it is nevertheless a lien upon such property and a purchaser at foreclosure sale who buys subject to all taxes which might be liens, takes the property charged with the tax lien which is paramount to prior incumbrances. N. Y. Terminal Co. v. Gaus, 204 N. Y. 512 (1912).

Franchise Tax is an Exaction for Exercise of Future Corporate Privileges.

In the case of People ex rel. Mutual Trust Co. v. Miller, 177 N. Y. 51 (1903), where the corporation began business a few days before the end of the tax year, it was held that only the average outstanding stock during the year was to be the basis of the tax, but in that case the franchise tax was treated as a payment for the corporate privilege enjoyed for the past year. After that decision section 182 was amended so as to provide that the tax should be paid in advance. Such amendment thus changed the character of the tax as to corporations embraced within that section from a payment for past privileges already enjoyed to a payment for future privileges to be enjoyed in the following year. Peo. ex rel. N. Y. Central & H. R. R. R. Co. v. Gaus, 200 N. Y. 328 (1911).

Method of Taxation When Capital Stock and Dividends Have Varied During Tax Year.

Where a corporation increased its capital stock during the tax year and paid quarterly dividends at the rate of six per cent. on all its stock outstanding at the time of the payment of the respective dividends it is properly assessed upon the basis of the stock outstanding at the end of the year, the tax being assessed for the privilege to be enjoyed during the following year. Peo. ex rel. N. Y. C. & H. R. R. R. Co., 200 N. Y. 328 (1911), overruling dictum to contrary in Peo. ex rel. Lincoln Trust Co. v. Glynn, 132 A. D. 546 (1909), affd. on op. below, 198 N. Y. 501. Held, also, that although six per cent. was not paid upon the entire amount of stock issued during the year, yet it was so paid on all that was outstanding when the respective quarterly dividends were declared, and hence it is to be assessed upon the theory that the stock outstanding at the end of the tax year was all six per cent. stock. Id.

Basis of Tax, Largest Amount of Capital Stock Employed During Year.

Where a corporation distributed dividends on $300,000 capital stock, but before the end of the year reduced its capital stock to $100,000, its tax must be based upon the larger amount, as the statute does not contemplate that all the capital stock must be employed during the entire year in order to fix the basis for the tax. Peo. ex rel. Mercantile Safe Deposit Co. v. Sohmer, 158 A. D. 110 (1913).

Since the amendment to the foregoing section, by Laws of 1907, chapter 734, requiring tax to be paid annually "in advance," the tax is to be computed upon the largest amount of capital stock employed at any time during the preceding year, and this rule applies whether the capital stock has been increased or reduced during the year. Peo. ex rel. Mercantile Safe Deposit Co. v. Sohmer, 158 A. D. 110 (1913).

Method of Taxation When Dividend Rate is Less than 6 per cent. or No Dividends are Declared.

See, also, "Appraisal of Capital Stock," post, page 1326.

The Tax Law does not authorize a tax of three-quarters of a mill upon the par value of capital stock employed in this State as against corporations which pay no dividend or whose assets do not exceed their liabilities exclusive of capital stock, or whose stock has not been sold within the year at an average price equal to or exceeding its par value, but such capital stock must be appraised for taxation at its actual value. People ex rel. N. Y. Mail & Newspaper Transportation Co. v. Gaus, 198 N. Y. 250 (1910).

A corporation which has paid no dividends must be taxed upon the actual and not the par value of its stock under the present law. The provisions of this section must be read in connection with section 190, infra. The provisions of the latter section directing appraisal apply to such a corporation. Peo. ex rel. Fifth Ave. Building Co. v. Williams, 198 N. Y. 238 (1910).

Where the dividends paid by a corporation are only four per cent. per annum the tax is to be at the rate of three-quarters of a mill upon each dollar of the amount of the capital stock. Peo. ex rel. Am. Bank Note Co. v. Sohmer, 157 A. D. 1 (1913), affd., 210 N. Y. 621.

Section Imposes a Franchise Tax, not a Property Tax, Therefore Rules Relating to Taxation of Property do not Apply.

This statute does not impose a property tax but merely exacts a payment for the privilege of exercising corporate powers within the State. The Legislature is not bound to impose the same conditions upon all corporations for the privilege of doing business within the State. It may grant or withhold the privilege in the case of each corporation as it sees fit. The rules relating to the taxation of property do not apply. People ex rel. Vandervoort Realty Co. v. Glynn, 194 N. Y. 387, 390 (1909).

Doubtful Tax Provisions to be Construed Most Strongly Against the State.

Where two sections or different provisions of a statute imposing a tax are inconsistent the taxpayer is entitled to the benefit of the section or provision most favorable to him. Peo. ex rel. Am. Bank Note Co. v. Sohmer, 157 A. D. 1 (1913), affd., 210 N. Y. 621: Peo. ex rel. Mutual Trust Co. v. Miller, 177 N. Y. 51 (1903); Peo. ex rel. N. Y. & East River Ferry Co. v. Roberts, 168 N. Y. 14 (1901).

A statute which levies a tax is to be construed most strongly against the government and in favor of the citizen. The government takes nothing except what is given by the clear import of the words used, and a well-founded doubt as to the meaning of the act defeats the tax. Peo. ex rel. Mutual Trust Co. v. Miller, 177 N. Y. 51, 57 (1910); Peo. ex rel. Fifth Ave. Building Co. v. Williams, 198 N. Y. 238, 247 (1910); Peo. ex rel. N. Y. Mail & Newspaper Transportation Co. v. Gaus, 198 N. Y. 250, 255.

Average Price of Stock; How Determined.

In imposing a franchise tax in cases where the same is based upon the average price at which stock has been sold during the year such average price should be determined by the different sales irrespective of the amount of stock sold upon each of said sales; for instance, if one hundred shares be sold at forty-eight upon one day and ten shares at fifty upon the next day the average price for the two days would be forty-nine. Peo. ex rel. Am. Bank Note Co. v. Sohmer, 157 A. D. 1 (1913), affd., 210 N. Y. 621.

Legality of Tax Against a Bankrupt Corporation.

A trustee of a bankrupt corporation is not concluded by the assessment of an annual franchise tax and a license tax by the State Comptroller, but the amount and legality of taxes so assessed may be determined by the bankruptcy court as provided by section 64-a of the Bankruptcy Law. In re Heffron Co., 216 Fed. 642 (1914). A State creating a corporation may fix the terms of its existence and provide that for the continued existence of its franchise it must yearly pay the State certain sums fixed by the amount of its outstanding stock. While the State court may construe a statute and define its meaning, it cannot conclusively determine that which is not a tax to be a tax within the meaning of a Federal statute; that is a Federal question of ultimate decision in the Federal court. New Jersey v. Anderson, 203 U. S. 483 (1906).

Corporations Holding Real Estate are Taxable.

See, also, cases distinguished by the following cases, under the topic "Capital Not Actively Employed," post, page 1324.

A corporation formed to hold real property for the convenience of its principal stockholder and holding such real property is employing its capital in the State and is subject to the tax under the statute in force Oct. 31, 1905. The capital need not be employed in business under such law. Peo. ex rel. Waclark Realty Co. v. Williams, 198 N. Y. 54 (1910), revsg. 134 A. D. 83.

Corporations organized for the purposes of buying, selling, leasing, renting and owning real estate, and of erecting buildings thereon are taxable under the law as it now stands. As soon as the corporation begins to use its money to purchase real estate for the purposes of its incorporation it employs capital in the State. Peo. ex rel. Fifth Ave. Building Co. v. Williams, 198 N. Y. 238 (1910); Peo. ex rel. Wall & Hanover St. Realty Co. v. Miller, 181 N. Y. 328 (1905); Peo. ex rel. Vandervoort Realty Co. v. Glynn, 194 N. Y. 387 (1909).

Where the charter of a foreign corporation organized for the immediate object of taking title to land on which is situated a valuable office building, the incorporators being the persons who owned the building as tenants in common is broad enough to authorize unlimited dealing in real estate and in personal property, although the corporation has no surplus but has all of its capital invested in the property from which it derives a net income devoted to dividends, it is engaged in carrying on business by the active use of capital and is subject to the license and franchise tax imposed on foreign corporations doing business within the State. Peo. ex rel. Wall & Hanover St. Realty Co. v. Miller, 181 N. Y. 328 (1905), distg. Peo. ex rel. Niag. River Hyd. Power Co. v. Roberts, 157 N. Y. 676; Peo. ex rel. Ft. George Realty Co. v. Miller, 179 N. Y. 49; Peo. ex rel. Singer Mfg. Co. v. Wemple, 150 N. Y. 46, affg. 98 A. D. 584.

A corporation organized to purchase, sell and exchange real estate and erect and manage buildings and which owns real estate subject to a mortgage and other charges, but which nets over seven per cent. on its capital stock is subject to a franchise tax. Peo. ex rel. Fourteenth St. Realty Co. v. Kelsey, 110 A. D. 797, affd., 184 N. Y. 572 (1906).

Where a corporation, which was organized for the purpose of "buying and acquiring a certain tract of real estate in the Borough of Brooklyn," purchased from four owners in common such real estate and issued stock amounting to $187,000 to the vendors in payment therefor, and leased such property, deriving therefrom rentals which were used in paying dividends,

such corporation is employing its capital stock and is taxable. Peo. ex rel. Vandervoort Realty Co. v. Glynn, 194 N. Y. 387 (1909).

A domestic corporation which was organized for racing purposes but ceased carrying on such business is taxable when it purchases, holds and rents real estate, although such business is ultra vires because not authorized in its certificate of incorporation. Peo. ex rel. Coney Isl. Jockey Club v. Sohmer, 155 A. D. 842 (1913), affd., 210 N. Y. 549.

Where a corporation was formed for the purpose of taking title to undivided interests in real property for convenience in litigation and such property was leased, it is engaged in business and is liable for the payment of a franchise tax. Peo. ex rel. Tetragon Co. v. Sohmer, 162 A. D. 433 (1914). The moneys received upon the sale of such real property and distributed to the stockholders constitutes a distribution of capital and not the payment of a dividend. Id.

The chartered privileges of a corporation as defined in its certificate of incorporation which is invariably framed in the language of the corporators should be the index to its relations to the State, rather than the possibly sporadic and shifting exercise of any one or more of a larger number of the powers delegated to it. Peo. ex rel. Wall & Hanover St. Realty Co. v. Miller, 181 N. Y. 328, 334 (1905).

Interstate Commerce.

The tax is imposed for the privilege of exercising corporate franchises within the State, and is based upon the amount of capital stock employed here, and notwithstanding that such capital stock is used in a business which in its nature constitutes commerce between the States. Peo. ex rel. Union Sulphur Co. v. Glynn, 125 A. D. 328 (1908), citing 198 U. S. 305; 141 U. S. 18; 155 U. S. 695.

The only limitation upon the power of a State to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the Federal government, or where its business is strictly commerce, interstate or foreign. Pembina Cons. Silver Mining & M. Co. v. Penn., 125 U. S. 181; Peo. ex rel. Southern Cotton-Oil Co. v. Wemple, 131 N. Y. 64; Peo. ex rel. Penn. R. R. Co. v. Wemple, 138 N. Y. 1.

The State is not permitted to tax a foreign corporation upon its business carried on in this State, where it is exclusively the business of interstate commerce. Peo. ex. rel. Penn. R. R. Co. v. Wemple, 138 N. Y. 1.

Where a corporation is engaged partly in interstate commerce and partly in domestic or infrastate commerce, the imposition of a tax is within the power of the State, as is also the power to prescribe the basis of its measurement, if the corporation is doing business and employing capital within the State, and in this respect there is no distinction between domestic and foreign corporations. Peo. ex rel. Klipstein v. Roberts, 36 A. D. 597, affd., 167 N. Y. 617; Peo. ex rel. Am. Soda Fountain Co. v. Roberts, 158 N. Y. 168, revsg. 29 A. D. 585; Peo. ex rel. Penn. R. R. Co. v. Wemple, 138 N. Y. 1; Peo. ex rel. Southern Cotton-Oil Co. v. Wemple, 131 N. Y. 64; Peo. ex rel. Parke, Davis & Co. v. Roberts, 91 Hun 158, affd., 149 N. Y. 608, affd. in U. S. Sup. Ct. in New York State v. Roberts, 171 U. S. 658; Peo. ex rel. Postal Tel. Co. v. Campbell, 70 Hun 507; Peo. ex rel. Eppens, Smith & Wieman Co. v. Roberts, 51 A. D. 152.

The fact that the other business besides manufacturing carried on by a corporation within the State was interstate commerce does not entitle it to exemption upon that portion of its capital invested in interstate commerce. Peo. ex rel. Am. Soda Fountain Co. v. Roberts, 158 N. Y. 168.

A cab service maintained by a railroad company to take passengers to and from its terminus in New York city for which the charges are separate from those of other transportation and wholly for service within the State of New York is not interstate commerce and the corporation is not exempt from tax. Penn. R. R. Co. v. Knight, 192 U. S. 21, affg. 171 N. Y. 354, 67 A. D. 398.

A tax or burden imposed by the statutes under consideration upon foreign corporations is laid not upon their property, but their business, and cannot be lawfully imposed upon the business of interstate commerce or transportation. Gloucester Ferry Co. v. Penn., 114 U. S. 211; see, also, Robbins v. Shelly Tax District, 120 U. S. 489; McCall v. California, 136 U. S. 104; Savage v. Atlanta Home Ins. Co., 55 A. D. 20.

If the corporation is engaged in State as well as interstate business, it is taxable upon both, and this is not in conflict with the Federal Constitution. Peo. ex rel. American Soda Fountain Co. v. Roberts, 158 N. Y. 168, revsg. 29 A. D. 585.

Imported Goods, Capital Invested in.

Where the original packages in which goods were imported have been broken, and the goods taken therefrom and placed in a store on sale, thereby becoming mixed with other property, the restrictions of the Federal Constitution upon imposts on imports and upon the regulation of foreign commerce do not apply, and the goods become subject to the taxing power of the State. Peo. ex rel. Wm. J. Matheson & Co. v. Roberts, 158 N. Y. 162, affg. 27 A. D. 632.

A corporation, six-sevenths of whose business, carried on in the State of New York, consists of importing goods from foreign countries and selling the same in the original packages, and the balance in selling broken packages of its imported goods, and also some domestic goods, is taxable. Peo. ex rel. Klipstein & Co. v. Roberts, 36 A. D. 597, affd., 167 N. Y. 617.

A State can levy no tax upon exports or imports, and goods imported from foreign countries and brought within a State cannot be reached by its taxing power while in the hands of the importer in the condition in which they were when imported, unless they have been mingled with other property. Peo. ex rel. Penn. R. R. Co. v. Wemple, 138 N. Y. 9; Low v. Austin, 13 Wall. 29; State Tax on Railway Receipts, 15 Wall. 284, 295; Waring v. Mayor, 8 Wall. 110, 121; Cook v. Penn., 97 U. S. 566, 573; Machine Co. v. Gage, 100 U. S. 679.

The imposition upon a domestic corporation of the franchise tax computed upon its dividends is not a tax upon property, and is not violative of the restrictions of the Federal Constitution upon the taxation of imports, even if a portion of the corporation's property consists of imported goods. Peo. ex rel. Wm. J. Matheson & Co., Ltd. v. Roberts, 158 N. Y. 162, affg. 27 A. D. 632.

"Capital Stock." Meaning of Term.

The value of the capital stock is the value of the property of the corporation without regard to the amount of the capital stock. The term "capital stock" means not share stock, but the property of the corporation. Capital

stock and capital are practically the equivalent of each other when considered as a basis for a franchise tax. Peo. ex rel. Tetragon Co. v. Sohmer, 162 A. D. 433, 437 (1914).

The term "capital stock," in the Tax Law, does not mean share stock, but means the property of the corporation contributed by its stockholders or otherwise obtained by it, to the extent required by its charter. "Capital stock" and "capital" are practically the equivalent of each other when considered as a basis for a franchise tax. Williams v. Western Union Tel. Co., 93 N. Y. 162; Peo. ex rel. Commercial Cable Co. v. Morgan, 178 N. Y. 433; Peo. ex rel. Am. Axe & Tool Co. v. Roberts, 82 Hun 313; Burrall v. Bushwick R. R. Co., 75 N. Y. 211; Peo. ex rel. Wiebusch & Hilger Co., Ltd. v. Roberts, 154 N. Y. 101, affg. 19 A. D. 574, and cases there cited.

Basis of Tax on Domestic Corporations.

A domestic corporation is required to pay a tax upon its franchise and business, to be measured by the amount of its capital stock found to be employed in this State. As to foreign corporations, jurisdiction for taxing purposes is gained from the business which they do in this State, and the tax is one upon that business. Peo. ex rel. Am. Contracting & Dredging Co. v. Wemple, 129 N. Y. 558; Peo. ex rel. United Verde Copper Co. v. Roberts, 156 N. Y. 585, revsg. 25 A. D. 89; Peo. ex rel. Wiebusch & Hilger Co., Ltd. v. Roberts, 154 N. Y. 101, affg. 19 A. D. 574; Peo. ex rel. Edison Electric Lt. Co. v. Wemple, 148 N. Y. 690, revsg. 63 Hun 444; Peo. ex rel. Edison Electric Lt. Co. v. Campbell, 138 N. Y. 543.

There must be some property or business within the State to justify a tax upon a domestic corporation. If it has no property or business within the State there is no basis for taxation. Peo. ex rel. Davis-Colby Co. v. Campbell, 66 Hun 146.

Stock owned by a domestic corporation in other domestic corporations constitutes capital employed within the State, and so forms a basis for taxation; but as to the stock in corporations in other States, it is capital employed outside of the State and cannot be considered. Peo. ex rel. Edison Electric Lt. Co. v. Campbell, 138 N. Y. 543; Peo. ex rel. Edison Electric Lt. Co. v. Wemple, 148 N. Y. 690, revsg. 63 Hun 44.

The stock of a foreign corporation, in which a portion of the capital stock of a domestic railroad corporation is invested, is not capital stock used in the State. Peo. v. Campbell, 88 Hun 544, citing and following 138 N. Y. 543, supra.

Although the income from capital invested outside the State is received by a domestic corporation at its home office in this State and is here used in its business, such capital is not taxable. Peo. ex rel. Am. Surety Co. v. Campbell, 74 Hun 101, affd., 143 N. Y. 625, approving 138 N. Y. 543, supra. This point is now specifically covered by the amendment of 1906.

That part of the capital stock of a railroad company which is invested in freight cars, permanently engaged out of the State, is not subject to a franchise tax. Peo. v. Campbell, 88 Hun 544; Pullman Palace Car Co. v. Penn., 141 U. S. 18; Commonwealth v. Del., L. & W. R. R. Co., 145 Penn. 96.

A railroad company is not entitled to be credited with the average amount of its rolling stock employed outside the State, but only with the amount used exclusively and continuously outside the State. Peo. ex rel. N. Y. C. & H. R. R. R. Co. v. Knight, 173 N. Y. 255; Same v. Miller, 89 A. D. 127.

Bonds issued by foreign corporations and held by a domestic corporation affords a basis of taxation. Such bonds are presumably held by a domestic

corporation at its office in this State and have their situs at the domicile of the owner. Peo. ex rel. Edison Electric Lt. Co. v. Campbell, 138 N. Y. 543; Peo. v. Campbell, 88 Hun 544.

Where the amount of capital employed within the State varies from time to time during the year, the assessment of the corporation should be fixed at the average amount of capital employed throughout the year and not at the highest sum employed at any one time. Peo. ex rel. Brooklyn Rapid Transit Co. v. Morgan, 57 A. D. 335, modified as to amount of tax by 168 N. Y. 672.

That the proper method of reaching the amount of capital employed is by average is supported by authority. Peo. ex rel. Brooklyn Rapid Transit Co. v. Morgan, 57 A. D. 335, citing Peo. ex rel. Tiffany & Co. v. Campbell, 144 N. Y. 166; Peo. ex rel. New England Loan Co. v. Roberts, 25 A. D. 16, affd., 156 N. Y. 688.

Where the entire capital stock of a corporation has been issued in payment for an equity in mortgaged premises, the value of such equity less the indebtedness of the corporation is the value of the capital stock. Peo. ex rel. Lorena Co. v. Morgan, 55 A. D. 265. This case does not apply since the amendment of 1906.

In Pennsylvania it has been held that when the capital stock of a corporation has been increased during the tax year, the tax on such increase should be apportioned with regard to the length of time it has been in existence. Commonwealth v. Machine Co., 2 Chester Co. Rep. (Pa.) 186. An apportionment of the tax should also be made when the corporation has been organized less than a year. Commonwealth v. Wyoming Val. Coal Co., 50 Pa. St. Rep. 410.

The Comptroller in estimating the amount of the capital stock employed within the State is not obliged to deduct real estate subject to local taxation. Peo. ex rel. Postal Telegraph Cable Co. v. Campbell, 70 Hun 507.

The State of origin remains the permanent situs of personal property, notwithstanding occasional excursions to other States, and a State may tax its own corporations for all their property in the State during the year even if every item should be taken into another State for a period and then brought back. Peo. ex rel. N. Y. C. & H. R. R. R. Co. v. Miller, 202 U. S. 584 (1906), and cases cited.

Domestic Corporation, When Taxable.

The capital of a domestic corporation in order to be liable to assessment for a franchise tax must be employed within the State. The capital of such a company is employed where it is kept and used for the purposes of the corporation. Peo. ex rel. Edison Electric Lt. Co. v. Campbell, 138 N. Y. 546 (1893); Peo. ex rel. Am. Surety Co. v. Campbell, 74 Hun 101, affd., 143 N. Y. 625 (1894).

Portions of the capital stock of a domestic corporation, organized for guaranteeing bonds, etc., invested in real estate in another State and in United States bonds deposited under a deed of trust in a third State and in Canada, to enable the corporation to do business in such States and Canada, are not "capital stock employed within this State" for purposes of taxation, although the investments are subject to claims of creditors, and the income therefrom is received at its home office in this State, and is there used in its business. Peo. ex rel. Am. Surety Co. v. Campbell, 74 Hun 101, affd., 143 N. Y. 625 (1894).

A domestic corporation, organized for manufacturing purposes, and carrying on all such operations in another State, is not exempt from tax. For purposes

of taxation the average bank account here and the average value of the goods which it sends to and keeps in the State until they are sold represent the capital stock employed within the State. Peo. ex rel. Blackington Co. v. Roberts, 4 A. D. 388, affd., 151 N. Y. 652.

There must be some property or business within the State to justify a tax. If it has no property or business within the State there is no basis upon which to compute the tax. Peo. ex rel. Davis-Colby Co. v. Campbell, 66 Hun 146.

A domestic corporation engaged in business out of the State, but having its office and bank accounts in the State, made annual reports to the Comptroller for three years, by which it appeared that dividends were declared and paid upon its capital during those years. The Comptroller based his adjustment of taxes upon the amount of capital employed in this State, which he determined from the average monthly balances in the New York banks, and the expenditures for the maintenance of its office there. Held, there was sufficient evidence upon which the Comptroller could act and that the tax was properly imposed. Peo. ex rel. Am. Contracting & Dredging Co. v. Wemple, 129 N. Y. 558, affg. 60 Hun 225; see. also, cases therein cited.

It seems that capital of a casualty company deposited as security in other States for those doing business with it in those States is employed without the State and entitled to exemption from taxation here. Am. Surety Co. v. Campbell, 64 Hun 417.

A corporation, in order to be liable for a tax, must have its capital actively employed in this State in its corporate business and cannot be taxed upon the passive holding of capital in the form of an unproductive investment. Peo. ex rel. Niagara River Hydraulic Co. v. Roberts, 30 A. D. 180, affd., 157 N. Y. 676. Subsequent cases have so distinguished this ruling as to practically overrule it. Peo. ex rel. Fourteenth St. Realty Co. v. Kelsey, 110 A. D. 797 (1906), affd., 184 N. Y. 592; Peo. ex rel. Wall & Hanover St. Realty Co. v. Miller, 181 N. Y. 328 (1905); Peo. ex rel. Vandervoort Realty Co. v. Glynn, 194 N. Y. 387 (1909).

Property having a permanent situs outside the State cannot be included as capital within the State. Peo. v. Campbell, 88 Hun 544 (1895).

For other cases respecting taxability of domestic corporations, see cases cited under "Basis of Tax on Domestic Corporations."

Basis of Tax on Foreign Corporations.

Taxation under the act as to foreign corporations is limited to those "doing business in this State," and the tax is upon that business, to be computed upon the basis of the amount of capital employed in its business within the State. Peo. v. Equitable Trust Co., 96 N. Y. 387 (1884); Peo. ex rel. Am. Contracting & Dredging Co. v. Wemple, 129 N. Y. 558; Peo. ex rel. Roebling's Sons' Co. v. Wemple, 138 N. Y. 582 (1893); Peo. ex rel. Chicago Junction Ry. & Union Stockyards Co. v. Roberts, 154 N. Y. 1 (1897), revsg. 90 Hun 474; Peo. ex rel. Singer Mfg. Co. v. Wemple, 150 N. Y. 46 (1896); Peo. ex rel. Seth Thomas Clock Co. v. Wemple, 133 N. Y. 323 (1892).

Capital employed in this State by a foreign corporation cannot be measured by comparing the sales made within the State with the total sales, and assuming that the capital employed here bears the same proportion to the capital of the corporation. Peo. ex rel. Seth Thomas Clock Co. v. Wemple, 133 N. Y. 323 (1892).

A foreign corporation which maintains an office in this State, and has a stock of western securities which are sold and replenished in the course of its

business, the proceeds of which are deposited in a New York bank and subsequently sent out of the State to be reinvested, is subject to taxation on its capital employed within the State represented by its bank account and the amount paid out for salaries and rentals and the securities through which it transacts business, less what may be deemed income. Peo. ex rel. New England Loan & Trust Co. v. Roberts, 25 A. D. 16, affd., 156 N. Y. 688 (1898).

Whether a foreign corporation is doing business in this State is a question that must be determined from the character of the business carried on, not from the existence of any unexercised powers reserved to it by its contracts. Peo. v. Am. Bell Telephone Co., 117 N. Y. 241 (1889); Peo. v. Horn Silver Mining Co., 105 N. Y. 76 (1887); s. c., 143 U. S. 305. The statute does not require that the whole business of a foreign corporation shall be done within the State in order to subject it to taxation. Horn Silver Mining Co. v. New York, 143 U. S. 305 (1887).

Cars of a foreign palace car company within the State, although employed in interstate commerce, are not exempt from taxation as property; taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which its cars run within the State bears to the whole number of miles in this and other States over which its cars were run, is a just and equitable method of assessment. Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18, affg. 107 Pa. St. Rep. 156.

A foreign corporation, whose capital is wholly invested in the stock and bonds of an independent foreign corporation doing business wholly out of this State, whose whole income is derived from such investment, and which maintains a leased office, with furniture, officers and clerks, in this State, where it receives and distributes the dividends derived from its investment, which constitutes its whole business, is not subject to taxation here, since, although "doing business in this State," no part of its capital is "employed within the State," within the meaning of the statute. Peo. ex rel. Chicago Junction Ry. & Union Stockyards Co. v. Roberts, 154 N. Y. 1 (1897), revsg. 90 Hun 474.

The amount of capital employed within the State is to be ascertained by computing the value of the stock in trade here during the year, its other personal property, the average monthly bank balance, and value of the real estate owned and used in business here. Peo. ex rel. Roebling's Sons' Co. v. Wemple, 138 N. Y. 582 (1893).

The imposition of a tax upon a foreign corporation doing business in the State, measured by the amount of the capital employed in such business within the State, is entirely within the power of the State. Peo. ex rel. Parke, Davis & Co. v. Roberts, 91 Hun 158 (1895), affd., 149 N. Y. 608.

A foreign corporation engaged in mining and refining, shipped its bullion for refining to the United States assay office in this State, maintained an office in the city of New York solely for meetings of directors, payment of dividends, and correspondence with its superintendents at the mines and refineries. Held, that it was doing business in this State, and subject to tax as such; and that it could not claim exemption from taxation, as a company manufacturing within this State. People v. Horn Silver Mining Co., 105 N. Y. 76, affg. 38 Hun 276 (1887).

In Pennsylvania it has been held that when a railroad extends through that and other States, the assessment of tax on its capital stock is to be in the proportion its line in that State bears to its total length. Commonwealth v. Cleveland, Painesville & Ashtabula R. R. Co., 29 Pa. St. Rep. 370; Commonwealth v. Del., Lack. & West. R. R. Co., 145 id. 96; Pittsb., Ft. W. & Chicago R. R. Co. v. Commonwealth, 66 id. 73; Commonwealth v. Erie R. R. Co., 98 id. 127.

Foreign Corporations, When Taxable.

Where a foreign corporation has its principal office in this State, publishes periodicals and receives subscriptions here, and receives, approves and pays for advertising contracts here, its open book accounts due from non-residents at such office constitute capital employed in this State for the purpose of determining the franchise tax. Peo. ex rel. Williams Co. v. Sohmer, 151 A. D. 764 (1912).

Where the charter of a foreign corporation, for the immediate object of acquiring land in New York on which is situated a valuable office building, the incorporators being the persons who owned the building as tenants in common, is broad enough to authorize unlimited dealing in real estate, although the corporation has no surplus but has all its capital invested in the property and employed in the care and management thereof, it is engaged in carrying on business by the active use of capital and is subject to the license and franchise tax. Peo. ex rel. Wall & Hanover St. Realty Co. v. Miller, 181 N. Y. 328 (1905), affg. 98 A. D. 584; see, also, to same effect Peo. ex rel. Vandervoort Realty Co. v. Glynn, 194 N. Y. 387 (1909).

A foreign corporation maintaining an office in New York from which it sells products of mines situated in other States and collects the proceeds of sales is doing business here and is subject to payment of a franchise tax. Such a corporation cannot escape taxation upon the theory that it is engaged in interstate commerce. Peo. ex rel. Union Sulphur Co. v. Glynn, 125 A. D. 328 (1908).

The jurisdiction to tax foreign corporations depends upon the existence of two concurring conditions, namely, that the corporation shall be "doing business" in this State, and, second, that its capital or some portion thereof shall have been "employed within this State." Peo. ex rel. Harlan & Hollingsworth Co. v. Campbell, 139 N. Y. 68 (1893); Peo. ex rel. Chicago Junction Rys. & Union Stockyards Co. v. Roberts, 154 N. Y. 1 (1897), revsg. 90 Hun 474.

The question whether or not a foreign corporation is doing business in this State must be determined from the actual character of the business carried on, and not from the existence of any unexercised powers reserved to it by its contracts. Peo. v. Am. Bell Telephone Co., 117 N. Y. 241 (1889); Peo. v. Horn Silver Mining Co., 105 N. Y. 76; Horn Silver Mining Co. v. New York, 143 U. S. 305 (1887).

A foreign corporation, having no office in this State, which merely leases and licenses its telephones to domestic corporations, the business in this State being entirely conducted by local companies, although the rentals for instruments are collected in the name of the foreign corporation, is not doing business in this State. Peo. v. Am. Bell Telephone Co., 117 N. Y. 241 (1889).

A foreign corporation obtaining, through brokers carrying on business in the State, orders for goods which are sent to it for approval at the home office, and when approved are filled by the transmission of the goods direct from its factory in the foreign State, is not doing business within the State of New York. Peo. ex rel. Southern Cotton-Oil Co. v. Roberts, 25 A. D. 13 (1898).

The fact that a foreign corporation assigns a portion of its goods to brokers, who are its agents, and that sales are made within the State from such goods, either directly at a price fixed by the corporation or in fulfillment of orders approved by it, the proceeds being deposited to the credit of the corporation in a bank in the State of New York, and the charges of the brokers being paid by check after the deposit, instead of being deducted before the deposit, does not render the corporation subject to taxation. Peo. ex rel. Southern Cotton-Oil Co. v. Roberts, 25 A. D. 13 (1898).

Where a foreign corporation employs an agent to solicit orders in this State, but keeps no goods for sale here, and simply provides a place for the agent to receive orders and for the temporary deposit of goods, it is not liable to a franchise tax. Lembeck & Betz Eagle Brewing Co. v. Roberts, 22 A. D. 282 (1897).

A foreign manufacturing corporation, whose business is conducted in another State, where all its contracts are made and its products are manufactured, sold and delivered, and which transacts none of its corporate business in this State, but has an office here in charge of an agent, maintained merely as a convenient meeting place for its patrons for the discussion of questions preliminary to the making of contracts, the contracts being executed at the home office, and the rent of the office and the salary of its agent paid by checks drawn on a bank in another State and paid there, cannot be regarded as employing any of its capital in this State. Peo. ex rel. Harlan & Hollingsworth Co. v. Campbell, 139 N. Y. 68 (1893).

A foreign corporation which solicits and obtains, through agents in this State, orders which are filled by shipping goods from its factory in another State, and which leases an office in New York city, where it keeps samples of value of $4,000, and has a bank account of several thousand dollars, is not taxable. Peo. ex rel. H. B. Smith Co. v. Roberts, 27 A. D. 455 (1898).

A foreign corporation which prints a newspaper outside the State and merely solicits and secures advertising patronage within the State and collects upon contracts, which collections are deposited in a New York bank to the extent of an average monthly balance of $6,000, and owns office furniture worth about $700, has no capital employed within the State within the meaning of the act. Peo. ex rel. Kellogg Newspaper Co. v. Roberts, 30 A. D. 150 (1898).

Office conveniences are permitted within the State to a foreign corporation doing business in another State for use in the work of soliciting orders to be executed in other States, without liability for the payment of a franchise tax. Peo. ex rel. Kellogg Newspaper Co. v. Roberts 30 A. D. 150 (1898).

Where a foreign corporation rented part of a building in New York city, in which its selling agent kept an office for distribution of samples, the payment of traveling agents and for the purpose of taking orders for goods, which orders were sent for approval to the treasurer in Massachusetts, from which State all goods were shipped, it was held that the corporation was not taxable, as doing business within this State. Peo. ex rel. Washington Mills Co. v. Roberts, 8 A. D. 201, affd., 151 N. Y. 619 (1896). The bank account of said corporation was not taxable, as the money was sent to the State merely to pay an indebtedness, and was not capital employed within the State. Id. The fact that the corporation had an interest as lessee in a building for which it paid rent did not make such an interest capital, taxable within this State. Id.

A corporation which maintains an office within the State in charge of an agent, for the convenience of the corporation and its patrons, is not employing capital within the State. The office furniture cannot fairly be considered capital. Peo. ex rel. Harlan & Hollingsworth Co. v. Campbell, 139 N. Y. 68 (1893); Peo. ex rel. Washington Mills Co. v. Roberts, 8 A. D. 201, affd., 151 N. Y. 619 (1896); Peo. ex rel. Chicago Junc. Rys. & Union Stockyards Co. v. Roberts, 154 N. Y. 1 (1897); Peo. ex rel. A. N. Kellogg Newspaper Co. v. Roberts, 30 A. D. 150 (1898); Peo. ex rel. H. B. Smith Co. v. Roberts, 27 A. D. 455 (1898).

Where it is shown that the business carried on in this State was soliciting orders through agents, and that when the orders were obtained, the goods were shipped from its factory in another State to the purchaser, such a busi-

ness cannot be taxed in this State. Brennan v. Titusville, 153 U. S. 289; Robbins v. Shelby Co. Taxing District, 120 U. S. 489.

A foreign corporation which establishes a place for the sale of its goods within the State of New York, pays rent for the premises, employs agents and employees to conduct its business, and sells its product from such place of business, transacts business within the State. Peo. ex rel. Parke, Davis & Co. v. Roberts, 91 Hun 158, affd., 149 N. Y. 608 (1896).

It is not necessary that the whole business of a foreign corporation shall be done within the State in order to subject it to the taxing power of the State. Horn Silver Mining Co. v. New York, 143 U. S. 305.

Sales made by a foreign corporation in this State from samples, the goods being delivered to the purchaser directly from the factory in another State, do not represent capital stock employed in this State. Seth Thomas Clock Co. v. Wemple, 133 N. Y. 323 (1892).

A foreign corporation is engaged in business in this State when it becomes a special partner in a limited partnership within the State, which is the sole agent for the sale of its products in this country, and is liable to taxation upon the amount of capital which it contributed to the partnership, as capital stock employed in this State. Peo. ex rel. Badische Anilin & Soda Fabrik v. Roberts, 152 N. Y. 59 (1897), affg. 11 A. D. 310.

A foreign corporation, whose sole business consists in selling, under a contract of agency, the goods of another corporation in foreign countries through agencies in such foreign countries, the orders for the goods and purchase-price being sent directly to its principal, and which maintains its office in New York city merely as a headquarters for the transmission of orders to its agents, and for the receipt of reports from them, does not employ capital within the State, and no part of its good will is taxable here. Peo. ex rel. Dutilh-Smith, McMillan & Co. v. Miller, 90 A. D. 545 (1904).

A foreign investment company engaged in purchasing, holding and selling stocks and bonds of other foreign corporations doing business outside the State maintained an office in New York city, where its principal business was transacted, all the business relating to the investment or reinvestment in said stocks and bonds being supervised at the New York office, where the company also paid annually wages aggregating $23,000, and where it carried large bank balances and a large amount of securities, and also held a considerable amount of bills and accounts receivable, is properly taxable for a franchise tax and license fee. Peo. ex rel. North Am. Co. v. Miller, 90 A. D. 560, affd., 182 N. Y. 521 (1905).

Taxation of Holding Companies.

A corporation which is a holding company of the stock of a manufacturing corporation is not entitled to the exemption from a franchise tax which is allowed to manufacturing corporations. Peo. ex rel. Am. Bank Note Co. v. Sohmer, 157 A. D. 1 (1913), affd., 210 N. Y. 621.

A foreign corporation doing business in this State and acting as a holding corporation of the capital stock of other corporations is subject to a franchise tax upon the money so invested, that being the purpose of the corporation. Peo. ex rel. Manhattan Silk Co. v. Miller, 125 A. D. 296 (1908).

Basis of Tax Cannot Exceed Capital Stock.

Where a foreign corporation had a capital stock of $5,000, and it employed in this State $40,000, from which it realized a profit of $20,000 a year, held, that the determination of the Comptroller, fixing the amount of the capital

stock employed in this State at $40,000, was erroneous; that the capital stock, made by statute the basis of taxation, however great the aggregate property, cannot exceed in amount, though it may in value, the amount authorized by its charter. Peo. ex rel. Railway Advertising Co. v. Roberts, 4 A. D. 288, affd., 151 N. Y. 621 (1897).

The basis of a tax imposed upon the business or franchise of a foreign corporation cannot exceed the amount of capital stock authorized by its charter. Peo. ex rel. Int'l Contracting Co. v. Roberts, 27 A. D. 400, affd., 158 N. Y. 666 (1899).

To the contrary it has been held when a foreign corporation has all its authorized capital stock amounting to $25,000 invested in a foreign State, and after investing $12,500 of accumulated surplus in this State, declares a dividend of $50,000, such dividend should be estimated as paid upon a capital of $37,500. Peo. ex rel. Long Dock Mills & Elevator v. Wilson, 121 A. D. 376 (1907).

Surplus, When Entitled to Exemption.

The surplus is part of the capital, and must be taken into consideration in estimating the capital of a domestic corporation. Peo. ex rel. Coney Island Jockey Club v. Sohmer, 155 A. D. 842 (1913), affd., 210 N. Y. 549; Peo. ex rel. Metropolitan Securities Co. v. Kelsey, 101 A. D. 248 (1905). These cases supersede Peo. ex rel. United Verde Copper Co. v. Roberts, 156 N. Y. 585 (1898), in which it was held that the surplus earnings of a domestic corporation, or property purchased with and representing such surplus, is not taxable. The above cases recognize and sustain the theory in the case of Peo. ex rel. Am. Contracting & Dredging Co. v. Wemple, 129 N. Y. 558 (1892), in which it was held that the words "doing business in this state" refer only to foreign corporations.

Surplus earnings of a foreign manufacturing corporation carrying on a portion of its business in this State, invested in real estate in this State leased by it to third parties, and not occupied by the corporation or used by it in transacting its ordinary business, and taxable for general State and local purposes, do not constitute capital stock; and, while such investment influences the amount of the corporation tax by increasing the dividends or the valuation of the capital stock, it is not taxable as "capital stock employed within this State." Peo. ex rel. Singer Mfg. Co. v. Wemple, 150 N. Y. 46 (1896), affg. 78 Hun 63.

The surplus profits and earnings of a corporation are not capital, though they may be converted into capital. If no such conversion has taken place, they furnish no basis for taxation, except incidentally as they aid in increasing the dividends. Peo. ex rel. Chicago Junc. Rys. & Union Stockyards Co. v. Roberts, 154 N. Y. (1898), approving 146 N. Y. 46, supra.

A foreign corporation may employ its surplus in its business if it chooses, instead of increasing its capital stock, and such surplus would not be taxable. Peo. ex rel. Railway Advertising Co. v. Roberts, 4 A. D. 288, affd., 151 N. Y. 621 (1897).

Bonds bought with surplus are not a basis for taxation. Peo. ex rel. Com'l Cable Co. v. Morgan, 178 N. Y. 433 (1904), revsg. 86 A. D. 577. The fact that assets exceed the share stock does not create the presumption that stocks and bonds purchased by it were bought with surplus. Id.

When a foreign corporation has all of its authorized capital stock, amounting to $25,000, invested in a foreign State, and after investing $12,500 of accumulated surplus in this State, declares a dividend of $50,000 such dividend

should be estimated as paid upon a capital of $37,500. Peo. ex rel. Long Dock Mills & El. v. Wilson, 121 A. D. 376 (1907), affd., 193 N. Y. 671.

There has been no decision to determine whether or not this case has been superseded by the change in phraseology of the foregoing section in 1906.

Good Will.

When a corporation acquires the good will of companies or individuals who never did any business within the State the amount of stock in payment for such good will does not represent taxable capital employed within the State. Peo. ex rel. International Elevating Co. v. Miller, 120 A. D. 901 (1907).

The good will of a foreign corporation, acquired and built up in this State and having a market value here, where its business is carried on, is not exempt from taxation, merely because it is intangible. Peo. ex rel. A. J. Johnson Co. v. Roberts, 159 N. Y. 70 (1899), revsg. 35 A. D. 624.

Good will embraces at least two elements, the advantage of continuing an established business in its old place, and of continuing it under the old style or name; while it is not necessarily altogether local, it is usually to a great extent, and must, of necessity, be an incident to a place, an established business or a name known to the trade. Peo. ex rel. A. J. Johnson Co. v. Roberts, 159 N. Y. 70 (1899), revsg. 35 A. D. 624.

Where a foreign corporation was incorporated to acquire and continue the business of a firm doing business in the State of New York, the value of the good will and name of the business acquired from such firm is a part of the capital stock employed within the State. Peo. ex rel. Journeay & Burnham Co. v. Roberts, 37 A. D. 1 (1899).

Good will embraces at least two elements, the advantage of continuing an established business in its old place, and of continuing it under the old style or name. It is not altogether local, but must, of necessity, be an incident to a place, an established business or a name known to the trade. Peo. ex rel. A. J. Johnson Co. v. Roberts, 159 N. Y. 70 (1899), revsg. 35 A. D. 624.

Where a corporation which, although organized in another State, has never done any business, owned any property or had an office there, but which has carried on its business wholly in this State, where all its tangible property is located, has acquired a good will created here, and has built up the same by the exercise of its corporate franchises and through the increased value of its tangible property in this State, such good will is properly taxable as capital employed here. Peo. ex rel. A. J. Johnson Co. v. Roberts, 159 N. Y. 70 (1899), revsg. 35 A. D. 624.

That benefit which rests only on good will and that kind and friendly feeling of others. Parsons on Partnerships, 4th ed., section 181.

Good will seems to be that species of connection in trade which induces customers to deal with a particular firm. Wedderburn v. Wedderburn, 22 Beav. 84.

Evidence to the effect that the corporation could not put a price on its good will, and could not get anything for it is not sufficient to overcome a statement in its balance sheet showing that the value of the good will and name was $381,000, and the Comptroller in such case is justified in taking the statement of the balance sheet as to the value of the good will and name. Peo. ex rel. Journeay & Burnham Co. v. Roberts, 37 A. D. 1 (1899).

If a corporation is doing business both within and without the State, the same proportion of the value of the entire good will should be taken as the amount of the tangible property employed within the State bears to the entire amount of tangible capital employed both inside and outside the State. Peo. ex rel. Koechl & Co. v. Morgan, 96 A. D. 110, affd., 183 N. Y. 574 (1906).

Upon the sale of an established business its good will has a marketable value, whether the business is that of a professional man, or that of any other person. But it is plain that good will has no meaning except in connection with a continuing business. Lindley on Partnerships, vol. 2, page 439.

Good will is the favor which the management of a business wins from the public and the probability that old customers will continue their patronage. Chittenden v. Witbeck, 50 Mich. 401.

Good will may, properly enough, be described to be the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant and habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices. Story on Partnership, section 99.

As the value of good will depends upon net profits a common mode of determining its value is to multiply the average net profits by a more or less arbitrary number of years having regard for the character of the business under consideration. Van Au v. Magenheimer, 115 A. D. 87 (1906).

Capital Not Actively Employed.

A domestic corporation, in order to be liable for a tax imposed, must have its capital actively employed in this State in its corporate business and cannot be taxed upon the passive holding of capital in the form of an unproductive investment; therefore, a corporation whose entire capital stock was issued in payment for an island, consisting of unimproved swamp land, is not taxable within the contemplation of the statute. Peo. ex rel. Niagara River Hydraulic Co. v. Roberts, 30 A. D. 180, affd., 157 N. Y. 676 (1899).

A corporation composed only of tenants in common of unimproved city real estate and organized solely to take title to property so as to raise funds by mortgage thereon to pay taxes and hold the property until it can be sold is not liable to the franchise tax. Peo. ex rel. Ft. George Realty Co. v. Miller, 179 N. Y. 49 (1904), revsg. 90 A. D. 588.

The above cases have been discussed and distinguished. Peo. ex rel. Wall & Hanover St. Realty Co. v. Miller, 181 N. Y. 328 (1905), affg. 98 A. D. 584.

Deduction of Debts.

Where the construction of instruments purporting to be certificates of preferred stock of a corporation, which in its certificate of incorporation declared that the money represented by them constituted a part of its capital stock, is debatable, as to whether they are stock certificates or solely an indebtedness, a corporation in a proceeding to determine its franchise tax is estopped from asserting that they constitute a debt to be deducted from the original assessment. Peo. ex rel. Cohn & Co. v. Miller, 180 N. Y. 16 (1904), affg. 94 A. D. 564.

Where the indebtedness of a foreign corporation doing business in New York has been incurred in its business generally and not in respect to any particular asset which is within the State it is not entitled on the assessment of a franchise tax to a deduction for more than a proportionate amount of indebtedness. Peo. ex rel. Manhattan Silk Co. v. Miller, 125 A. D. 296 (1908); citing to same effect, Peo. ex rel. North Am. Co. v. Miller, 90 A. D. 560, affd., 182 N. Y. 521, and Peo. ex rel. Rees' Sons v. Miller, 90 A. D. 591.

Cases Affected by Amendments.

The following cases (numbered 1–7) were decided prior to the revision of this section by L. 1906, ch. 474, which established a method of taxation quite different from that which prevailed under the previous statute:

(1) The basis for assessing the tax upon the capital stock employed in this State of a corporation which has paid no dividends, and of whose stock there have been no sales, during the tax year, is to be arrived at by ascertaining the actual cash value of such capital stock. The cash value of the capital stock liable to be taxed is to be measured by the assets of the corporation, after deducting its liabilities and the amount of its capital that is exempt, and adding to the sum then remaining the value of the good will of the business. Peo. ex rel. Wiebusch & Hilger Co., Ltd. v. Roberts, 154 N. Y. 101 (1897), affg. 19 A. D. 574.

(2) In determining the actual capital of a corporation for the purpose of general taxation, the true value of its corporate assets, less the debts and obligations, is the rule of assessment. Peo. ex rel. Roebling's Sons' Co. v. Wemple, 138 N. Y. 582 (1893).

(3) When the corporate property and business of a foreign corporation is in the State of New York, the amount of its debts must be deducted from the amount of its assets in computing the amount of capital employed here. Peo. ex rel. Journeay & Burnham Co. v. Roberts, 37 A. D. 1 (1899).

(4) A foreign corporation, in seeking a deduction for debts, is required to show that the indebtedness was for the articles which entered into the amount of assets located within the State. International Contracting Co. v. Roberts, 27 A. D. 400, affd., 158 N. Y. 666 (1899).

(5) Where the entire capital stock of a corporation has been issued in payment for an equity in mortgaged premises, the value of such equity, less the indebtedness of the corporation, is the value of the capital stock, and the Comptroller is not justified in arbitrarily assessing the corporation an amount equal to the par value of the stock, less the amount paid for interest on mortgages and taxes. Peo. ex rel. Lorena Co. v. Morgan, 55 A. D. 265 (1900).

(6) The taxable capital of a domestic corporation conducting a large portion of its business in another State and paying no dividends is to be determined by first deducting from all its assets its liabilities, and adding to the remainder the value of its good will, unless such good will has been included in the value of its assets, and then assessing the tax on such a proportion of such sum as is employed within the State. Peo. ex rel. Hans Rees' Sons v. Miller, 90 A. D. 591 (1904).

(7) A domestic corporation is not entitled to have deducted from its gross assets the assets employed without the State and together therewith its total liabilities, leaving the balance as to the amount upon which the tax is to be computed. Peo. ex rel. A. G. Hyde & Sons, 90 A. D. 599, affd., 179 N. Y. 564 (1904). The corporation is entitled to a reduction from the value of the assets employed in the State of only such proportionate amount of its liabilities as is represented by the ratio of the assets employed within the State to the entire assets of the corporation. Id.

Dividends.

Where a corporation was formed for the purpose of taking title to undivided interests in real property, for convenience in litigation, and a portion of such property was sold and the proceeds of such sale distributed to the stockholders, the transaction constitutes a distribution of capital and not the payment of a dividend. Peo. ex rel. Tetragon Co. v. Sohmer, 162 A. D. 433 (1914).

A corporation held a long term lease which was cancelled in exchange for a short term lease and $1,050,000 in cash, which was distributed among its stockholders. This sum less $200,000 invested in the original lease should be treated as a dividend, and said sum of $200,000 is to be regarded as a distribution of capital or assets. Peo. ex rel. Mercantile Safe Deposit Co. v. Sohmer, 158 A. D. 110 (1913).

The statutes make no distinction between dividends earned within and outside the State; therefore, a foreign corporation is properly taxed upon its capital employed within the State at the rate of dividends declared upon its stock, notwithstanding that its business in the State was without profit. Peo. ex rel. New England Dressed Meat Co. v. Roberts, 155 N. Y. 408 (1898), revsg. 20 A. D. 521.

Where a corporation, after the condemnation of its property under eminent domain, makes no use of the property and does no business except such as is incident to its corporate organization and to the condemnation proceedings, and subsequently distributes the award made to it among its stockholders, the amount so distributed in excess of the capital stock cannot be treated as a dividend in assessing the tax. Peo. ex rel. Jerome Park Co. v. Roberts, 41 A. D. 21 (1899); Peo. v. Albany Ins. Co., 92 N. Y. 458 (1883).

The taxes imposed upon corporations by the Tax Law are taxes upon franchises, not upon property, and the fact that dividends, a portion of which are derived from securities exempt from taxation, furnish the basis for computing the amount of the tax, does not invalidate the statute. Peo. v. Home Ins. Co., 92 N. Y. 328 (1883); Home Ins. Co. v. People, 134 U. S. 594;

The division of a surplus earned before 1880 is not to be considered a dividend within the meaning of Laws of 1880, chapter 542, section 3, which made the dividend the measure of the value of the franchise for taxable purposes. Peo. v. Albany Ins. Co., 92 N. Y. 458 (1883).

The return of money advanced by stockholders to increase the surplus is not a dividend. Peo. ex rel. North Am. Trust Co. v. Knight, 96 A. D. 120 (1904).

Section 182 must be read in connection with section 190; therefore, when the dividends amount to less than 6 per cent. per annum the assessment is to be upon the actual cash value of the capital employed within the State. Peo. ex rel. N. Y. & East River Ferry Co. v. Roberts, 168 N. Y. 14 (1901), revsg. 35 A. D. 625.

Whether, after an increase of capital stock, a distribution of the additional stock pro rata among stockholders is a dividend representing profits, or is an adjustment of the capital account, depends upon the circumstances of each case. When such distribution represents surplus earnings it will be treated as a dividend and may be considered as such in determining the amount of the franchise tax. Peo. ex rel. Pullman Co. v. Glynn, 130 A. D. 332 (1909), affd., 198 N. Y. 605.

Where the stockholders of a company pay cash into the treasury for the purpose of increasing the working capital and subsequently a part of the same is returned to them, such repayment does not constitute a dividend within the meaning of this section, for such sum did not arise from profits or earnings in the course of business. Peo. ex rel. N. A. Trust Co. v. Knight, 96 A. D. 120 (1904).

Appraisal of Capital Stock.

See note under "Deduction of Debts" which applies also to this section.

When no dividend has been declared the franchise tax is based upon the amount of appraised capital employed within the State, and as appraised

capital means the average value of the share stock, if there have been sales of the share stock during the year, it is not necessary for the Comptroller to ascertain the intrinsic or actual value of the stock in cash, unless such intrinsic value exceed the market value, as, under the statute, he is obliged to appraise it at a sum not less than the average price at which the stock sold during the year. Peo. ex rel. Brooklyn Elevated R. R. Co. v. Roberts, 90 Hun 537 (1895).

The tax upon the business carried on in this State by a foreign corporation is a specific tax, consequently no apportionment or appraisal is required. Peo. v. Equitable Trust Co., 96 N. Y. 388 (1884). But where the corporate property and business are within the State an appraisal is proper. Peo. ex rel. Journeay & Burnham Co. v. Roberts, 37 A. D. 1 (1899).

The basis for assessing the tax upon the capital stock employed in this State of a corporation which has paid no dividends and of whose stock there have been no sales, during the tax year, is to be arrived at by ascertaining the actual cash value of such capital stock, and such actual value is the value of its assets, after deducting its liabilities, and adding to the sum then remaining the value of the good will of the business. Peo. ex rel. Wiebusch & Hilger Co., Ltd. v. Roberts, 154 N. Y. 101 (1897), affg. 19 A. D. 574.

In determining the value of the capital employed within the State the Comptroller is not bound by an appraisal of the stock of the corporation made by the officers thereof. Peo. ex rel. Schwarzschild & Sulzberger Co. v. Roberts, 11 A. D. 449, affd., 156 N. Y. 690 (1898).

This section provides that "if dividends amount to less than six per centum of the par value of the capital stock, the tax shall be at the rate of one and one-half mills upon such portion of the capital stock at par as the amount of capital employed within the State bears to the entire capital of the corporation," but it is held that this section must be read in connection with section 190, and, therefore, when the dividends amount to less than 6 per cent. per annum, the tax is to be one and one-half mills upon such portion of the capital stock at its actual value as the amount of capital stock employed within the State bears to the entire capital of the corporation. Peo. ex rel. N. Y. & East River Ferry Co. v. Roberts, 168 N. Y. 14 (1901), revsg. 35 A. D. 625.

The provisions of section 190, that in case no dividend has been declared by a corporation, association, or joint-stock company liable to pay a tax under section 182 of the act, the treasurer or secretary shall "appraise the capital stock of such company upon which no dividend has been declared, or upon which the dividend amounted to less than six per centum at its actual value in cash, not less, however, than the average price which said stock sold for during said year," authorize the Comptroller to assess a corporation which has declared no dividend upon the basis of the actual value of its stock, estimated, at the "average price which said stock sold for during said year," although such average price exceeds the par value of the stock and the surplus of the corporation is thus indirectly assessed. Peo. ex rel. Colonial Trust Co. v. Morgan, 47 A. D. 126, affd., 162 N. Y. 654 (1900).

In applying the provisions of the Tax Act that when the dividends declared by a corporation during the year "amount to six or more than six per centum upon the par value of its capital stock, then the tax to be at the rate of one-quarter mill upon the capital stock for each one per centum of dividends," the tax is properly assessed upon the capital stock at its par value, as distinguished from its appraised capital. Peo. ex rel. Jewelers' Circular Publishing Co. v. Roberts, 155 N. Y. 1 (1898), affg. 19 A. D. 632.

The amount of the tax to be levied upon a corporation is dependent upon

its business prosperity, as evidenced by its capacity to declare dividends, and is not dependent upon the value of the corporate property. Peo. ex rel. Staten Island Rapid Transit R. R. Co. v. Roberts, 4 A. D. 334 (1896); Peo. v. Home Ins. Co., 92 N. Y. 328 (1883).

The words "capital stock" do not mean the "share" stock, but refer to the authorized capital stock, paid in or contributed by the stockholders. Peo. ex rel. Am. Ax & Tool Co. v. Roberts, 82 Hun 313, affd., 147 N. Y. 699 (1895). The Comptroller may properly hold, in the absence of any satisfactory explanation, that the value of the capital stock of a corporation is equal to the sum paid into its treasury; and, on that assumption, he may well doubt the truth of the report of the officers of the corporation in estimating that its stock had so shrunken in value as to be worth only one-quarter of its par value. Id. He is justified in doubting the reliability of the appraisement made by the officers of the corporation which makes its capital stock employed within the State less than the conceded value of its real estate therein. Id. He is made by the statute an assessor, and he has the right to estimate the value of the stock of a corporation according to such information as he can obtain, or upon his own judgment. His decision in such case, unless clearly shown to be erroneous, will not be disturbed. Id. It is for the corporation, on an application for a rehearing, to establish the fact that the conclusion of the Comptroller in fixing the value of its property within the State was erroneous. Id.

The value of the capital stock of a corporation which was entirely invested in an apartment-house, leases of apartments in which were given to stockholders who were only to pay deficiencies in expenses and which leases were appurtenant to the stock, where there is no depreciation of the property, and the rentals, if apartments of stockholders were included, would have produced a fair dividend, is properly fixed at the amount of the paid-up authorized capital stock. Peo. ex rel. Gramercy Co. v. Roberts, 91 Hun 146, affd., 158 N. Y. 709 (1899).

Stocks and Bonds.

In reading the following cases it should be borne in mind that by the change in the section made by L. 1906, ch. 474, a corporation holding the stocks of other corporations is taxable upon such shares proportionate to the value of the physical properties of such corporations located in this State.

Stocks held by a domestic corporation in other corporations organized under the laws of this State constitute capital employed within the State and are a basis of taxation. Peo. ex rel. Edison Electric Lt. Co. v. Campbell, 138 N. Y. 543 (1893). But only to the extent that the physical properties are located here.

Stocks in foreign corporations held by a domestic corporation have no situs here, but constitute capital employed outside the State, and should not be included in the computation of the domestic corporation's annual tax. Peo. ex rel. Edison Electric Lt. Co. v. Wemple, 148 N. Y. 690 (1896); Peo. ex rel. Edison Electric Lt. Co. v. Campbell, 138 N. Y. 543 (1893).

The stock of a foreign corporation, in which a portion of the capital stock of a domestic railroad corporation is invested, is not capital stock used in the State. Peo. v. Campbell, 88 Hun 544, citing and following 138 N. Y. 543, supra (1893).

Bonds of a foreign corporation acquired by a domestic corporation constitute capital employed in this State subject to taxation. The bonds were presumably held at the office of the corporation in this State, and such bonds, as well as choses in action, unless kept employed, or used outside of the

State, have their situs at the domicile of the owner. Peo. ex rel. Edison Electric Lt. Co. v. Campbell, 138 N. Y. 543 (1893); Peo. v. Campbell, 88 Hun 544.

A foreign corporation, whose capital is wholly invested in the stock and bonds of another foreign corporation doing business wholly out of this State, whose whole income is derived from such investment, and which maintains a leased office, with furniture, officers and clerks, in this State, where it receives and distributes the dividends derived from its investment, which constitutes its whole business, is not subject to taxation, since, although doing business in this State, no part of its capital is "employed within the State," within the meaning of the statute. Peo. ex rel. Chicago Junction Rys. & Union Stockyards Co. v. Roberts, 154 N. Y. 1 (1897), revsg. 90 Hun 474.

United States Bonds.

It is not necessary to deduct the amount of capital which a corporation holds in United States bonds from the total amount of its capital stock, and to compute the tax only upon dividends derived from the remainder, since the tax is upon the franchise, and not upon the property. Peo. v. Home Ins. Co., 92 N. Y. 328, affd., in Home Ins. Co. v. New York, 134 U. S. 594 (1883).

Bonds of the United States, purchased with capital, as distinguished from surplus, and held within the State are to be treated as capital employed within the State and furnish a proper basis for taxation. Peo. ex rel. Com'l Cable Co. v. Morgan, 178 N. Y. 433 (1904), revsg. 86 A. D. 577.

Patents and Copyrights.

A patent is an incorporeal right, a franchise conferred by the sovereign power upon the patentee. It is personal to him, and until he is divested of the title thereto, like other personal rights, it attends his person and exists where he is or where he puts it to use; therefore, the Comptroller may include in the capital of a domestic corporation, to be estimated for taxation, its patents, since their situs is at the domicile of the owner. Peo. ex rel. Edison Electric Lt. Co. v. Campbell, 138 N. Y. 543 (1893), distg. 117 N. Y. 246; Peo. ex rel. Edison Electric Lt. Co. v. Wemple, 148 N. Y. 690 (1896).

The Court of Appeals has held that capital of a corporation employed in this State, consisting of copyrights granted by the United States, cannot be assessed for the purpose of the State franchise tax. Peo. ex rel. A. J. Johnson Co. v. Roberts, 159 N. Y. 70 (1899). In reaching this conclusion the court cited Peo. ex rel. Edison El. Illg. Co. v. Assessors, 156 N. Y. 417, relating to a local tax, which is a tax on property and not a franchise tax. The decision in 138 N. Y. 543 (1893), supra, seems, to have been disregarded, and, also, the case of Peo. v. Home Ins. Co., 92 N. Y. 328 (1883), in which latter case a domestic corporation was held liable for franchise taxes on capital invested in United States bonds.— ED.

Since the above paragraph was written the question at issue in the case decided in 159 N. Y. 70, supra, has again been presented to the court and the principle established in the earlier cases has been reaffirmed that the capital of a corporation invested in letters patent, United States bonds or copyrights may be appraised for the purpose of ascertaining the amount of franchise tax the same as other property. Peo. ex rel. U. S. Aluminium Printing Plate Co. v. Knight, 174 N. Y. 475 (1902).

Assignment of Tax Credit.

Section 195 of the Tax Law, as amended by chapter 642, Laws of 1903, permits a tax credit to be assigned to another corporation and applied to the payment of taxes assessed against the corporation to which such credit was assigned. Said amendment of 1903 supersedes the decision in Peo. ex rel. Western Union Telegraph Co. v. Roberts, 30 A. D. 78, in which it was held that tax credits could not be applied to the payment of taxes assessed against another corporation.

Bridge Company.

A bridge company owning a bridge which spans a stream forming a boundary between two States is taxable upon one-half of its capital stock in each State. Easton Bridge Co. v. Northampton County, 9 Pa. St. Rep. 415; Commonwealth v. Delaware Trenton Bridge Co., 9 Am. L. Reg. 298.

Determination of Comptroller.

In determining the amount of capital employed by a foreign corporation within the State, the Comptroller cannot arbitrarily reject uncontradicted and not improbable testimony of an employee of the corporation familiar with its assets. Peo. ex rel. Journeay & Burnham Co. v. Roberts, 37 A. D. 1 (1899).

The determination of an assessing officer that the assessment for one particular year should be canceled, is not conclusive upon succeeding officers against assessments for subsequent years upon the same property or franchise. Peo. ex rel. New England Dressed Meat & Wool Co. v. Roberts, 155 N. Y. 408 (1898), revsg. 20 A. D. 521. Therefore, when a cancellation has been granted for the years 1890, 1891 and 1892, upon the ground that it was a manufacturing corporation, when in fact its business within the State was not, a succeeding Comptroller will not be prevented from assessing such corporation for a corporate tax for the years 1894, 1895 and 1896, as provided by statute, merely because the former Comptroller erroneously decided that the corporation was not liable to be assessed for the previous years. Id.

Bank Balances.

The cash bank balance arising from the proceeds of the sale of bonds is taxable. Peo. ex rel. B'klyn R. T. Co. v. Miller, 85 A. D. 178, affd., 181 N. Y. 582 (1905).

Bills Receivable.

Where a domestic corporation operated a tannery in another State, bills receivable for merchandise sold out of the State which merchandise never came within the State did not constitute capital to be assessed for the franchise tax within the State, although the bills for such merchandise were made out and entered at the New York office of the corporation. Peo. ex rel. Hans Rees' Sons v. Miller, 90 A. D. 591.

§ 183. Certain corporations exempt from tax on capital stock. Banks, savings banks, institutions for savings, title guaranty, insurance or surety corporations, every trust company incorporated, organized or formed, under, by or pursuant to a law of this state, and any company authorized to do a trust company

business, solely or in connection with any other business, under a general or special law of this state, laundering corporations, manufacturing corporations to the extent only of the capital actually employed in this state in manufacturing, and in the sale of the product of such manufacturing, mining corporations wholly engaged in mining ores within this state, agricultural and horticultural societies or associations, and corporations, joint-stock companies or associations owning or operating elevated railroads or surface railroads not operated by steam, or formed for supplying water or gas for electric or steam heating, lighting or power purposes, and liable to a tax under sections one hundred and eighty-five and one hundred and eighty-six of this chapter, shall be exempt from the payment of the taxes prescribed by section one hundred and eighty-two of this chapter. But such a laundering, manufacturing or mining corporation shall not be exempted from the payment of such tax, unless at least forty per centum of the capital stock of such corporation is invested in property in this state and used by it in its laundering, manufacturing or mining business in this state.

L. 1896, ch. 908, as am'd by L. 1897, ch. 785, and L. 1901, ch. 558, L. 1906, ch. 474.

A corporation which is a holding company of the stock of a manufacturing corporation is not entitled to the exemption from a franchise tax which is allowed to manufacturing corporations. Peo. ex rel. Am. Bank Note Co. v. Sohmer, 157 A. D. 1 (1913), affd., 210 N. Y. 621.

The exemptions from annual State taxation heretofore granted to laundry and mining corporations and to manufacturing corporations to the extent of the capital actually employed in this State in manufacturing have been retained in the foregoing section, as amended, but upon modified terms, for a new condition restricting the exemption was prescribed in the amendment of 1901, by the addition of the provision to the effect that "such a laundrying, manufacturing or mining corporation shall not be entitled to the exemption unless at least forty per centum of the capital stock of such corporation is invested in property in this State and used by it in its laundrying, manufacturing or mining business in this State."

Heating and mixing refined asphalt, oil, sand and limestone and thus producing a new and distinct substance which is used as a paving compound, a purpose for which none of the raw materials alone is of any value, constitutes manufacturing. Peo. ex rel. Eastern Bermudez Asphalt Paving Co. v. Morgan, 61 A. D. 373 (1901).

The preparation of a street for the purposes of laying an asphalt pavement thereon and the placing of such pavement thereon is not a process of manufacturing. Peo. ex rel. Syracuse Imp. Co. v. Morgan, 59 A. D. 302 (1901).

A corporation which makes paints by mixing, in definite proportions, dry colors manufactured by itself, with linseed oil and turpentine, and with other ingredients not manufactured by it, stirring the mixture by machinery

and afterward grinding the resulting mass, none of the separate ingredients being capable of use for any of the purposes for which the mixed paint is used, is engaged in the manufacturing business, within the meaning of the statute exempting capital so invested from taxation. Peo. ex rel. F. W. Devoe & C. T. Raynolds Co. v. Roberts, 51 A. D. 77 (1900). Such corporation is taxable upon that portion of its capital employed in other than manufacturing business, although so employed in violation of its charter. Id.

Under the Tax Act of 1880, chapter 542, it is held that the other business besides manufacturing carried on by a corporation within the State which was interstate commerce, did not bring the corporation within the exemption, confined to manufacture solely, prescribed by that act as amended. Peo. ex rel. Am. Soda Fountain Co. v. Roberts, 158 N. Y. 168 (1899), revsg. 29 A. D. 585.

A corporation which publishes a newspaper, but does not own or operate any plant for printing it, and takes no part in the work of printing, is not a manufacturing corporation. within the meaning of the exemption in the Tax Act. Peo. ex rel. Jewelers' Circular Publishing Co. v. Roberts, 155 N. Y. 1 (1898), affg. 19 A. D. 632.

Purchasing sheep, slaughtering them, pulling the wool from the hides, selling it and the hides, converting the offal into fertilizer, reducing the carcasses to a temperature which will retard decomposition, and shipping them to the place of delivery, does not constitute manufacturing. Peo. ex rel. N. E. Dressed Meat & Wool Co. v. Roberts, 155 N. Y. 408, revsg. 20 A. D. 521 (1898).

A corporation conducting a department store and employing a portion of its capital in manufacturing is entitled to a deduction to the extent of capital invested in its manufacturing business. Peo. ex rel. Journeay & Burnham Co. v. Roberts, 37 A. D. 1 (1899). But under the amendment of 1901, a deduction on account of manufacturing is not to be allowed unless at least 40 per cent. of the capital of the company is thus employed.— Ed.

A corporation organized for the purpose of the manufacture and sale, within the State, of a patented fountain pen, which purchases the constituent parts of its fountain pens partially ready for use, and by means of skilled workmen resets each gold pen and shapes the holder to it, and by adjusting the feed and the pen produces the peculiar feature which distinguishes its fountain pen from others, the completed work being four times more valuable than the parts purchased by the corporation, is a manufacturing corporation. Peo. ex rel. L. E. Waterman Co. v. Morgan, 48 A. D. 395 (1900), see, also, the opinion in Peo. ex rel. Seth Thomas Clock Co. v. Wemple, 133 N. Y. 323 (1892), in which the court said, "Unless the corporation produces the whole or some part of the article in this State from the original material, by means of labor, machinery and operatives, such as are usually applied to manufacturing operations, it is not within the exemption."

A corporation engaged in making and selling kindling wood produced from slabs taken in their natural state, sawed into strips and securely compressed in bundles of kiln-dried wood of a specific size and shape, is engaged in manufacturing. Peo. ex rel. Standard Wood Co. v. Roberts, 20 A. D. 514 (1897).

Where the having of an office and office furniture are mere incidents to a manufacturing business, the value of the one and rental of the other do not constitute capital separate and apart from the manufacturing business, and the amount so used is, therefore, not taxable. Peo. ex rel. Standard Wood Co. v. Roberts, 20 A. D. 514 (1897).

A manufacturer is "a person engaged in the business of working raw materials into wares suitable for use." Webster's Dictionary.

The collection, storage, preparation for market, and transportation of ice is not a manufacture, but the production of ice by artificial means is. Peo. v. Knickerbocker Ice Co., 99 N. Y. 181 (1885).

"Manufacture" is defined as "anything made from raw materials by the hand, by machinery, or by art, as cloths, iron utensils, shoes, machinery, saddlery," etc. Webster's Dictionary.

The process of manufacture is supposed to produce some new article by the application of skill and labor to the raw material. Peo. ex rel. Union Pacific Tea Co. v. Roberts, 145 N. Y. 375 (1895).

The business of refining crude petroleum is manufacturing. Commonwealth v. Atlantic Refining Co., 2 Pa. Co. Ct. Rep. 62.

A company engaged in finishing and shaping material so as to make bridges, and selling and erecting the same, held to be manufacturing. Commonwealth v. Keystone Bridge Co., 156 Pa. St. Rep. 500.

Dyeing and finishing woolen and cotton goods is manufacturing. Commonwealth v. Quaker City Dye Works, 5 Pa. Co. Ct. Rep. 94.

The United States Circuit Court has held that cutting grass, converting it into hay, pressing it in bales and transporting it to market did not result in the production of a manufactured article. Frazee v. Moffitt, 20 Blatchf. (U. S.) Cir. Ct. Rep. 267.

The Supreme Court of the United States held that shells cleaned by acid and then ground on an emery wheel, and some of them afterward etched by acid, and all of them intended to be sold as ornaments, as shells, were not dutiable as manufactures of shells. Hartranft v. Wiegman, 121 U. S. 609.

A cooper who makes barrels, hogsheads, and similar articles of wood, such as coopers usually make, is a manufacturer. New Orleans v. Le Blanc, 34 La. Ann. 596.

In the District of Columbia it was held that a corporation engaged in the business of printing and publishing a newspaper is not a manufacturer within the meaning of the Bankruptcy Law. In re Capital Publishing Co., 3 McArthur's Rep. (D. C.), 405.

The mere appropriation of an article which is furnished by nature is not a manufacture. Thus, the liberation of natural gas or oil from the earth, and its transportation to consumers, is not a manufacture. Commonwealth v. Northern Elec. Light & Power Co., 145 Pa. St. Rep. 117.

In a case relative to the payment of excise duties in Great Britain it was held that a printer of calicoes was not a manufacturer. The King v. Tregoning, 2 Younge & Jervis 132.

The printing, publishing and selling of books, and job printing, constitute a manufacturing business. Peo. ex rel. Frederick A. Stokes Co. v. Roberts, 90 Hun 533; Press Printing Co. v. State Board of Assessors, 51 N. J. L. 75; Evening Journal Assn. v. State Bd. of Assessors, 47 N. J. L. R. 36.

Printing and publishing a newspaper is not manufacturing. Press Printing Co. v. State Bd. of Assessors, 51 N. J. L. R. 75; Evening Journal Assn. v. State Bd. of Assessors, 47 id. 36.

A manufacturer is not one who creates out of nothing, for that surpasses human power; neither is he one who produces a new article out of materials entirely raw. He is one who gives new shapes, new qualities, new combinations to matter which has already gone through some artificial process. A shoemaker is none the less a manufacturer, because he does not tan the leather; the tanner is none the less a manufacturer of leather, because he does not breed and raise the bullocks from which the raw hides are taken.

The tanner makes leather to sell, but does not buy hides to sell again. He produces the article of the leather, and depends for his profit upon the labor which he bestows upon the raw material. City of New Orleans v. Le Blanc, 34 La. Ann. R. 596.

A domestic corporation engaged in slaughtering cattle, preparing the same and the various products thereof for market, a portion of which business is carried on in this State and a portion elsewhere, is not wholly engaged in manufacturing in New York State. Peo. ex rel. Schwarzchild & Sulzberger Co. v. Roberts, 11 A. D. 449, affd., 156 N. Y. 690 (1898).

A corporation engaged in manufacturing beer in New York and New Jersey, employed an agent to solicit orders in New York city and Brooklyn, the moneys collected by the agent being deposited in a Brooklyn bank, the average balance being $500. The corporation did not keep any goods on sale in the State of New York, but shipped them from Jersey City directly to the purchaser. It did, however, have a place in Brooklyn, where its agent might take orders, and where goods not exceeding in value $100 at any one time were temporarily stored. Held, that the corporation was not doing business other than manufacturing within the State. Peo. ex rel. Lembeck & Betz Eagle Brewing Co. v. Roberts, 22 A. D. 282 (1897).

A corporation engaged in the sale of spices, baking powder, coffee and tea, purchased these articles in bulk. The spices and baking powder were merely put up in packages and sold. Various kinds of tea were mixed and sold as "combination tea." The coffee was roasted and ground. Held, that this was not manufacture, and the corporation was not exempt from taxation as a manufacturing corporation. Peo. ex rel. Union Pacific Tea Co. v. Roberts, 145 N. Y. 375 (1895).

The courts have decided that the exemption in favor of manufacturing corporations applies only to such corporations as create some new and artificial product within the State. Peo. ex rel. Brush El. Mfg. Co. v. Wemple, 129 N. Y. 543; Peo. ex rel. Edison El. Ill. Co. v. Wemple, 129 N. Y. 664; People v. Horn Silver Mining Co., 105 N. Y. 76; Peo. v. Knickerbocker Ice Co., 99 N. Y. 181 (1885); People v. N. Y. F. Dock Co., 92 N. Y. 487 (1883).

A foreign corporation claiming exemption as a manufacturing corporation must show that some substantial portion of its manufacturing is carried on in this State. Peo. ex rel. Roebling's Sons' Co. v. Wemple, 63 Hun 452, affd., 138 N. Y. 582 (1893).

A manufacturing corporation of another State cannot bring its products here, and by putting the several parts together and adjusting them to each other, or by performing upon the article some slight operation, though it may involve labor that may be necessary before using it or exposing it for sale, and thereby obtain exemption from taxation on the ground that it is carrying on manufacturing within the State. Peo. ex rel. Seth Thomas Clock Co. v. Wemple, 133 N. Y. 323 (1892).

Decisions Affected by Amendment of 1901.

The Tax Law in existence prior to the enactment of the present law, to-wit: the Tax Law of 1880, ch. 542, as am'd by Laws of 1889, ch. 353, extended an exemption to manufacturing companies only when they were "wholly engaged in carrying on manufactures within the State," and the points passed upon in the following cases have reference to said act of 1880.

A foreign corporation conducting a manufacturing business in this State and also purchasing and selling general electric supplies not manufactured by it, is not wholly engaged in carrying on manufacture within the State,

and, therefore, is not exempt from taxation on the amount of its capital employed here. Peo. ex rel. Western Electric Co. v. Campbell, 145 N. Y. 587, affg. 80 Hun 466, and distg. Peo. ex rel. Tiffany & Co. v. Campbell, 144 N. Y. 166.

The provision exempting from taxation manufacturing corporations "wholly engaged in carrying on manufacture" within this State, had in view corporations whose corporate powers were confined to the exclusive business of manufacturing, and the limiting words "wholly engaged in," were intended to distinguish between such corporations and corporations which embraced a wider scope of power, but which included the power to engage in the business of manufacture. These latter corporations were not exempted, unless their actual business was confined to the exercise of this specific power. Peo. ex rel. Tiffany & Co. v. Campbell, 144 N. Y. 166, affg. 80 Hun 486. The statute did not contemplate the exercise of powers ultra vires; therefore, if a manufacturing corporation is engaged in business outside of its corporate powers, in connection with its manufacturing business, it does not cease to be "wholly engaged" in the business of manufacture; that is to say, its only legal and authorized business was that of manufacture, and it subjected itself to taxation upon that portion of its capital so illegally used, but nevertheless it remained a corporation which, so far as it exercised its legal powers, was "wholly engaged" in manufacture, and entitled to exemption as to its manufacturing business. Id.

A corporation, which is neither a manufacturing corporation nor one wholly engaged in carrying on manufacture within the State, is liable to taxation. Peo. ex rel. Union Pacific Tea Co. v. Roberts, 82 Hun 352.

A corporation, organized for the purpose of printing, publishing and selling books, and all business appertaining to a general bookselling business, which annually uses a small part of its capital in the purchase and sale of foreign books, is not a corporation "wholly engaged" in carrying on a manufacturing business. Peo. ex rel. Frederick A. Stokes Co. v. Roberts, 90 Hun 533.

The Comptroller has the right to settle an account for taxes against a corporation after the fifteenth day of January in the year when the tax becomes due and payable. Peo. ex rel. Frederick A. Stokes Co. v. Roberts, 90 Hun 533.

§ 184. Additional franchise tax on transportation and transmission corporations and associations. Every corporation and joint-stock association formed for steam surface railroad, canal, steamboat, ferry, except a ferry company operating between any of the boroughs of the city of New York under a lease granted by the city, express, navigation, pipe line, transfer, baggage express, telegraph, telephone, palace car or sleeping car purposes, and every other transportation corporation not liable to taxation under sections one hundred and eighty-five or one hundred and eighty-six of this chapter, shall pay for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, an annual excise tax or license fee which shall be equal to five-tenths of one per centum upon its gross earnings within this state, which shall include its

gross earnings from its transportation or transmission business originating and terminating within this state, but shall not include earnings derived from business of an interstate character.

L. 1896, ch. 908, as am'd by L. 1907, ch. 734; L. 1914, ch. 334.

The amendment of 1914 inserted the words "except a ferry company operating between any of the boroughs of the city of New York under a lease granted by the city."

The corporation operating the subway and elevated railway systems in New York City is subject to the provisions of sections 182 and 184. Peo. ex rel. Interb. R. T. Co. v. Sohmer, 207 N. Y. 270 (1913).

A corporation organized for the purpose of carrying on a general express and transfer business is subject to the tax provided in this section. Opinion of Atty. Genl., Feb. 23, 1911.

The amendment of 1907 omitted and thereby repealed the last sentence of the former section, which reads as follows:

All settlements for such taxes heretofore based by the Comptroller upon gross earnings excluding earnings from interstate business, have been ratified and confirmed, except that the accounts for taxation under section six of chapter three hundred and sixty-one of the laws of eighteen hundred and eighty-one, for the years eighteen hundred and ninety-two and eighteen hundred and ninety-three, shall be settled and adjusted by the Comptroller by excluding the earnings of an interstate character as provided by this section.

A railroad company is not liable for a tax upon its gross earnings derived from carrying United States mail where they include domestic, interstate and foreign mail and it is impossible to ascertain the proportion which originates and terminates within the State. Peo. ex rel. N. Y. C. & H. R. R. R. Co. v. Morgan, 168 N. Y. 1 (1901), affg. 57 A. D. 302.

By the term "gross earnings from its transportation or transmission business," it is intended that a corporation embraced within the provisions of the act shall pay a tax upon all receipts arising from or growing out of the employment of its capital, whether that capital is employed in the transportation or transmission business or otherwise. Peo. ex rel. N. Y. C. & H. R. R. R. Co. v. Roberts, 32 A. D. 113, affd., 157 N. Y. 677 (1898).

The tax imposed is legally applicable to the gross earnings, arising from the carriage of goods or passengers within the State, of a consolidated railroad corporation created under the laws of New York and of an adjoining State, whose line is from a point in the State of New York to a point in such adjoining State, and which at each terminus connects with roads running to other States, although such carriage within the State of New York is a part of "interstate business," that is, of business which originated in this State and terminated in another State, or originated in another State and terminated in this State, or both originated and terminated in another State. Peo. ex rel. Dunkirk, Allegheny Valley & P. R. R. Co. v. Campbell, 74 Hun 210 (1893).

In such a case the tax is not a tax imposed by the State on interstate commerce, but is simply a tax on a domestic corporation, created by the State, for the privileges and franchise granted to it by the power which created it; and such a tax may be legally and constitutionally imposed by the State. Id.

The imposition of such a tax upon the gross earnings of a domestic corporation for the carriage of goods or passengers within the State of New York, where the beginning or termination of such business is in another

State or country, is not within the prohibition upon State legislation arising from the "interstate commerce" clause of the Federal Constitution. Id.

The power conferred by the Federal Constitution upon Congress to regulate commerce with foreign nations and among the States, does not reach so far as to prohibit a State from imposing a franchise tax upon a corporation created by and doing business in such State, as to all business done by it in the State in the transportation of property or persons coming from or going to any other State or country. Id.

A railroad which is a link in a through line, by which passengers and freight are carried into a State from other States, and from that State to other States, is engaged in interstate commerce, and a tax for keeping the office of such railroad in the State is unconstitutional. Norfolk & W. R. R. Co. v. Penn., 136 U. S. 114.

A tax by the State upon the business of a foreign corporation carried on in this State, where it is exclusively the business of interstate commerce, is a regulation of commerce and the power to regulate commerce between the States is vested exclusively in Congress. Peo. ex rel. Penn. R. R. Co. v. Wemple, 138 N. Y. 1 (1893).

The transportation of goods and passengers by continuous carriage from one place to another in the same State, although part of the route is over the soil of another State, is not interstate commerce, and it is, therefore, within the power of the State to impose a tax upon such business. Lehigh Valley R. R. Co. v. Penn., 145 U. S. 175.

The United States Express Company, an unincorporated joint-stock association, doing business in this State, is subject to taxation under this act. Peo. ex rel. Platt v. Wemple, 117 N. Y. 136 (1889).

Telegraph companies are only taxable on gross receipts from messages transmitted wholly within the State. Western Union Tel. Co. v. Pennsylvania, 128 U. S. 39, overruling 110 Pa. St. Rep. 405. A tax levied upon the receipts for messages from points within to points without the State, and from points without to points within the State, and from points without, through the State, to points beyond, according to the average proportion of line in the State over which the messages are sent, is unconstitutional and void. Id.

A statute requiring a railroad corporation operating railroads within the State to pay an annual tax for the privilege of exercising its franchises therein, to be determined by the amount of gross transportation receipts, and which provides that, when applied to a railroad lying partly within and partly without the State, or to one operated as a part of a line or system extending beyond the State, to be ascertained in the manner provided by the statute, does not conflict with the Constitution of the United States. Maine v. Grand Trunk Ry. Co., 142 U. S. 217.

Held, in Pennsylvania that a State tax may be imposed upon the gross receipts of railroad companies, for transportation by continuous carriage from one point in that State, through another State, to another point in Pennsylvania. Commonwealth v. Lehigh Valley R. R. Co., 129 Pennsylv. St. Rep. 308.

The tax upon the entire gross receipts of an express company is not illegal double taxation, although the amounts paid by such company to railroad companies for transportation, are included in the gross receipts of the railroad company and taxed as such. Commonwealth v. U. S. Exp. Co., 157 Pennsylv. St. Rep. 579.

§ 185. Franchise tax on elevated railroads or surface railroads not operated by steam. Every corporation, joint-stock

company or association owning or operating any elevated railroad or surface railroad not operated by steam shall pay to the state for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity within this state, an annual tax which shall be one per centum upon its gross earnings from all sources within this state, and three per centum upon the amount of dividends declared or paid in excess of four per centum upon the actual amount of paid-up capital employed by such corporation, joint-stock company or association. Any such railroad corporation whose property is leased to another railroad corporation shall only be required under this section to pay a tax of three per centum upon the dividends declared and paid in excess of four per centum upon the amount of its capital stock.

Formerly L. 1896 ch. 908, as am'd by L. 1906, ch. 474.

In 1906 the words "owning or" in the second line were inserted and the last sentence was materially changed.

Where a corporation is operating both an elevated road and a subway, it cannot be assessed, under this section, for a tax upon the gross receipts from both the elevated and the subway system. The words "from all sources" do not have such an unqualified meaning that a corporation utilizing its corporate franchise to operate an elevated road should pay a tax, not only upon receipts from such employment of its franchise, but also on an entirely distinct business, in respect whereof it is not subject to assessment. Peo. ex rel. Interb. R. T. Co. v. Williams, 200 N. Y. 93 (1910).

The foregoing section was first enacted as a part of the Tax Law in 1896 (ch. 908). Such corporations theretofore paid a capital stock tax, and also a gross earnings tax of one-half of one per cent. Section 183 exempts them from the capital stock tax, and they are now subject to the tax above imposed for State purposes.

The franchise to build and operate a street railway is property and is subject to taxation. New Orleans City & L. R. Co. v. New Orleans, 143 U. S. 192.

§ 186. Franchise tax on water-works companies, gas companies, electric or steam heating, lighting and power companies. Every corporation, joint-stock company or association formed for supplying water or gas, or for electric or steam heating, lighting or power purposes, shall pay to the state for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, an annual tax which shall be five-tenths of one per centum upon its gross earnings from all sources within this state, and three per centum upon the amount of dividends declared or paid in excess of four per centum upon the actual amount of paid-up

capital employed by such corporation, joint-stock company or association. The term "gross earnings" as used in this section means all receipts from the employment of capital without any deduction.

Formerly § 186, ch. 908, L. 1896, as am'd L. 1907, ch. 734.

The last sentence was added in 1907, and was apparently enacted for the purpose of authorizing the assessment of a tax to include the value of raw materials and thus avoid the effect of the decision in the case of Peo. ex rel. Brooklyn Union Gas Co. v. Morgan, 114 A. D. 266 (1906), affd., 195 N. Y. 616 (1909).

This section was added in 1896. Such corporations heretofore paid a capital stock tax only, based upon dividends. Section 183 exempts them from such tax and they are now subject to this tax for State purposes.

Under the provision of this section that "the term 'gross earnings,' as used in this section, means all receipts from the employment of capital without any deduction," money paid by a power company for electricity should not be deducted from its gross earnings in assessing a franchise tax. Peo. ex rel. Genesee Light & Power Co. v. Sohmer, 162 A. D. 207 (1914), affd., 212 N. Y. 598; Peo. ex rel. Westchester Lighting Co. v. Gaus, 199 N. Y. 147 (1910).

The use of coal to produce gas or for fuel to produce electricity, represents the employment of capital and the return of the cost in the price of the product is a return of capital, but by the amended act, it is clear that the Legislature intended to define "gross earnings" as all receipts without any deduction, and, for the purpose of the tax, this includes all receipts which the use of capital originated. Peo. ex rel. Westchester Lighting Co. v. Gaus, 199 N. Y. 147 (1910), aff'g. 137 A. D. 934.

§ 192. Reports of corporations. Corporations liable to pay a tax under this article shall report as follows:

1. Corporations paying franchise tax. Every corporation, association or joint-stock company liable to pay a tax under section one hundred and eighty-two of this chapter shall, on or before November fifteenth in each year, make a written report to the comptroller of its condition at the close of its business on October thirty-first preceding, stating the amount of its authorized capital stock, the amount of stock paid in, the date and rate per centum of each dividend declared by it during the year ending with such day, the entire amount of the capital of such corporation, and the capital employed by it in this state during such year.

2. Transportation and transmission corporations. Every transportation or transmission corporation, joint-stock company or association liable to pay an additional tax under section one hundred and eighty-four of this chapter, shall also, on or before August first in each year, make a written report to the comptroller of its condition at the close of its business on June thirtieth pre-

ceding, stating the amount of its gross earnings from all sources and the amount of its gross earnings from its transportation or transmission business originating and terminating within this state.

3. Elevated and surface railroad corporations. Every corporation, joint-stock company or association liable to pay a tax under section one hundred and eighty-five of this chapter, shall, on or before August first of each year, make a written report to the comptroller of its condition at the close of its business on June thirtieth preceding, stating the amount of its gross earnings from business done in this state, the amount of dividends of every nature declared or paid during the year ending June thirtieth, the authorized capital of the company and the amount of capital stock actually issued and outstanding.

4. Water-works, gas, electric, steam-heating, lighting and power corporations. Every corporation, joint-stock company or association liable to pay a tax under section one hundred and eighty-six of this chapter, shall, on or before December first of each year, make a written report to the comptroller of its condition at the close of its business on October thirty-first preceding, stating the amount of its gross earnings from business done in this state, the amount of dividends of every nature declared or paid during the year ending with October thirty-first, the authorized capital of the company and the amount of capital stock actually issued and outstanding.

5. Insurance corporations. Omitted.

6. Foreign bankers. Omitted.

7. Trust companies. Omitted.

8. Savings banks. Omitted.

§ 193. Value of stock to be appraised. If the dividend or dividends amount to less than six per centum on the par value of the capital stock, or no dividend is declared, the president, treasurer or secretary of the company liable to pay a tax under the provisions of section one hundred and eighty-two of this chapter, shall, under oath, between the first and fifteenth days of November in each year, estimate and appraise the capital stock of such company at its actual value.

And shall forward the same to the comptroller with the report provided for in the last section. If the comptroller is not satisfied with the valuation so made and returned he is authorized and empowered to make a valuation thereof, and settle an account upon the valuation so made by him, and the taxes, penalties and interest to be paid the state.

L. 1896, ch. 908, as am'd by L. 1906, ch. 474; L. 1907, ch. 734.

As amended this section is restored in a measure to its condition prior to the amendment of 1906, although this new form of the section is more favorable to the corporations than the statute which governed appraisals prior to the enactment of the 1906 amendment.

§ 194. Further requirements as to reports of corporations. Every report required by this article shall have annexed thereto the affidavit of the president, vice-president, secretary or treasurer of the corporation, association or joint-stock company or of the person or one of the persons, or the members of the partnership making the same, to the effect that the statements contained therein are true. Such reports shall contain any other data, information or matter which the comptroller may require to be included therein, and he may prescribe the form in which such reports shall be made and the form of oath thereto. When so prescribed such forms shall be used in making the report. The comptroller may require at any time a further or supplemental report under this article, which shall contain information and data upon such matters as the comptroller may specify.

Formerly L. 1896, ch. 908.

Source.—L. 1881, ch. 361, § 1; L. 1881, ch. 361, § 5, as am'd by L. 1895, ch. 425; L. 1881, ch. 361, § 7; L. 1882, ch. 409, § 322, as am'd by L. 1894, ch. 196; L. 1886, ch. 679, § 2, without change of substance, except that all reports are required to be verified.

§ 195. Powers of comptroller to examine into affairs of corporations. In case any report required by any of the preceding sections of this article shall be unsatisfactory to the comptroller, or if any such report is not made as herein required, the comptroller is authorized to make an estimate of the dividends paid by such corporation and the value of the capital stock employed by it, from any such report or from any other data, and to order and state an account according to the estimate and value so made by him for the taxes, percentage and interest due the state from such corporation, association, joint-stock company, person or part-

nership. The comptroller shall also have power to examine or cause to be examined, in case of a failure to report or in case the report is unsatisfactory to him, the books and records of any such corporation, joint-stock association, company, foreign banker, person or partnership, and may hear testimony and take proofs material for his information, either personally or he may appoint a commissioner by a written appointment under his hand and official seal for that purpose. Every commissioner so appointed shall be authorized to make such examination and take such testimony and hear such proofs and report the proofs and testimony so taken and the result of his examination so made and the facts found by him to the comptroller. The comptroller shall, therefrom, or from any other data which shall be satisfactory to him, order and state an account for the tax due the state, together with the expenses of such examination and the taking of such testimony and proofs. Such expenses shall be fixed and adjusted by the comptroller.

Formerly § 192, ch. 908, L. 1896.

Source.— L. 1881, ch. 361; L. 1882, ch. 409, §§ 322, 323; L. 1895, ch. 196, without change of substance. The power to subpœna witnesses and the punishment for contempt provided by L. 1881, ch. 361, § 13, is covered by Code Civil Procedure, § 854ff.

§ 196. Notice of statement of tax; interest. Upon auditing and stating every account for taxes or other charges under this article, the comptroller shall forthwith send notice thereof in writing to the person, partnership, company, association or corporation against whom the same is made, which notice may be mailed to the post-office address of such person, partnership, association, company or corporation. All accounts so audited and stated shall bear interest upon the total amount found due thereon to the state, for taxes, percentage, interest and other charges, from the expiration of thirty days after sending such notice until payment therof shall be made.

Formerly § 193, ch. 908, L. 1896.

§ 197. Payment of tax and penalty for failure. A tax imposed by section one hundred and eighty-two or one hundred and eighty-six of this chapter shall be due and payable into the state treasury on or before the fifteenth day of January in each year. A tax imposed by section one hundred and eighty-four of this chapter on a transportation or transmission corporation, or by

section one hundred and eighty-five, on elevated railroads or surface railroads not operated by steam, shall be due and payable into the state treasury on or before the first day of August in each year. A tax imposed by section one hundred and eighty-seven of this chapter on an insurance corporation shall be due and payable into the state treasury on or before the first day of June in each year. A tax imposed by section one hundred and eighty-eight or one hundred and eighty-nine shall be due and payable into the state treasury on or before the first day of September in each year. A tax imposed by section one hundred and ninety-one of this chapter on a foreign banker shall be due and payable into the state treasury on or before February first in each year. If such tax in any case is not paid within thirty days after the same becomes due, or if the report of any such corporation is not made within the time required by this article, the corporation, association, joint-stock company, person or partnership, liable to pay the tax, shall pay into the state treasury, in addition to the amount of such tax, a sum equal to five per centum thereof, and one per centum additional for each month the tax remains unpaid, which sum shall be added to the tax and paid or collected therewith. Every corporation, association, joint-stock company, person or partnership failing to make the annual report required by this article, or failing to make any special report required by the comptroller, within any reasonable time to be specified by him, shall forfeit to the people of the state the sum of one hundred dollars for every such failure, and the additional sum of ten dollars for each day that such failure continues. Such tax shall be a lien upon and bind all the real and personal property of the corporation, joint-stock company or association liable to pay the same from the time when it is payable until the same is paid in full.

Formerly § 194, ch. 908, L. 1896, as am'd by L. 1901, chs. 118, 132 and 558.

Source.— L. 1881, ch. 361, §§ 4, 5, 6, 7; L. 1882, ch. 409, § 322, as am'd by L. 1895, ch. 196; L. 1886, ch. 679, § 1, as am'd by L. 1895, ch. 418. The former law in each instance imposes a penalty of 10 per centum if the tax is not paid within thirty days after it became due. This section of the revision imposes a penalty of only 5 per centum if the tax is not paid within thirty days after it becomes due, and 1 per centum for each month throughout the calendar year, and interest, if not paid during such year.

For cases involving penalties for failure to make annual reports under the former statute see Peo. ex rel. Edison El. Ill. Co. v. Wemple, 61 Hun 53; Peo. ex rel. Brush El. M. Co. v. Wemple, 15 N. Y. Supp. 718; 39 St. Rep. 614, see, also, 129 N. Y. 664 and 543, cases reversed on other points.

§ 198. Revision and readjustment of accounts by comptroller. If an application be filed with the comptroller by the party against whom the account is stated or by the attorney-general within one year from the time any such account shall have been audited and stated, the comptroller may at any time, upon notice thereof sent to the person, partnership, company, association or corporation against whom it is stated, revise and readjust such account and if it shall be made to appear upon any such application, by evidence submitted to him or otherwise, that any such account included taxes or other charges which could not have been lawfully demanded, or that payment has been legally made or exacted of any such account, he shall resettle the same according to law and the facts, and charge or credit, as the case may require, the difference, if any, resulting from such revision or resettlement upon the accounts for taxes of or against any such person, partnership, company, association or corporation. Such credit, whether allowed before or after the passage of this chapter may be, by the person, partnership, company, association or corporation in whose favor it is allowed, assigned to a person, partnership, company, association or corporation liable to pay taxes under article nine of this chapter, and the assignee of the whole or any part of such credit on filing with the comptroller such assignment shall thereupon be entitled to credit on the books of the comptroller for the amount thereof on the current account for taxes of such assignee in the same way and with the same effect as though the credit had originally been allowed in favor of such assignee. The comptroller shall forthwith send written notice of his determination upon such application to the applicant, and to the attorney-general, which notice may be sent by mail to his post-office address.

Formerly § 195, ch. 908, L. 1896, as am'd by L. 1903, ch. 642; L. 1907, ch. 734.

For form of application for revision, see Form No. 472.

Source.— L. 1881, ch. 361, § 19, as added by L. 1899, ch. 463, without substantial change, except that the readjustment must be within one year after notice of the audit of the account has been served on the person or corporation, instead of "at any time."

In 1907 the first sentence of this section was amended so as to permit the Comptroller to revise and readjust a tax "at any time," provided the application for such revision and readjustment shall have been filed within one year from the time the tax account has been audited and stated. Prior to this amendment the Comptroller could not lawfully revise and readjust an erroneous tax after the expiration of one year, even though the application had been previously filed.

The provision for assignment of a credit was added in 1903.

The requirement that the Comptroller should send reports to the Attorney-General was added in 1903.

Taxes once paid into the treasury under this law cannot be paid back without an appropriation by the Legislature. All the Comptroller may do is to resettle the account and credit or charge the difference, if any, "upon the current account." Peo. ex rel. Edison El. Ill. Co. v. Wemple, 133 N. Y. 617 (1892).

This section contemplates but one revision by the Comptroller. Peo. ex rel. Am. Surety Co. v. Campbell, 64 Hun 417 (1892).

In proceedings to revise and readjust an account for taxes the Comptroller is not empowered, even if upon the readjustment the original assessment shall appear to have been too small, to increase such original assessment. Peo. ex rel. Eppens, Smith & Wieman Co. v. Roberts, 51 A. D. 152 (1900); Peo v. Miller, 84 A. D. 166 (1903).

The fact that the State Comptroller, upon the revision and readjustment of the tax assessed against a corporation during several years, finds that in some of such years excessive taxes were collected, reduces the amount pro tanto, does not authorize him to increase the amount of the tax assessed against the corporation during other years. Peo. ex rel. Syracuse Imp. Co. v. Morgan, 59 A. D. 302 (1901).

Where the amount of the capital stock of a foreign corporation employed within the State has been fixed by the Comptroller, after a report has been made by the corporation to him, such amount will not be changed on a rehearing before the Comptroller on which it is claimed that the debts exceed the assets, where it is not satisfactorily shown why the whole indebtedness was not stated in the first report, or how the debt arose. Peo. ex rel. International Contracting Co. v. Roberts, 27 A. D. 400, affd., 158 N. Y. 666 (1899).

§ 199. Review of determination of comptroller by certiorari. The determination of the comptroller upon any application made to him by any person, partnership, company, association or corporation for a revision and resettlement of any account, as prescribed in this article, may be reviewed both upon the law and the facts upon certiorari by the supreme court at the instance of any person, partnership, company, association or corporation affected thereby, and in the name and on behalf of the people of the state. For the purpose of such review the comptroller shall return, on such certiorari, the accounts and all the evidence before him on such application, and all the papers and proofs upon the original statement of such account and all proceedings thereon. If the original or resettled accounts shall be found erroneous or illegal, either in point of law or of fact, by the supreme court, upon any such review, the accounts reviewed shall then be corrected and restated, and from any determination of the supreme court upon any such review an appeal to the court of appeals may be taken by either party.

Formerly § 196, ch. 908, L. 1896.

Source.—L. 1881, ch. 361, as am'd by L. 1889, ch. 463.

For forms of papers in certiorari proceedings, see Forms Nos. 472–477

See, also, provisions of sections 200, 290, et seq., post.

As a condition precedent to the making of an application for a writ of certiorari under this section to review a franchise tax the amount of such tax must be deposited with the State Treasurer as required by the next succeeding section (200) of this law. Peo. ex rel. Lehigh Valley R. R. Co. v. Sohmer, 84 Misc. 518 (1914).

The provisions of this section, providing for the review of assessments by certiorari, are consistent with section 906 of the Greater New York charter. Peo. ex rel. Coney Isl. Jockey Club v. Purdy, 152 A. D. 175 (1912), affd., 207 N. Y. 695.

The return to the Comptroller to a certiorari should show all the facts so that the court may determine whether the action of the Comptroller was erroneous or illegal, and, if it were, that the court itself might make the proper determination. Peo. ex rel. Staten Island Rapid Transit R. R. Co. v. Roberts, 4 A. D. 334 (1896).

When the return of the Comptroller to a certiorari to review his determination contains all the evidence and proceedings before him, including his decision, he will not be required to add items and particulars to such decision and then to return them. Peo. ex rel. Wiebusch & Hilger Co., Ltd. v. Roberts, 18 Misc. 530, revsd. on other grounds, 154 N. Y. 101 (1897).

On certiorari to review the action of the Comptroller in imposing a tax the burden is upon the relator to show error or mistake. Peo. ex rel. Brooklyn Elevated R. R. Co. v. Roberts, 90 Hun 537 (1895).

The decision of the Comptroller as to an assessment and taxation will not be disturbed unless it is clearly shown to be erroneous, hence the party seeking a revision or readjustment of a tax settled by the Comptroller must produce evidence showing the error of such settlement. Peo. ex rel. Roebling's Sons' Co. v. Wemple, 138 N. Y. 582; Peo. ex rel. Postal Telegraph Cable Co. v. Campbell, 70 Hun 507, see, also, Peo. v. Wemple, 129 N. Y. 523, sustaining this remedy.

In proceedings to review the decision of the Comptroller in assessing a tax the burden is upon the corporation to show that the Comptroller erred in imposing the tax of which it complains. Peo. ex rel. Western Elec. Co. v. Campbell, 80 Hun 466.

The office of Comptroller of the State is a continuous office, and while the term of office of a particular incumbent may, and does by the tenure fixed by law, expire as to such incumbent, the office, nevertheless, devolves on his successor and is perpetual, and such successor succeeds to the records and papers of the office; therefore, a writ of certiorari is properly directed to the Comptroller of the State under section 2129 of the Code of Civil Procedure, although the determination of the Comptroller sought to be reviewed was made by a Comptroller in office preceding the one to whom the writ was directed, and the predecessor in office is not a necessary party to the proceeding in order to obtain a review of such determination. Matter of Tax against Tiffany & Co., 80 Hun 486 revsd. on other grounds by 144 N. Y. 166.

It seems that the return of the Comptroller to a certiorari to review his appraisal should set forth the items of the appraisal, instead of simply giving the total, and making the evidence a part of the return. Peo. ex rel. Union Pacific Tea Co. v. Roberts, 145 N. Y. 375.

§ 200. Regulations as to such writ of certiorari. No certiorari to review any audit and statement of an account or any

determination by the comptroller under this article shall be granted unless notice of application therefor is made within thirty days after the service of the notice of such determination. Eight days' notice shall be given to the comptroller of the application for such writ. The full amount of the taxes, percentage, interest and other charges audited and stated in such account must be deposited with the state treasurer before making the application and an undertaking filed with the comptroller, in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that if such writ is dismissed or the determination of the comptroller affirmed, the applicant for the writ will pay all costs and charges which may accrue against him or it in the prosecution of the writ, including costs of all appeals.

Formerly § 197, ch. 908, L. 1896.

Source.— L. 1881, ch. 361, § 17, without change of substance.

The Comptroller cannot, without legislation, return to a corporation a deposit of an assessment made by it, under section 197 of the Tax Law, for the purpose of reviewing the same and which the Appellate Division subsequently declared to be illegal, as section 21 of article 3 of the State Constitution forbids it. Matter of L. E. Waterman Co., 33 Misc. 569.

§ 201. Warrant for the collection of taxes. After the expiration of thirty days from the sending by the comptroller of a notice of a statement of an account as provided in this article, unless the amount of such account shall have been paid or deposited with the state treasurer, if an appeal or other proceedings have been taken to review the same, and the undertaking given as provided in this article, the comptroller may issue a warrant under his hand and official seal, directed to the sheriff of any county of the state, commanding him to levy upon and sell the real and personal property of the person, partnership, company, association or corporation against which such account is stated, found within his county for the payment of the amount thereof with interest thereon and costs of executing the warrant, and to return such warrant to the comptroller and pay to the state treasurer the money collected by virtue thereof, by a time to be therein specified, not less than sixty days from the date of the warrant. Such warrant shall be a lien upon and shall bind the real and personal property of the person, partnership, company, association or corporation against which it is issued, from the time an actual levy shall be made by virtue thereof. The sheriff to whom any such warrant shall be directed shall proceed upon the same in all respects, with like effect, and in the same manner as prescribed by

law in respect to executions issued against property upon judgments of a court of record, and shall be entitled to the same fees for his services in executing the warrant, to be collected in the same manner.

Formerly § 198, ch. 908, L. 1896.
Source.— L. 1885, ch. 501, § 18; L. 1882, ch. 409, § 322, as am'd by L. 1894, ch. 196.

§ 202. **Information of delinquents.** It shall be the duty of any person having knowledge of the evasion of taxation under this article by any corporation, association, joint-stock company, partnership or person liable to taxation thereunder, or any omission on their part to make the reports required by this article, to make a written report thereof to the comptroller of the state, with such information as may be in his possession as may lead to the recovery of any taxes due the state therefrom. If, in his opinion, the interests of the state require it, the comptroller may employ such person to assist in the collection and preparation of evidence and in the prosecution and trial of actions for such taxes, and so much of the same, not exceeding ten per centum thereof, as may be collected from any such delinquent corporation, association, company, partnership or person, by reason of such report and such services, as shall have been agreed upon between such person and the comptroller or attorney-general as a compensation therefor, shall be paid to such person, and nothing shall be paid to such person for such report or services unless there shall be a recovery of taxes by reason thereof.

Formerly § 199, ch. 908, L. 1896.
Source.— L. 1886, ch. 266.

§ 203. **Action for recovery of taxes; forfeiture of charter of delinquent corporation.** An action may be brought by the attorney-general, at the instance of the comptroller, in the name of the state, to recover the amount of any account audited and stated by the comptroller under the provisions of this article. If any such account shall remain unpaid at the expiration of one year after notice of the statement thereof has been sent as required by this article, and the comptroller is satisfied that the failure to pay the same is intentional, he shall so report to the attorney-general, who shall immediately bring an action, in the name of the people of the state, for the forfeiture of the franchise of any corporation,

joint-stock company or association failing to make such payment, and if it is found that such failure was intentional, judgment shall be rendered in such action for the forfeiture of its franchise and for its dissolution, and thereafter such franchise shall be annulled.

Formerly § 200, ch. 908, L. 1896.

Source.—L. 1881, ch. 361, § 2; L. 1882, ch. 409, § 322, as am'd by L. 1894, ch. 196; L. 1886, ch. 679, § 3.

§ 204. Reports to be made by the secretary of state. The secretary of state shall transmit on the first day of each month to the comptroller a report of the stock corporations whose certificates of incorporation are filed, or of the foreign stock corporations to whom a certificate of authority has been issued to do business in this state, during the preceding month. Such report shall state the name of the corporation, its place of business, the amount of its capital stock, its purposes or objects, the names and places of residence of its directors, and, if a foreign corporation, its place of business within the state. The comptroller may prescribe the forms and furnish the blanks for such reports. The secretary of state shall make like reports to the comptroller whenever required by him relating to any such corporations whose certificates have been filed or to whom a certificate of authority has been issued prior to the time when this article takes effect, and during any period of time specified by the comptroller in his request for such report.

Formerly § 201, ch. 908, L. 1896.

§ 205. Exemptions from other state taxation. The personal property of every corporation, company, association or partnership, taxable under this article, other than for an organization tax, shall be exempt from assessment and taxation upon its personal property for state purposes, if all taxes due and payable under this article have been paid thereby. The personal property of every corporation taxable under section one hundred and eighty-eight of this article, other than for an organization tax, and as provided in the banking law, shall be exempt from assessment and taxation for all other purposes. The personal property of a private or individual banker, actually employed in his business as such banker, shall be exempt from taxation for state purposes, if such private or individual banker shall have paid all taxes due and payable under this article. Such corporation and private

or individual banker shall in no other respect be relieved from assessment and taxation by reason of the provisions of this article. The owner and holder of stock in an incorporated trust company liable to taxation under the provisions of this chapter shall not be taxed as an individual for such stock. Personal property exempted from taxation by this section shall not include shares of stock of banks and banking associations taxable under the provisions of section twenty-four of this chapter.

Formerly § 202, ch. 908, L. 1896, as am'd by L. 1902, ch. 172; L. 1907, ch. 121.

In 1907 the words "if all taxes due and payable under this article have been paid thereby," which prior thereto had been at the end of the second sentence were transposed to the end of the first sentence.

A trust company which has paid all taxes due from it, under article 9 of the Tax Law, is not subject to local taxation upon stock owned by it in a national bank. Guaranty Trust Co. v. New York, 108 A. D. 192 (1905). A tax on such stock is void, and if payment of such tax by the trust company is involuntary it may recover the amount thereof in an action for money had and received. Such a payment is involuntary where it is made by the national bank issuing the stock in question, without the knowledge of the trust company and against its will. Id.

§ 206. Application of taxes. The taxes imposed by this article and the revenues thereof shall be applicable to the general fund of the treasury and to the payment of all claims and demands which are a lawful charge thereon.

Formerly § 203, ch. 908, L. 1896.

§ 207. Limitation of time. The provisions of the code of civil procedure relative to the limitation of time of enforcing a civil remedy shall not apply to any proceeding or action taken to levy, appraise, assess, determine or enforce the collection of any tax or penalty prescribed by this article, and this section shall be construed as having been in effect as of date of the original enactment of the corporation tax law.

Formerly § 282, ch. 908, L. 1896, added by ch. 737, L. 1899.

The enactment of the foregoing section superseded the decision in Peo. ex rel. N. Y. Loan & Impt. Co. v. Roberts, 157 N. Y. 70, revsg. 22 A. D. 630.

§§ 270-280. (Tax on Transfers of Stock.)

For provisions of the foregoing sections, court decisions and rulings of State Comptroller, respecting the same, see pages 297-313, ante. For provisions of the United States War Revenue statute, imposing a tax upon stock certificates, bonds, etc., see pages 314-316, ante.

§ 290. Contents of petition. Any person assessed upon any assessment-roll, claiming to be aggrieved by any assessment for property therein, may present to the supreme court a petition duly verified setting forth that the assessment is illegal, specifying the grounds of the alleged illegality, or if erroneous by reason of overvaluation, stating the extent of such overvaluation, or if unequal in that the assessment has been made at a higher proportionate valuation than the assessment of other property on the same roll by the same officers, specifying the instances in which such inequality exists, and the extent thereof, and stating that he is or will be injured thereby. Such petition must show that application has been made in due time to the proper officers to correct such assessment. Two or more persons assessed upon the same roll who are affected in the same manner by the alleged illegality, error or inequality, may unite in the same petition.

Formerly § 250, ch. 908, L. 1896.

Source.— L. 1880, ch. 269, § 1.

A petition for a writ of certiorari to review a special franchise assessment for overvaluation which does not state the extent thereof is defective, but making a return to the writ and submitting the questions involved on the merits constitutes a waiver of such defect. Peo. ex rel. N. Y. & Rockaway Beach Ry. Co. v. Tax Comrs., 79 Misc. 135 (1913).

§ 291. Allowance of writ of certiorari. Such petition must be presented to a justice of the supreme court or at a special term of the supreme court in the judicial district in which the assessment complained of was made, within fifteen days after the completion and filing of the assessment-roll and the first posting or publication of the notice thereof as required by this chapter. Upon the presentation of such petition, the justice or court may allow a writ of certiorari to the officers making the assessment, to review such assessment, and shall prescribe therein the time within which a return thereto must be made and served upon the relator's attorney, which shall not be less than ten days, and may be extended by the court or a justice thereof. Such writ shall be returnable to a special term of the supreme court of the judicial district in which the assessment complained of was made. The allowance of the writ shall not stay the proceedings of the assessors or other persons to whom it is directed or to whom the assessment is delivered, to be acted upon according to law.

Formerly § 251, ch. 908, L. 1896.

Source.— L. 1880, ch. 269, §§ 1, 3.

The requirement that a petition for a writ of certiorari to review an assessment for taxation must be presented within fifteen days after the completion and filing of the assessment-roll and the first posting of publication of the notice thereof, as required by law, has no application to assessments in New York city, since this section refers to provisions of the Tax Law which apply to the State generally, but not to the city of New York. Peo. ex rel. Thompson v. Feitner, 168 N. Y. 441, affg. 61 A. D. 117; see also cases therein cited.

§ 292. Return to writ. The officers making a return to such writ shall not be required to return the original asessment-roll or other original papers acted upon by them, but it shall be sufficient to return certified or sworn copies of such roll or papers, or of such portions thereof as may be called for by such writ. The return must concisely set forth such other facts as may be pertinent and material to show the value of the property assessed on the roll and the grounds for the valuation made by the assessing officers and the return must be verified.

Formerly § 252, ch. 908, L. 1896.

Source.— L. 1880, ch. 269, § 7.

The return to a writ of certiorari is sufficient even though it does not expressly specify the valuation of lengthwise highway crossings when the return shows a method of determining value and an intention to apply it to all forms of occupation and the method is equally applicable to all forms of crossings. Peo. ex rel. N. Y. Central & H. R. R. R. Co. v. Sullivan, 77 Misc. 535 (1912).

A return in which the board said that it did not limit itself to one fixed rule or method of determining value, but applied both the so-called net earnings rule and the stock and bond theory and in the light of all the circumstances exercised its best judgment, is not a sufficient compliance with the statute. The officers must tell the court how they arrived at a valuation; the modus operandi leading to the result, and the application of methods used. Peo. ex rel. Buffalo Gas Co. v. Tax Comrs., 199 N. Y. 162 (1910), affg. 137 A. D. 358; Peo. ex rel. L. V. R. Co. v. Woodbury, 199 N. Y. 167 (1910), affg. 137 A. D. 929.

§ 293. Proceedings upon return. If it shall appear upon the return to any such writ that the assessment complained of is illegal or erroneous or unequal for any of the reasons alleged in the petition, the court may order such assessment, if illegal, to be stricken from the roll, or if erroneous or unequal, it may order a reassessment of the property of the petitioner, or the correction of his assessment upon the roll, in whole or in part, in such manner as shall be in accordance with law, or as shall make it conform to the valuations and assessments of other property upon the same roll and secure equality of assessment. If upon the hearing it shall appear to the court, that testimony is necessary for the

proper disposition of the matter, it may take evidence or may appoint a referee to take such evidence as it may direct, and report the same to the court, with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. Upon such hearing the parties to the proceeding may mutually agree upon the number of pieces of property to be valued and the number of witnesses to be sworn on the subject of the value of such properties. But in case the parties fail to so agree, then upon application of either party the court shall determine the number of witnesses to be sworn and the number of the pieces of property to be valued and shall limit the same to such number as the court shall deem reasonable. When the writ is obtained to review a special franchise assessment made pursuant to the provisions of section forty-six of this chapter, upon the filing of the return to the writ the court may take such evidence as it may deem necessary, or may appoint a referee to take evidence and to hear, try and determine all questions raised by the petition and the return thereto and to make his findings and determinations therein, or, on motion of either party, the court may direct the place of trial changed to the county in which the special franchise under review is situated, and on an order duly entered granting such motion, the place of trial shall be deemed changed to the county designated and the papers and proceedings shall be certified to that county in the manner now provided by law in the case of a change in the place of trial of an action and all subsequent proceedings shall be had in the county so designated, as if the special proceedings had been originally instituted in that county, and the court may, upon the application of the attorney-general, upon cause shown, vacate any reference heretofore made in any proceeding instituted to review a special franchise assessment, made pursuant to the provisions of section forty-six of this chapter. The governor may, upon the application of the attorney-general, upon cause shown, appoint extraordinary terms of the supreme court to be held in any judicial district and designate a justice to preside thereat, to try such special franchise cases. Such extraordinary term shall have jurisdiction over all special franchise cases arising in any tax district within the judicial district for which the term is appointed, without regard to the county in which the term is being

held, and either party to a proceeding to review a special franchise assessment may at any time bring the proceeding on for a hearing or trial before said extraordinary term by serving upon the other party sixteen days' notice thereof by mail or fourteen days' notice personally. A new assessment or correction of an assessment made by order of the court shall have the same force and effect as if it had been so made by the proper officers within the time prescribed by law for making such assessment.

Formerly § 253, ch. 908, L. 1896, as am'd by L. 1909, ch. 330; L. 1911, ch. 302.

Source.— L. 1880, ch. 269, §§ 4, 5.

§ 294. **Costs.** Costs shall not be allowed against the officers whose proceedings may be reviewed under any such writ unless it shall appear to the court that they acted with gross negligence or in bad faith or with malice in making the assessment complained of. If the writ shall be quashed or the assessment confirmed, or if the assessment complained of shall be reduced by an amount less than half the reduction claimed before the assessing officers, costs and disbursements shall be awarded against the petitioner. If the assessment shall be reduced by an amount greater than half the reduction claimed before the assessing officers, costs and disbursements shall be awarded against the tax district represented by the officers whose proceedings may be reviewed. The costs and disbursements shall not exceed those taxable in an action upon the trial of an issue of fact in the supreme court, except that if evidence shall be taken there shall be included in the taxable costs and disbursements the expense of furnishing to the court or to the referee a copy of the stenographer's minutes of the evidence taken.

Formerly § 254, ch. 908, L. 1896.

Source.— L. 1880, ch. 269, § 6.

§ 295. **Appeals.** An appeal may be taken by either party from an order, judgment or determination under this article as from an order, and it shall be heard and determined in like manner as appeals in the supreme court from orders. All issues and appeals in any proceeding under this article shall have preference over all other civil actions and proceedings in all courts.

Formerly § 255, ch. 908, L. 1896.

Source.— L. 1880, ch. 269, § 3.

§ 296. Refund of tax paid upon illegal, erroneous or unequal assessment. If in a final order in any such proceeding it has been or shall be ordered or adjudged or determined that the assessment complained of was illegal, erroneous or unequal, and correcting or directing correction thereof, and such order shall not be made in time to enable the assessors or other officers to make a new or corrected assessment for the use of the board of supervisors or for the use of the town, village, city or school officers levying any tax upon such property, the assessment of which has been or shall be so ordered or adjudged or determined to be illegal, erroneous or unequal, then any tax collected or to be collected upon such illegal, erroneous or unequal assessment shall be refunded as follows:

1. When such tax upon such illegal, erroneous or unequal assessment shall have been levied by the board of supervisors, then at an annual session of the board of supervisors held after the order for such correction has been granted and entered there shall be audited and allowed to the petitioner or other person who shall have paid such tax, and included in the tax levy of the town, village or city in which the property is situated, made next after the entry of such order, and paid to the petitioner, or other person paying the tax, the amount paid by him, in excess of what the tax would have been if the assessment had been made as ordered, adjudged or determined by such order of the court, together with the interest thereon from the date of payment. In case the amount deducted from such assessment by such order exceeds ten thousand dollars, so much of the tax as shall be refunded by reason of such corrected assessment, other than the proportion or percentage thereof collected for such town, village or city purposes, shall be levied upon the county at large and paid with interest, to the petitioner or other person paying the tax without further audit; and the board of supervisors shall audit and levy upon such town, village or city, the proportion or percentage of such excess of tax collected for such town, village or city purposes, which shall be collected and paid with interest to the petitioner, or other person paying the tax, without other or further audit.

2. When such tax upon such illegal, erroneous or unequal assessment shall have been levied by the proper officers of any city or village, then the common council or other auditing officer or

officers of such city or village shall immediately after such correction audit and allow, to the petitioner or other person who shall have paid such tax, and include in the tax levy of such city or village in which the property is situated made next after the entry of such order and cause to be paid to such petitioner or other person paying such tax, the amount paid by him in excess of what the tax would have been if the assessment had been as ordered, adjudged or determined by such order of the court together with interest thereon from the date of the payment.

3. When a tax shall have been levied and collected in any school district of this state upon any property within such district on any assessment value thereof which shall have been ascertained from a town assessment-roll and which assessment upon such town roll shall have been ordered, adjudged or determined by order of the court as aforesaid to have been illegal, erroneous or unequal and which assessment though made by town assessors was adopted and was used in such district for the purpose of taxation for school purposes, then and in such case the trustees of such school district shall audit and allow and cause to be paid to the petitioner, or other person who shall have paid such tax, the amount paid by him in excess of what the school tax would have been in such case if the assessment had been made as ordered, adjudged or determined by such order of the court, together with interest thereon from the date of the payment.

Application to the proper officer for the audit and allowance of such moneys must be made by the petitioner or other person paying such tax as follows: Where the writ of certiorari was issued pursuant to chapter two hundred and sixty-nine of the laws of eighteen hundred and eighty, and such tax shall not have been heretofore refunded, such application must be made within three years from the twenty-fourth day of July, nineteen hundred and seven. When the writ of certiorari was issued under the provisions of this section, then such application for audit and allowance must be made within three years after the entry of the final order ordering or adjudging or determining such assessment to have been illegal, erroneous or unequal; provided that the time of the pendency of any appeal in any such proceeding or from any such order shall not be deemed any part of such three years.

Formerly § 256, ch. 908, L. 1896, as am'd by L. 1907, ch. 721.

§ 299. Supplementary proceedings to collect tax. If a tax exceeding ten dollars in amount levied against a person or corporation is returned by the proper collector uncollected for want of personal property out of which to collect the same, the supervisor of the town or ward, or the county treasurer or the president of the village, if it is a village tax, may, within one year thereafter, apply to the court for the institution of proceedings supplementary to execution, as upon a judgment docketed in such county, for the purpose of collecting such tax and fees, with interest thereon from the fifteenth day of February after the levy thereof. Such proceedings may be taken against a corporation, and the same proceedings may thereupon be had in all respects for the collection of such tax as for the collection of a judgment by proceedings supplementary to execution thereon against a natural person, and the same costs and disbursements may be allowed against the person or corporation examined as in such supplementary proceedings but none shall be allowed in his or its favor. The tax, if collected in such proceeding, shall be paid to the county treasurer or to the supervisor of the town, and if a village tax, to the treasurer of the village. The costs and disbursements collected shall belong to the party instituting the proceedings, and shall be applied to the payment of the expense of such proceeding. The president of a village and a county treasurer shall have no compensation for any such proceeding. A supervisor shall have no other compensation except his per diem pay for time necessarily spent in the proceeding.

Formerly § 259, ch. 908, L. 1896.

An order made under this section for the examination of a water company upon its failure to pay village taxes cannot be vacated by an order made upon affidavits where the assessment is not claimed to be illegal and where the claim for relief rests upon the injustice of including an assessment for the maintenance of a municipal water system. Matter of Beauty Spring Water Co., 198 N. Y. 413 (1910).

§ 300. No fine or imprisonment for nonpayment of tax. Neglect or refusal to pay any tax shall not be punishable as a contempt or as misconduct; and no fine shall be imposed for such nonpayment, nor shall any person be imprisoned or otherwise punishable on account of nonpayment of any tax, or of any fine imposed for refusal or neglect to pay such tax. This section shall not apply to proceedings supplementary to execution upon judgments recovered for taxes.

Formerly L. 1897, ch. 766, §§ 1, 2, as am'd by L. 1898, ch. 79, §§ 1, 2.

§ 301. Dismissal of suits or proceedings. Where the person or corporation against whom a proceeding or suit is brought to collect a personal tax in arrears is unable for want of property to pay the tax in whole or in part, or where for other reasons upon the facts as they existed either before or after the assessment was made it appears to the court just that said tax should not be paid, the court may dismiss such suit or proceeding absolutely, without costs, or on payment of such part of the tax as may be just or on payment of costs, and may direct the cancellation or reduction of the tax.

L. 1909, ch. 62, § 301, as am'd by L. 1909, ch. 374.

Formerly § 259a, ch. 908, L. 1896, added by L. 1905, ch. 348.

The amendment of 1909 added the words "as they existed either before or after the assessment was made" and also the words "and may direct the cancellation or reduction of the tax."

This section prior to the amendment of 1909 did not apply to a case where the dismissal of the action was asked for upon the ground that after the assessment of the tax a decision was rendered which would have made possible the successful maintenance of a certiorari proceeding. In such a case the corporation assessed abandoned its legal rights in the matter by its failure to sue out the writ of certiorari and no new circumstances arose which rendered the collection of the tax inequitable. City of N. Y. v. Assurance Co. of America, 129 A. D. 904 (1908); City of N. Y. v. Zimmerman Co., App. Div. 1st Dept., June, 1909, not yet reported.

New York City.

Section 934 of the New York city charter as amended by Laws of 1904, ch. 624, provides:

> "The court in which any suit or proceeding may be commenced to enforce the payment of any tax for personal property, may, on motion of either party, dismiss the suit or proceedings absolutely without costs, or conditionally, upon the payment of costs, or may, on the facts, in its discretion, dismiss such suit or proceedings on the payment of such part of the tax and costs as shall be just, in any case where it shall be satisfied that the person or persons taxed are unable, for want of property, or other reason, to pay any tax or have an equitable defense to such suit or proceeding."

Despite this section a corporation in New York city may avail itself of the remedy provided for in the above section of the Tax Law which is broader in its provisions. City of N. Y. v. Halsey, 132 A. D. 192 (1909).

Where the defendant was not permitted to inspect the record and was advised that there was no assessment against him and where in fact he was assessed but was not possessed of any personal estate liable to taxation, he is entitled to relief both under the charter and the Tax Law. City of N. Y. v. Halsey, 132 A. D. 192 (1909).

See, also, City of N. Y. v. Goss, 124 A. D. 680 (1908).

The interpretation of both the charter and the Tax Law by the courts and the amendments which have followed the same indicate that the intention of the Legislature is that these sections should have a liberal construction. City

of N. Y. v. McCaldin Bros. Co., 81 A. D. 622, affd. on op. below, 176 N. Y. 585 (1903), followed by the amendment in Laws of 1904, ch. 624; City of N. Y. v. Holzderber, 44 Misc. 509 (1904), followed by the amendment in Laws of 1905, ch. 348; City of N. Y. v. Assurance Co. of America, 129 A. D. 904 (1908), followed by Laws of 1909, ch. 374; also the amendment to the preceding section added by Laws of 1908, ch. 12, making the imposition of costs discretionary.

§ 302. Cancellation of personal tax where it is void for want of jurisdiction. If a personal tax, levied against a person or corporation, is void for want of jurisdiction of such person or corporation and has been returned by the proper collector *uncollectable for want of personal property out of which to collect the same, the person or corporation against whom the said tax was levied may then apply to the supreme or county court in the county in which is located the tax district where said tax was levied, for an order cancelling the said tax, and upon notice to the president of the village, county treasurer, supervisor of the town or, in the case of a city, upon notice to its attorney or to the corporation counsel, and upon satisfactory proof by affidavit, the court shall make an order directing the cancellation of said tax from the assessment roll by the county treasurer, comptroller, or other officer in whose custody and control the said roll may be.

Formerly § 259-b, ch. 908, L. 1896, added by L. 1908, ch. 505.

A tax on the personal estate of a nonresident is a tax upon property within the State and therefore can not be cancelled under this section, because it is not a tax against the person which is void for want of jurisdiction. Matter of Adams, 60 Misc. 333 (1908), affd. no op., 129 A. D. 911 (1908).

§ 306. Attorney-general to bring action for sequestration. It shall be the duty of the attorney-general, on being informed by the comptroller or by the county treasurer of any county that any incorporated company refuses or neglects to pay the taxes imposed upon it, pursuant to articles one and two of this chapter, to bring an action in the supreme court for the sequestration of the property of such corporation and the court may so sequestrate the property of such corporation for the purpose of satisfying taxes in arrear, with the costs of prosecution, and may, also, in its discretion, enjoin such corporation and further proceedings under its charter until such tax and the costs incurred in the action shall be paid. The attorney-general may recover such tax with costs from such delinquent corporation by action in any court of record.

Formerly § 263, ch. 908, L. 1896.

* So in original.

FORMS AND PRECEDENTS

Form No. 1.

* Certificate of Incorporation of a Business Corporation.

See the Business Corporations Law, § 2.

We, the undersigned, all being persons of full age, and at least two-thirds being citizens of the United States, and at least one of us a resident of the State of New York, desiring to form a stock corporation, pursuant to the provisions of the Business Corporations Law of the State of New York, do hereby make, sign, acknowledge and file this certificate for that purpose, as follows:

First. The name of the proposed corporation is [*insert corporate name.*]

Second. The purposes for which it is to be formed are [*insert statement of objects: see specimens of object clauses, forms Nos. 9 to 203.*]

Third. The amount of the capital stock is [*insert the amount*] dollars. [*If any portion be preferred stock, state the preferences; see examples of preference clauses, Forms Nos. 262–277.*]

[*See also, clauses restricting voting powers of holders of preferred stock, Forms Nos. 274–277.*]

Fourth. The number of shares of which the capital stock shall consist is [*the number fixed must be such that the par value shall not be less than five dollars nor more than one hundred dollars each*], of the par value of $ each, and the amount of capital with which said corporation will begin business is [*state a definite amount, but not less than five hundred dollars.*]

Fifth. Its principal business office is to be located in the [*city, village or town*] of , in the county of , State of New York. [*If in the city of New York insert also the name of the borough.*]

Sixth. Its duration is to be [*insert number of years, or say perpetual if desired.*]

*General form. For examples of certificates of incorporation of Business Corporation filed in the office of the Secretary of State, see the next succeeding pages.

Seventh. The number of its directors is to be [*insert a definite number, but not less than three.*]

[*If directors are to be classified, see Forms Nos.* 3, 287–289.]

Eighth. The names and post-office addresses of the directors for the first year are as follows:

Names.	Post-office addresses.
.....	.....
.....	.....
.....	.....

Ninth. The names and post-office addresses of the subscribers to this certificate and a statement of the number of shares of stock which each agrees to take in the corporation are as follows:

Names.	Post-office addresses.	Number of shares.
.....	.....	.....
.....	.....	.....
.....	.....	.....

Tenth. [*If desired the certificate may contain any other provisions for the regulation of the business and the conduct of the affairs of the corporation and any limitation upon its powers and upon the powers of its directors and stockholders which does not exempt them from any obligation or from the performance of any duty imposed by law. For some examples of such provisions, see Forms Nos.* 22–29, 274, 275–277, 285, 286, 312, 313.

IN WITNESS WHEREOF, we have made, signed, acknowledged and filed this certificate in duplicate.

Dated, this day of , 19 .

[*Signatures of incorporators, not less than three in number.*]

STATE OF NEW YORK, }
County of . } *ss.:*

On this day of , 19 , before me personally came [*insert names of subscribers to certificate*], to me known and known to me to be the persons described in and who executed the foregoing certificate and severally duly acknowledged to me that they executed the same.

[*Signature of Notary.*]

Upon filing and recording the certificate of incorporation in the office of the Secretary of State, the fees to be paid are: Filing, ten dollars; recording,

fifteen cents per folio. Upon filing and recording a certified copy or duplicate original thereof in the office of the county clerk, the fees to be paid are: Filing, six cents; recording, ten cents per folio. In addition to such payments an organization tax of one-twentieth of one per cent upon the amount of the capital stock must be paid to the State Treasurer. See the statutes regulating such payments and further information relative thereto, pages 287–297.

Form No. 2.

*** Certificate of Incorporation of The Almada Sugar Refineries Company.**

Under the Business Corporations Law, § 2.

We, the undersigned, all being persons of full age, and at least two-thirds being citizens of the United States, and at least one of us a resident of the State of New York, desiring to form a stock corporation, pursuant to the provisions of the Business Corporations Law of the State of New York, do hereby make, sign, acknowledge and file this certificate for that purpose, as follows, to-wit:

First. The name of the proposed corporation is

THE ALMADA SUGAR REFINERIES COMPANY.

Second. The purposes for which it is to be formed are as follows:

To manufacture, refine, purchase, sell and deal in sugar, molasses and melada, glucose, syrup, starch, feed and such other products and by-products as are incidental thereto.

To propagate, cultivate and develop the different varieties of the grape, and to manufacture sugar, wines and brandies therefrom, and to cultivate sugar cane, sugar beets, cotton, tobacco, indigo, rice, wheat, rye, oats, corn and other products of the earth, to manufacture and prepare the same for market, and to buy, sell, deal in and transport the same.

To purchase or otherwise acquire, hold, sell and deal in landed property in the United States of America or in any colony, dependency or district thereof, in Mexico, or in any foreign or

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*For skeleton form of certificate of incorporation pursuant to section 2 of the Business Corporations Law, see form No. 1. This certificate, containing quite extensive purposes, was prepared by the author of this book, and, before filing in the office of the Secretary of State, each provision was discussed with and approved by the chief of the corporation division.

The names of corporations hereafter organized must indicate a corporation. Gen. Corp. L., § 6.

other country, and to develop the resources and to turn to account the lands, buildings and rights for the time being of the company in such manner as may be deemed desirable, and in particular by clearing, draining, irrigating, fencing, planting, building, improving, farming, grazing and mining.

To conduct and carry on the business of farmers, graziers, meat and fruit preservers, brewers, planters, miners, metallurgists, quarry owners and operators, brickmakers, builders, contractors for the construction of works, both public and private, merchants, importers and exporters, printers, publishers, brokers, shipbuilders, shipowners, and the business of using, hiring and operating ships, boats, steam, sail and other vessels in connection with the operations of the company.

To acquire water by purchase, development or otherwise; to construct dams, reservoirs, water towers and water ways, laying of water mains, pipes, gates, valves and hydrants; to furnish and sell water to manufactories, private corporations, associations, firms and individuals for fire protection, manufacturing, power, irrigating and domestic purposes, and collect payment of rentals for the same.

To construct, equip, improve and develop public and private works of all kinds, including railways, railroads, docks, harbors, piers, wharves, canals, reservoirs, sewage, drainage, sanitary, water, gas, power supply works, warehouses, and buildings, public or private, tunnels, bridges, conduits, viaducts and all other works of public or private use or utility, and also to build, own, purchase or otherwise acquire for its own use and operation railways and railroads, but such use and operation to be solely in connection with and appurtenant to the business of the corporation as herein set forth and not for public purposes.

To manufacture, purchase, or otherwise acquire, deal in, hold, own, manage, sell, pledge, transfer, or otherwise dispose of, goods, wares, merchandise and property of any and every class and description.

To acquire the good will, rights and property of any person, firm, association or corporation, and to pay for the same in cash, the stock of this company, bonds or otherwise, and to hold or in any manner dispose of the whole or any part of the property so purchased; or to conduct in any lawful manner the whole or any part of the business so acquired, provided such business is within

the authorization of the Business Corporations Law, and to exercise all the powers necessary or convenient in and about the conducting and management of such business.

To purchase or otherwise acquire, hold, own, mortgage, pledge, sell, assign, transfer, and generally to invest, trade and deal in personal property of every class and description.

To buy, sell, deal in, lease, hold or improve real estate, and the fixtures and personal property incidental thereto or connected therewith, and, with that end in view, to acquire, by purchase, lease, hire or otherwise, lands, tenements, or hereditaments, or any interest therein, and to improve the same, and generally to hold, manage, deal with and improve the property of the company, and to sell, lease, mortgage, pledge or otherwise dispose of the lands, tenements, and hereditaments or other property of the company.

To apply for, obtain, register, purchase, lease or otherwise to acquire and to hold, use, own, operate and introduce, and to sell, assign or otherwise dispose of, any trademarks, tradenames, patents, inventions, improvements and processes used in connection with or secured under letters-patent of the United States, or elsewhere or otherwise, and to use, exercise, develop, grant licenses in respect of, or otherwise turn to account any such trademarks, patents, licenses, processes and the like, or any such property or rights, provided always that the terms "use" and "operate" shall not be deemed to include any business except such as is permitted by the Business Corporations Law.

To purchase, acquire, hold and dispose of the stocks, bonds and other evidences of indebtedness of any corporation, domestic or foreign, and issue in exchange therefor its stock, bonds or other obligations, and, while owner of any such stock, bonds or other obligations, to possess and exercise in respect thereof, all the rights, powers and privileges of individual owners or holders thereof, and to exercise any and all voting power thereon.

To make, purchase, or otherwise acquire, deal in, and to carry out any contracts for or in relation to any of the foregoing businesses that may be necessary and lawful under the act pursuant to which this corporation is organized.

To make any guarantee respecting dividends, stocks, bonds, contracts or other obligations so far as the same may be permitted by corporations organized under said Business Corporations Law.

To do all and everything necessary, suitable and proper for the accomplishment of any of the purposes or the attainment of any of the objects or the furtherance of any of the powers hereinbefore set forth, either alone or in association with other corporations, firms or individuals, and to do every other act or acts, thing or things incidental or appurtenant to or growing out of or connected with the aforesaid business or powers or any part or parts thereof, provided the same be not inconsistent with the laws under which this corporation is organized.

Third. The amount of the capital stock is three million five hundred thousand dollars ($3,500,000).

Fourth. The number of shares of which the capital stock shall consist is thirty-five thousand (35,000), of the par value of one hundred dollars ($100) each, and the amount of capital with which said corporation will begin business is one thousand dollars ($1,000).

Fifth. The principal business office of the corporation is to be located in the city of New York, county of New York, State of New York, but the corporation shall have power to conduct its business in all its branches, or any part thereof, in any of the States, territories, colonies and dependencies of the United States, in the District of Columbia and in any and all foreign or other countries, to have one or more offices therein, to hold, purchase, mortgage and convey real and personal property without limit as to amount, in any such State, territory, colony, dependency, district or foreign or other country, but always subject to the laws thereof.

Sixth. Its duration is to be perpetual.

Seventh. The number of its directors is to be ——, and it is hereby provided, pursuant to law, that directors are not required to be stockholders.

Eighth. The names and post-office addresses of the directors for the first year are as follows:

Names.	Post-office addresses.
.....	.....
.....	.....
.....	.....

Ninth. The post-office addresses of the subscribers of this certificate and a statement of the number of shares of stock which each agrees to take in the corporation, are as follows:

Names.	Post-office addresses.	Number of shares.
.....	.....	.....
.....	.....	.....
.....	.....	.....

IN WITNESS WHEREOF, we have made, signed and acknowledged this certificate in duplicate.

Dated, this 8th day of October, 1901.

[*Here follow signatures of the incorporators and acknowledgment.*]

Form No. 3.

Certificate of Incorporation of Phelps, Dodge & Co. *

Under the Business Corporations Law, § 2.

We, the undersigned, being all persons of full age and at least two-thirds being citizens of the United States and one or more being residents of the State of New York, do hereby make, sign, acknowledge and file this certificate of incorporation, as follows:

First. The name of the proposed corporation is: Phelps, Dodge & Co.

Second. The objects for which this corporation is formed are to do any of the things herein set forth to the same extent as natural born persons might, and in any part of the world, to wit: to conduct mining operations of all kinds; to purchase, take, hold, sell, convey, lease, mortgage, explore, develop, improve or otherwise deal in mines, mining rights and metalliferous or fuel-bearing lands and town site, building, power, water, and other properties of all forms; to mine, smelt, reduce, refine and otherwise treat minerals, ores and metals of all kinds, including coal, oil and fuel products; to buy and sell the product of all the foregoing operations; to undertake and carry on any business and operations incidental to such dealings, mining and treatment.

To apply for, purchase, or otherwise acquire, and to hold, own, use, operate and to sell, assign or to otherwise dispose of, to grant licenses in respect to or otherwise turn to account, trademarks and tradenames, letters-patent and any and all inventions, improvements and processes used in connection with or secured under letters-patent of the United States or elsewhere.

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* Corporations hereafter organized must use a name that clearly indicates a corporation. G. C. L., § 6.

To construct and install buildings, houses, engines, cars, machinery and other equipment, mining roads, docks, warehouses, slips, wharves, terminals, and mining and metallurgical facilities and plants, including plants for the handling, concentrating, smelting, reduction and treatment of minerals, ores and metals of all kinds, and to rent, use and operate the same.

To carry on a general construction and building business and that of public and private contractors; to use and develop water power.

To carry on the general business of foresters and lumbermen; to buy and sell standing timber and timber lands and manufacture and sell lumber, wood and pulp and all products of timber, and of the forest.

To conduct manufacturing operations of all kinds; to manufacture, purchase or otherwise acquire, hold, own, mortgage, pledge, sell, assign, transfer or otherwise dispose of, invest, trade and deal in goods, wares and merchandise, and real and personal property of all classes and descriptions; to transact a general mercantile business.

To act as the agent, broker, consignee or factor of others in buying and selling fuel, minerals, ores, lumber and metals of all kinds or other substances, and to make contracts with others with reference to handling, smelting, treating and disposing of minerals, ores, lumber and metals of all kinds and other substances; and in that employment with power to deliver goods on bills of lading in name of the corporation, to draw drafts against such bills of lading and carrying insurance in name of the company on goods consigned for sale.

To purchase, acquire, hold and dispose of the stocks, bonds and other evidences of indebtedness of any corporation, domestic or foreign, and to issue in exchange therefor its stock, bonds or other obligations, and to exercise in respect thereof all the rights, powers and privileges of individual owners, including the right to vote thereon, and to aid in any manner, as permitted by law, any corporation or association of which any bonds or other securities or evidences of indebtedness or stock are held by the corporation, and do any acts or things designed to protect, preserve, improve or enhance the value of any such bonds or other securities or evidences of indebtedness or stock.

To do everything necessary, suitable and proper for the accomplishment of any of the purposes or the attainment of any of the objects or the furtherance of any of the powers hereinabove set forth, either alone or in association with other corporations, firms or individuals, and do every other act or thing incidental or appurtenant to or growing out of or connected with the aforesaid business or powers, or any part thereof.

Third. The amount of its capital stock shall be fifty million dollars ($50,000,000). All of said stock shall be common stock.

Fourth. The number of shares of which the capital stock shall consist is five hundred thousand (500,000) of the par value of one hundred dollars ($100) each, and the amount of capital with which said corporation will begin business is fifty thousand dollars ($50,000).

Fifth. The principal office of the corporation is in the borough of Manhattan, city, county and State of New York. The corporation may establish other offices, agencies or branches, and carry on business outside the State of New York, and in any part of the world.

Sixth. Its duration shall be perpetual.

Seventh. The number of directors shall be nine; three directors shall be elected in each year, and the term of office of each director, except as provided in the next section hereof, shall be three years or until his successor shall be chosen. A director need not be a stockholder.

Eighth. The names and post-office addresses of the directors for the first year and the term of office of each are as follows:

TO SERVE THREE YEARS.

Names.	Post-office addresses.
James Douglas	No. 99 John Street, New York City, N. Y.
Cleveland H. Dodge	No. 99 John Street, New York City, N. Y.
Arthur Curtiss James	No. 99 John Street, New York City, N. Y.

TO SERVE TWO YEARS.

James McLean	No. 99 John Street, New York City, N. Y.
George B. Agnew	No. 22 William Street, New York City, N. Y.
E. Haywood Ferry	No. 11 Nassau Street, New York City, N. Y.

TO SERVE ONE YEAR.

Francis L. Hine	No. 2 Wall Street, New York City, N. Y.
George Notman	No. 99 John Street, New York City, N. Y.
William Church Osborn	No. 71 Broadway, New York City, N. Y.

Ninth. The names and post-office addresses of the subscribers to this certificate and a statement of the number of shares which each agrees to take in the corporation are as follows:

Names.	Post-office addresses.	Number of shares.
James Douglas	No. 99 John Street, New York City, N. Y.	100
Cleveland H. Dodge	No. 99 John Street, New York City, N. Y.	100
Arthur Curtiss James	No. 99 John Street, New York City, N. Y.	100
James McLean	No. 99 John Street, New York City, N. Y.	100
George Notman	No. 99 John Street, New York City, N. Y.	100

IN WITNESS WHEREOF, we have made, signed and acknowledged and filed this certificate this 11th day of December, 1908.

JAMES DOUGLAS.
CLEVELAND H. DODGE.
ARTHUR CURTISS JAMES.
JAMES McLEAN.
GEORGE NOTMAN.

STATE OF NEW YORK,
County of New York, } *ss.:*

On this 11th day of December, 1908, before me personally appeared James Douglas, Cleveland H. Dodge, Arthur Curtiss James, James McLean and George Notman, to me personally known and known to me to be the persons described in and who made and signed the foregoing certificate and severally duly acknowledged to me that they had made, signed and executed the same for the uses and purposes therein set forth.

I. VERNON WEISBROD,
Notary Public, New York County.

Form No. 4.

* Certificate of Incorporation of a Realty Company.

Under the Business Corporations Law, § 2.

We, the undersigned, all being persons of full age, and at least two-thirds being citizens of the United States, and at least one of us a resident of the State of New York, desiring to form a stock corporation, pursuant to the provisions of the Business Cor-

*This is a copy (names being omitted) of a certificate of incorporation filed in the office of the Secretary of State, Dec. 30, 1905.

porations Law of the State of New York, do hereby make, sign, acknowledge and file this certificate for that purpose, as follows:

First. The name of the proposed corporation is:

[*Insert corporate name*] Company, Inc.

Second. The purposes for which said corporation is to be formed are to do any or all of the things hereinafter set forth, to the same extent as natural persons might or could do, viz.:

To take, buy, purchase, exchange, hire, lease or otherwise acquire real estate and property either improved or unimproved, and any interest or right therein, and to own, hold, control, maintain, manage and develop the same, in any State of the United States.

To purchase, exchange, hire or otherwise acquire such personal property, chattels, rights, easements, permits, privileges and franchises as may lawfully be purchased, exchanged, hired or acquired under the Business Corporations Law of the State of New York.

To erect, construct, maintain, improve, rebuild, enlarge, alter, manage and control directly or through ownership of stock in any corporation, any and all kinds of buildings, houses, hotels, breweries, stores, offices, warehouses, mills, shops, factories, machinery and plants, and any and all other structures and erections which may at any time be necessary, useful or advantageous in the judgment of the board of directors, for the purposes of the corporation, and which can lawfully be done under the Business Corporations Law.

To sell, manage, improve, develop, assign, transfer, convey, lease, sublease, pledge or otherwise alienate or dispose of, and to mortgage or otherwise encumber the lands, buildings, real property, chattels real, and other property of the company, real and personal, and wheresoever situate, and any and all legal and equitable rights therein.

To transact a general real estate agency and brokerage business, buying and selling and dealing in real estate and real property and any interest and estates therein, on commission, and renting and managing real estate.

To purchase, sell and manufacture and deal in building materials and goods, wares and merchandise and to carry on any other lawful trade or business incident to or proper or useful in connection with the purchase, sale, ownership, construction, maintenance and management of real property.

To borrow money, with or without pledge of or mortgage on all or any of its property, real or personal, as security and to loan and advance money upon mortgages on personal and real property, or on either of them.

To buy, sell and deal in, with or without guarantee of payment thereof, bonds and mortgages, and other like securities and other kinds of property, whether real or personal, not prohibited or specially excepted by any law, and to do and prosecute any acts and things incident to or proper in connection with the carrying on of the business of this company.

To purchase, acquire, hold, sell, assign, transfer, mortgage, pledge and otherwise dispose of the shares of capital stock, bonds, debentures or other evidences of indebtedness of any corporation, domestic or foreign, and while the holder thereof, to exercise all the rights and privileges of ownership, including the right to vote thereon, and to issue in exchange therefor its own stock, bonds and other obligations.

To purchase or otherwise acquire, undertake, carry on, improve or develop, all or any of the business, good will, rights, assets or liabilities of any person, firm, association or corporation carrying on any kind of business the same as or of a similar nature to that which this corporation is authorized to carry on, pursuant to the provisions of this certificate.

To do all such acts and things as are incident or conducive to the premises.

And this corporation shall have the power to conduct its business in all its branches in the State of New York or any other State or States of the United States and ultimately to hold, purchase, mortgage, lease, convey, manage and control, real and personal property therein, as above provided, and generally to do all acts and things and to exercise all the powers, now or hereafter authorized by law, necessary to carry on the business of the said corporation, or to promote any of the objects for which the company is formed. The foregoing enumeration of specific powers shall not be held to limit or restrict in any manner the general powers of the company, and the enjoyment thereof, as conferred by the laws of the State of New York, upon corporations organized under the provisions of the Business Corporations Law.

Third. The amount of capital stock is fifty thousand dollars ($50,000), all of which is common stock.

Fourth. The number of shares of which the capital stock shall consist is five hundred (500), each of which shall be one hundred dollars ($100), and the amount of capital with which said corporation will begin business is fifty thousand dollars ($50,000).

Fifth. The location of its principal business office is to be in the borough of Brooklyn, city and State of New York, county of Kings.

Sixth. Its duration is to be perpetual.

Seventh. The number of its directors is to be ——.

Eighth. The names and post-office addresses of its directors for the first year are as follows:

Names.	Post-office addresses.
.....	.....
.....	.....
.....	.....
.....	.....

Ninth. The names and post-office addresses of the subscribers to this certificate and a statement of the number of shares of stock which each agrees to take in the corporation are as follows:

Names.	Post-office addresses.	Number of shares.
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....

IN WITNESS WHEREOF, we have made, signed and acknowledged this certificate in duplicate, the 28th day of December, one thousand nine hundred and five.

[*Here follow signatures of the incorporators and the acknowledgment.*]

Form No. 5.

* Certificate of Incorporation of Jamestown Worsted Mills.

Under the Business Corporations Law, § 2.

We, the undersigned, all being persons of full age, and all† citizens of the United States and residents‡ of the State of New York, desiring to form a stock corporation pursuant to the provisions of the Business Corporations Law of the State of New York, do hereby make, sign, acknowledge and file this certificate for that purpose, as follows:

First. The name of the proposed corporation is "Jamestown Worsted Mills."

Second. The purposes for which it is formed are to carry on the trade or business of manufacturing and producing textiles from any and all materials suitable for that purpose; the selling and dealing in such textiles; the manufacturing, buying, selling and otherwise dealing in woolen and worsted goods and other fabrics, and the purchase of any materials, articles or things required for or in connection with, or incidental to the aforesaid manufacture and sale of said articles; to own and lease any and all property, real and personal, necessary or convenient for such purposes, or convenient and useful in connection with carrying on said business as auxiliary or incidental thereto, and generally to carry on any other manufacturing business which can conveniently be carried on with any of the operations aforesaid.

Third. The amount of capital stock is two million five hundred thousand dollars ($2,500,000), of which the sum of five hundred thousand dollars ($500,000) shall be preferred stock and the sum of two million dollars ($2,000,000) shall be common stock, subject, however, to the provisions hereinafter contained for converting preferred stock into common stock.

The said five hundred thousand dollars ($500,000) of preferred stock shall be entitled to receive dividends at the rate of five per cent. per annum, payable semi-annually, on the first days of November and May in each year, or such other dates as may be

*This is a copy of a certificate of incorporation filed in the office of the Secretary of State, May 21, 1908.

† Citizenship of two-thirds is sufficient. Gen. Corp. Law, § 4.

‡Only one incorporator is required to be a resident. Gen. Corp. Law, § 4.

For skeleton form of certificate of incorporation pursuant to section 2 of the Business Corporations Law, see form No. 1.

The law as now amended requires the corporate name to clearly indicate a corporation. G. C. L., § 6.

determined by the board of directors, out of the earnings of said company, in preference to any dividends upon the common stock, and such dividends shall be cumulative, so that any deficiency in the dividends to be paid on said preferred stock shall be made good out of the earnings of subsequent years before any dividends shall be paid upon the common stock. Such preferred stock shall not, however, be entitled to participate in any other or additional earnings or profits, but shall be entitled to be repaid in full upon any distribution of the assets of the corporation in the event of insolvency or dissolution, before any distribution of capital shall be made to the common stock.

The control and management of the said corporation is to be in the hands of the holders of the common stock, except as may be otherwise expressly provided by law, and so long as the business of the company is able to pay from its earnings or reserve, dividends of five per cent. per annum on all the preferred stock, the holders of such preferred stock are to have no voting power, except where the law expressly confers such power, so long as such dividends on all the preferred shares are so paid. In case, however, said dividends on such preferred shares shall not be earned or paid for the period of three successive years, then and in such case the preferred stock of said corporation shall, upon the expiration of said three successive years, but in no event earlier than said time, have the same voting power as the common shares, to wit: one vote for each share of stock.

The company shall have the option of retiring preferred stock, in whole or in part, at any time and from time to time, at the par value thereof, in addition to dividends accumulated, earned or accrued thereon. Such retirement shall be effected by payment out of the surplus fund, if any, of the company, and there shall be issued in lieu thereof for the purpose of preserving the total amount of the capital stock of the company intact, an amount of common stock equal to the amount of preferred stock so retired, said common stock to be issued to the holders of the common stock of the company in proportion to their respective holdings. Such retirement of preferred stock may be made at any time by the board of directors upon request of the holder of the preferred stock, if there shall be sufficient surplus profits to warrant the same, or it may be made at any time, upon the election of the board of directors, by giving thirty days' notice to the holder of the pre-

ferred stock selected for retirement, of the time when the same will be so retired.

In lieu of retiring preferred stock as hereinbefore provided, the company may, so far as is lawful, purchase preferred stock in whole or in part, at any time and from time to time, at the par value thereof, in addition to dividends accumulated, earned or accrued, paying for the same out of the surplus fund. In making such purchase the company shall have the privilege of selecting such stock, and such an amount thereof, at any time, as it may desire. Preferred stock purchased in pursuance of this provision shall be held in the treasury of the company, and while so held receive no dividends, and may be reissued from time to time upon such terms of sale as the board of directors may determine, not less, however, than the par value thereof.

Fourth. The number of shares of which the capital stock shall consist is twenty-five thousand (25,000), of the par value of one hundred dollars ($100) each, being twenty thousand (20,000) shares of common stock and five thousand (5,000) shares of preferred stock, the preferred stock and common stock being of the same denomination, and the amount of capital with which said corporation will begin business is one million five hundred thousand dollars ($1,500,000).

Fifth. Its principal business office is to be located in the city of Jamestown, in the county of Chautauqua and State of New York.

Sixth. Its duration is to be perpetual.

Seventh. The number of its directors is to be four (4).

Eighth. The names and post-office addresses of the directors for the first year are as follows:

Names.	ost-office addresse-.
Arthur K. Briggs	Jamestown, New York.
Alfred E. Hall	Jamestown, New York.
Elliot C. Hall	Jamestown, New York.
Alba M. Kent	Jamestown, New York.

Ninth. The names and post-office addresses of the subscribers to this certificate and a statement of the number of shares of stock which each agrees to take in the corporation are as follows:

Forms and Precedents.

Names.	Post-office addresses.	No. shares common.	No. shares preferred.
Arthur K. Briggs	Jamestown, N. Y.	2500	1250
Alfred E. Hall	Jamestown, N. Y.	2500	1250
Elliot C. Hall	Jamestown, N. Y.	2500	1250
Rose E. Kent	Jamestown, N. Y.	2490	1250
Alba M. Kent	Jamestown, N. Y.	10	

Tenth. The board of directors by unanimous vote may appoint an executive committee of one, which committee shall be known by the designation general manager. Whenever the board of directors are not in session such general manager shall have and may exercise any and all powers of the board of directors in the management of the business operations of the company which may be lawfully delegated. The said committee shall continue during the pleasure of a majority of the board of directors. The power of said committee shall not be construed to extend to the declaration of dividends, to the sale, leasing or encumbering of the real property of the corporation, or to the purchase or retirement of preferred stock; the powers to be exercised by such committee to be confined to the carrying on of the usual and ordinary business operations of the company.

IN WITNESS WHEREOF, we have made, signed and acknowledged this certificate in duplicate.

Dated, this .. day of ....., 1908.

[*Here follow signatures of incorporators and the acknowledgment.*]

Form No. 6.

Certificate of Incorporation of Mining Company.

Under the Business Corporations Law, § 2.

We, the undersigned, all being persons of full age and at least two-thirds being citizens of the United States and at least one of us a resident of the State of New York, desiring to form a stock corporation, pursuant to the provisions of the Business Corporations Law of the State of New York, do hereby make, sign and acknowledge this certificate for that purpose, as follows:

First. The name of the proposed corporation is
ALASKA GASTINEAU MINING CORPORATION.

Second. The purposes for which it is to be formed are as follows:

To purchase, sell, lease or otherwise acquire, own, hold, operate and work mines or mining properties; to extract from such properties such gold, silver, lead, copper and other ores as they may contain, to crush, smelt, reduce and refine ores so extracted, and to sell and dispose of the product thereof; to purchase, lease or otherwise acquire, build, own and operate stamp mills, smelting furnaces, reduction works, mining, milling or smelting machinery and tools and materials suitable for or applicable to any such purposes, and to deal in the same.

To generate, use, lease or sell electric power, in the District of Alaska and elsewhere outside the State of New York.

To mine oil, coal and natural gas; to buy and sell, deal in, export or import oil, coal, natural gas, coke and wood and similar combustible material, and to act as the agent of any association, corporation, or individual in buying, selling or dealing for them in such materials and for the purpose of such business to own, or rent or otherwise acquire, use or occupy store houses, docks, piers, boats and barges and any real estate necessary to the carrying on of the said business or any part thereof.

To carry on the business of hotel, boarding-house and innkeepers, restaurant keepers, keepers of livery stables and garages, warehousemen, and proprietors or managers of theatres, opera houses and other places of public entertainment.

To acquire water by purchase, development or otherwise; to construct dams, reservoirs, water towers and waterways, laying of water mains, pipes, gates, valves and hydrants; to furnish and sell water to manufactories, private corporations, associations, firms and individuals for fire protection, manufacturing, power, irrigating, mining, milling, and domestic purposes, and collect payment of rentals for the same.

To construct, equip, improve and develop public and private works of all kinds, including railways, railroads, tramways, docks, harbors, piers, wharves, roads, highways, canals, reservoirs, sewage, drainage, sanitary, water, gas, power supply works, warehouses, and buildings, public or private, tunnels, bridges, conduits, viaducts and all other works of public or private use or utility, and also to build, own, purchase or otherwise acquire for its own use and operation stage lines, steamboats, tramways, railways

and railroads, but such use and operation to be solely in connection with and appurtenant to the business of the corporation as herein set forth and not for public purposes.

To manufacture, purchase, or otherwise acquire, deal in, hold, own, manage, sell, pledge, transfer, or otherwise dispose of, goods, wares, merchandise and property of any and every class and description.

To acquire the good will, rights and property of any person, firm, association or corporation, and to pay for the same in cash, the stock of this company, bonds or otherwise, and to hold or in any manner dispose of the whole or any part of the property so purchased; or to conduct in any lawful manner the whole or any part of the business so acquired, provided such business is within the authorization of the Business Corporations Law, and to exercise all the powers necessary or convenient in and about the conducting and management of such business.

To purchase or otherwise acquire, hold, own, mortgage, pledge, sell, assign, transfer, and generally to invest, trade and deal in personal property of every class and description.

To buy, sell, deal in, lease, hold or improve real estate, and the fixtures and personal property incidental thereto or connected therewith, and, with that end in view, to acquire by purchase, lease, hire or otherwise, lands, tenements or hereditaments, or any interest therein, and to improve the same, and generally to hold, manage, deal with and improve the property of the company, and to sell, lease, mortgage, pledge or otherwise dispose of the lands, tenements, and hereditaments or other property of the company.

To apply for, obtain, register, purchase, lease, or otherwise to acquire and to hold, use, own, operate and introduce, and to sell, assign, or otherwise dispose of, any trademarks, tradenames, patents, inventions, improvements and processes used in connection with or secured under letters patent of the United States, or elsewhere or otherwise, and to use, exercise, develop, grant licenses in respect of, or otherwise turn to account any such trademarks, patents, licenses, processes and the like, or any such property or rights, provided always that the terms "use" and "operate" shall not be deemed to include any business except such as is permitted by the Business Corporations Law.

To purchase, acquire, hold and dispose of the stocks, bonds and other evidences of indebtedness of any corporation, domestic or

foreign, and issue in exchange therefor its stock, bonds or other obligations, and while owner of any such stock, bonds or other obligations, to possess and exercise in respect thereof, all the rights, powers and privileges of individual owners or holders thereof, and to exercise any and all voting power thereon.

To make, purchase, or otherwise acquire, deal in, and to carry out any contracts, for or in relation to any of the foregoing businesses that may be necessary and lawful under the act pursuant to which this corporation is organized.

To make any guarantee respecting dividends, stocks, bonds, contracts or other obligations so far as, and to such extent that such power may be exercised by corporations organized under said Business Corporations Law.

To do all and everything necessary, suitable and proper for the accomplishment of any of the purposes or the attainment of any of the objects or the furtherance of any of the powers hereinbefore set forth, either alone or in association with other corporations, firms or individuals, and to do every other act or acts, thing or things incidental or appurtenant to or growing out of or connected with the aforesaid business or powers or any part or parts thereof, provided the same be not inconsistent with the laws under which this corporation is organized.

Third. The amount of the capital stock is twelve million dollars ($12,000,000).

Fourth. The number of shares of which the capital stock shall consist is two million four hundred thousand (2,400,000) of the par value of five dollars ($5) each, and the amount of capital with which said corporation will begin business is five hundred dollars ($500).

Fifth. The corporation is to issue, pursuant to statute, seven thousand (7,000) first mortgage convertible bonds of the par value of five hundred dollars ($500) each, bearing interest at the rate of six per cent. per annum, and the mortgage securing said bonds shall provide that for a limited period upon the written request of the holder of any of said first mortgage bonds presented to the treasurer of the corporation, such first mortgage bonds shall be convertible into stock, and the corporation shall thereupon issue to said holder an amount of stock equal to the par value of such first mortgage bonds so tendered for purposes of conversion into stock. Said mortgage shall also confer upon the corporation the

right to redeem bonds prior to the maturity thereof. All first mortgage bonds so converted or redeemed shall be forthwith cancelled.

Sixth. The principal business office of the corporation is to be located in the Borough of Manhattan, in the City, County and State of New York, but the corporation shall have power to conduct its business in all its branches, or any part thereof, in any of the States, Territories, Districts or dependencies of the United States, and in any foreign country or countries.

Seventh. Its duration is to be perpetual.

Eighth. The number of its directors is to be five.

Ninth. The names and post-office addresses of the directors for the first year are as follows:

Names.	Post-office addresses.
William J. Sutherland	68 William St., New York City.
Joseph T. Gilbert	Gilbertsville, N. Y.
Lovell H. Jerome	138 West 12th St., New York City.
William G. Robinson	18 Broadway, New York City.
Frank White	32 Liberty St., New York City.

Tenth. The post-office addresses of the subscribers of this certificate and a statement of the number of shares of stock which each agrees to take in the corporation are as follows:

Names.	Post-office addresses.	No. of shares.
Lovell H. Jerome	138 West 12th St., New York City.	34
William G. Robinson	18 Broadway, New York City.	33
Frank White	32 Liberty St., New York City.	33

IN WITNESS WHEREOF, we have made, signed and acknowledged this certificate in duplicate.

Dated this 10th day of January, 1911.

LOVELL H. JEROME,
WILLIAM G. ROBINSON,
FRANK WHITE.

(*Here follows acknowledgment*).

In accordance with the provisions of section 275-a of the Tax Law, every corporation is required to file in the office of the State Comptroller within ten days a certificate setting forth its principal place of business and when and where incorporated. For form of such certificate, see post, Form No. 478.

Form No. 7.

Corporation with Shares of Stock Without Par Value.

Under Section 19 of the Stock Corporation Law.

Certificate of Incorporation of The Wisconsin Edison Company, Incorporated.

We, the undersigned, all being of full age and at least two-thirds being citizens of the United States of America and at least one being a resident of the State of New York, desiring to form a corporation pursuant to the provisions of the Business Corporations Law of the State of New York, do hereby certify:

First. The name of the proposed corporation is The Wisconsin Edison Company, Incorporated.

Second. The purposes for which it is to be formed are as follows:

To acquire by purchase, subscription, or otherwise and to invest in, hold for investment or otherwise, and to trade and deal in and to use, sell, pledge or otherwise dispose of the stock, bonds and other evidences of indebtedness of any corporation, domestic or foreign, and issue in exchange therefor its stock, bonds or other obligations, and while owner of any such stocks, bonds, and other evidences of indebtedness to exercise all the rights, powers and privileges of ownership, including the right to vote thereon for any and all purposes; to aid by loan, subsidy, guaranty or in any other manner whatsoever, so far as the same may be permitted in the case of corporations organized under the Business Corporations Law, any corporation whose stocks, bonds, securities or other obligations are in any manner held or guaranteed, and to do any and all other acts or things for the preservation, protection, improvement or enhancement in value of any such stocks, bonds, securities or other obligations; and to do all and any such acts or things designed to accomplish any such purpose.

To acquire, hold, own, dispose of and generally deal in grants, concessions, franchises and contracts of every kind; to cause to be formed, to promote and to aid in any way in the formation of any corporation, domestic or foreign.

To act as financial or business agent for domestic and foreign corporations, individuals, partnerships, associations, states, governments or other bodies.

To borrow money, to issue bonds, debentures, notes and other obligations, secured or unsecured, of the corporation, from time to time, for moneys borrowed, or in payment for property acquired, or for any of the other objects or purposes of the corporation, or for any of the objects of its business; to secure the same by mortgage or mortgages, or deed or deeds of trust, or pledge or other lien upon any or all of the property, rights, privileges or franchises of the corporation, wheresoever situated, acquired or to be acquired; to confer upon the holders of any debenture or other bonds of the corporation, secured or unsecured, the right to convert the principal thereof into preferred or common stock of the corporation upon such terms and conditions as shall be fixed by the Board of Directors; to sell, pledge or otherwise dispose of any or all debenture or other bonds, notes and other obligations in such manner and upon such terms as the Board of Directors may deem judicious; and to guarantee the payment of any dividends upon stocks, or the principal or interest upon bonds, or the contracts or other obligations of any corporation or individual, so far as the same may be permitted in the case of corporations organized under the Business Corporations Law.

To conduct its business and all or any of its branches, so far as permitted by law in the State of New York and in other states of the United States of America and in the territories and the District of Columbia and in any and all dependencies, colonies or possessions of the United States of America and foreign countries; and for and in connection with such business to hold, possess, purchase, mortgage and convey real and personal property, and to maintain offices and agencies either within or anywhere without the State of New York.

In general to do any and all things and exercise any and all powers which may now or hereafter be lawful for the corporation to do or exercise under and in pursuance of the Business Corporations Law of the State of New York, or of any other law that may be now or hereafter applicable to the corporation.

Third. The number of shares that may be issued by said corporation is three hundred thousand (300,000), of which one hundred thousand (100,000) of the amount or par value of one hundred dollars ($100) each are to be preferred stock, and two hundred thousand (200,000) are to be common with no nominal or par value.

Fourth. The holders of the preferred stock shall be entitled to cumulative dividends thereon at the rate of six dollars ($6) per share or six per centum of the amount or par value for each and every fiscal year of the life of the corporation and no more, payable out of any and all surplus or net profits, quarterly, half-yearly or yearly, as and when declared by the Board of Directors, before any dividends shall be declared, set apart for, or paid upon the common stock of the corporation. Said dividends on the preferred stock shall be cumulative, so that if the corporation shall fail in any fiscal year to pay such dividends on all of the issued and outstanding preferred stock, such deficiency in the dividends shall be fully paid, but without interest, before any dividends shall be paid or set apart on the common stock. Subject to the foregoing provisions said preferred stock shall not be entitled to participate in any other or additional earnings or profits of the corporation.

In the event of the dissolution or liquidation of the corporation, or a sale of all its assets (whether voluntary or involuntary) or in event of its insolvency or upon any distribution of its capital, there shall be paid to the holders of the preferred stock the par value thereof, to wit, one hundred dollars ($100) per share and the amount of all unpaid accrued dividends thereon, before any sum shall be paid or any assets distributed among the holders of the common stock; and after the payment to the holders of the preferred stock of its par value and the unpaid accrued dividends thereon, the remaining assets and funds of the corporation shall be divided among and paid to the holders of the common stock according to their respective shares.

The Board of Directors may in their discretion declare and pay dividends on the common stock concurrently with dividends on the preferred stock, for any dividend period of any fiscal year when such dividends are applicable to the common stock; provided that all accumulated dividends on the preferred stock for all previous fiscal years and all dividends on the preferred stock for previous dividend periods for that fiscal year shall have been paid in full.

The whole of the preferred stock may be redeemed on any dividend day at the option of the Board of Directors, upon sixty (60) days' notice by mail to the holders of record of such stock as may be prescribed by the by-laws or, in the absence of any by-law upon the subject, by resolution of its Board of Directors, by paying for each share of the preferred stock one hundred and fifteen dol-

lars ($115) in cash, and in addition thereto all unpaid dividends accrued thereon at the date fixed for such redemption.

From time to time the preferred stock and the common stock may be increased according to law and may be issued in such amounts and proportions as shall be determined by the Board of Directors and as may be prescribed by law.

Fifth. The amount of capital with which the corporation will carry on business is twelve million dollars ($12,000,000).

Sixth. The corporation may issue and may sell its authorized shares from time to time for such consideration as may from time to time be fixed by the Board of Directors, and the consideration so fixed for shares of the preferred stock may be either greater or less than their par value.

Seventh. The principal business office of the corporation is to be located in the Borough of Manhattan, City, County and State of New York.

Eighth. The duration of the corporation is to be perpetual.

Ninth. The number of its directors is to be nine. Three directors shall be elected in each year, and the term of office of each director, except as provided in the next section hereof, shall be three years or until his successor shall be chosen.

Tenth. The names and post-office addresses of the directors for the first year and the term of office of each are as follows:

TO SERVE UNTIL THE FIRST ANNUAL MEETING.

Names.	Addresses.
Henry H. Pierce	49 Wall Street, New York, N. Y.
Edward H. Green	49 Wall Street, New York, N. Y.
Frederick H. Piske	30 Broad Street, New York, N. Y.

TO SERVE UNTIL THE SECOND ANNUAL MEETING.

James D. Mortimer	30 Broad Street, New York, N. Y.
John Foster Dulles	49 Wall Street, New York, N. Y.
Thomas H. Ryan	30 Broad Street, New York, N. Y.

TO SERVE UNTIL THE THIRD ANNUAL MEETING.

James Campbell	30 Broad Street, New York, N. Y.
John K. Byard	49 Wall Street, New York, N. Y.
Emerson D. Pray	30 Broad Street, New York, N. Y.

Eleventh. The names and post-office addresses of the subscribers to this certificate, and the number of shares of stock which each agrees to take in the corporation are as follows:

Names.	Addresses.	No. of Shares.

(Here follow names and addresses of subscribers).

Twelfth. No preferred stockholder shall be entitled to subscribe for, purchase, or receive any part of any new or additional issue of stock, or of any issue of bonds or debentures convertible into stock.

The Board of Directors may appoint an Executive Committee from among their number, which Committee, to the extent provided in the By-laws of the Corporation, shall have and may exercise all of the powers of the Board of Directors in the management of the business and affairs of the corporation during the intervals between the meetings of the Board of Directors, so far as may be permitted by law.

IN WITNESS WHEREOF, we have made, signed and acknowledged this certificate this 4th day of November, 1912.

[*Here follow signatures of incorporators and acknowledgment.*]

Form No. 8.

Limitation in Certificate of Incorporation of Stockholder's Right to Subscribe for New Stock.

(For use only in the certificate of a corporation having common shares with no par value and preferred shares with a fixed par value.)

The directors may from time to time offer for subscription or otherwise issue or sell, for any consideration permitted by law, and at par or any less prices, as they may determine, any or all of the authorized stock of the corporation of any class, not then issued, and any or all of any increased stock of any class that may hereafter be authorized, without offering to the stockholders then of record, of any class, any thereof, on the same terms or on any terms, irrespective of whether such stock or any of it is to be issued for property or services or cash or otherwise, or for a consideration equal to or less than its par value, and no stockholders of any class shall hereafter have any right, pre-emptive or other, to subscribe for any part of any such stock of any class now or hereafter authorized to be issued.

GENERAL OBJECT AND REGULATING CLAUSES.

In addition to the statement of the specific purposes of the corporation, the certificate of incorporation may also contain other clauses of a more general character and provisions regulating corporate management, limiting, restricting or defining the rights and powers of the directors, stockholders, etc.

Form No. 9.

To Acquire Other Businesses.

To purchase or otherwise acquire all or any part of the business, good will, rights, property and assets of all kinds and assume all or any part of the liabilities of any corporation, association, partnership or person engaged in any business included in the foregoing purposes and objects.

Form No. 10.

To Acquire Business of Going Concern.

To acquire and take over as a going concern and to carry on the business of any person, firm, association or corporation engaged in any business which this corporation is authorized to carry on, and in connection therewith to acquire the good will and all or any part of the assets and to assume or otherwise provide for all or any of the liabilities of the owner or owners of any such business.

Form No. 11.

Manufacture, etc., General Power to.

To manufacture, purchase or otherwise acquire, and to sell and deal in all kinds of materials, goods, wares and merchandise which may be required for any of the purposes of the company's business, or which may seem capable of being profitably used or dealt in in connection with such business.

Form No. 12.

Acquisition of Real and Personal Property Generally.

To purchase or otherwise acquire real estate and leaseholds or any interest therein, in addition to such as may be necessary for the purposes hereinbefore expressed, and to own, hold or improve, sell and deal in the same.

To purchase or otherwise acquire real and personal property of any and all kinds that may be lawfully acquired and held by a business corporation, and

in particular lands, leaseholds, shares of stock, mortgages, bonds, debentures and other securities, merchandise, book debts and claims, copyrights, manuscripts, trademarks, tradenames, brands, labels, patents, caveats and patent rights, licenses, grants and concessions and any interest in real or personal property.

Form No. 13.

Borrow Money, Power to.

To make, accept, indorse, execute and issue promissory notes, bills of exchange, bonds, debentures and other obligations, from time to time, for the purchase of property or for any purpose in or about the business of the company, and to secure the payment of any such obligation by mortgage, pledge, deed of trust, or otherwise.

Form No. 14.

General Power Clause.

To do all and everything necessary, suitable and proper for the accomplishment of any of the purposes or the attainment of any of the objects or the furtherance of any of the powers hereinbefore set forth, either alone or associated with other corporations, firms or individuals, and to do any other act or acts, thing or things incidental or pertaining to, or growing out of, or connected with the aforesaid business, or powers, or any part or parts thereof, provided the same be not inconsistent with the law under which this corporation is organized.

Form No. 15.

Conduct Business in Other States, Countries, etc., Power to.

The business or purpose of the company is from time to time to do any one or more of the acts and things herein set forth; and it may conduct such business in all its branches or any part thereof outside of the State of New York, and in other States and Territories and dependencies of the United States and in foreign countries.

Form No. 16.

Contracts, Generally, Power to Make.

To enter into, make, perform and carry out contracts of every sort and kind which may be necessary or convenient for the business of this company, or business of a similar nature, with any person, firm, corporation, private, public or municipal, body politic under the government of the United States, or any State, Territory or Colony thereof, or any foreign government, so far as, and to the extent that, the same may be done and performed by corporations organized under the Business Corporations Law.

Form No. 17.

Stock, Bonds and Obligations of Other Corporations, Power to Acquire.

Subject to the restrictions or limitations imposed by law to purchase or otherwise acquire, hold, own, sell, assign, transfer, mortgage, pledge, exchange or otherwise dispose of the shares of the capital stock, bonds, obligations or other securities or evidences of indebtedness of other corporations, domestic and foreign, and the good will, rights, assets and property of any and every kind or any part thereof, of any person, firm or corporation, domestic or foreign, and if desirable to issue in exchange therefor the stock, bonds or other obligations of this company, and while the owner of such shares of the capital stock to exercise all rights, powers and privileges of ownership, including the power to vote thereon; and for any and all lawful purposes, in the course of the transaction of the business and affairs of the corporation, to acquire real and personal property, rights and interests of every nature, and to execute and issue bonds, debentures and other negotiable or transferable instruments, and to mortgage or pledge any or all of the property of the corporation; to secure such bonds, debentures or other instruments, upon such terms and conditions as may be set forth in the instrument or instruments mortgaging or pledging the same, or in any deed, contract or other instrument relating thereto.

Form No. 18.

Construction of Public Works and Utilities.

To construct, equip, improve and develop public and private works of all kinds, including railways, railroads, docks, harbors, piers, wharves, canals, reservoirs, sewers, drainage, sanitary, water, gas, power supply works, warehouses and buildings, public or private, tunnels, bridges, conduits, viaducts, and all other works of public or private use or of utility; and also, to build, own, purchase or otherwise acquire for its own use and operation, railways and railroads but such use and operation to be wholly in connection with and appertaining to the business of the corporation as herein set forth and not for public purposes.

Form No. 19.

Power to Make Guarantees.

To make any guarantee respecting dividends, shares of stock, bonds, debentures, contracts or other obligations to the extent that such power may be exercised by corporations organized under said Business Corporations Law.

Form No. 20.

Enumeration of Specific Powers Not to Limit General Corporate Powers.

The foregoing enumeration of specific powers shall not be deemed to limit or restrict in any manner the general powers of the corporation, and the enjoyment and exercise thereof, as conferred by the laws of the State of New York upon corporations organized under the provisions of the Business Corporations Law.

Form No. 21.

Interpretation Provision to Follow Object Clauses.

It is the intention that each of the objects, purposes and powers specified in all the paragraphs of the second subdivision of this certificate shall be regarded as independent objects, purposes and powers, and be in no manner or to any extent limited or restricted by reference to or inference from the terms of any other clause of this or any other paragraph contained in this certificate.

Form No. 22.

Restricting Inspection of Books and Accounts.

The board of directors shall from time to time decide whether and to what extent and at what times and under what conditions and requirements the accounts and books of the corporation, or any of them, except the stock book, shall be open to the inspection of the stockholders, and no stockholder shall have any right to inspect any books or documents of the corporation except as conferred by statute in New York, or authorized by the board of directors

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Form No. 23.

Restricting Inspection of Books and Accounts.

The by-laws shall determine whether and to what extent the accounts and books of this corporation, or any of them, shall be open to the inspection of the stockholders; and no stockholder shall have any right of inspecting any account, or book, or document of this corporation, except as conferred by statute in New York, or the by-laws, or by resolution adopted by the stockholders.

There is no decision of this State respecting the right of a corporation to restrict the inspection of corporate books as above, but it is believed that a clause inserted in the certificate of incorporation in the form above set forth falls within the doctrine of the case of Ripan v. U. S. Woven Label Co., 205 N. Y. 442 (1912), and also that it would preclude a stockholder from the right to a mandamus to compel an inspection of the books of account which was held in the Steinway case (159 N. Y. 250) to be a common law right.

Form No. 24.

Creation of Surplus Fund and Purchase of Its Own Stock.

The company may use and apply the surplus property, earnings or accumulated profits, in the absolute discretion of the directors, to the creation and maintenance of a surplus fund, and to the purchase and acquisition of its own capital stock, and it may take said capital stock in payment or satisfaction of any debt due to the company from time to time, and to any such extent and manner, and upon such terms as the directors shall determine, and may reissue any stock so acquired.

Form No. 25.

Setting Apart Working Capital.

The directors shall not make any dividends except from the surplus profits arising from the business of the corporation. The directors may, in any year, set apart from such surplus profits the amount thereof to be determined by them as working capital or as a reserve or surplus fund to meet liabilities or contingencies, before declaring any dividend on the capital stock.

Method of Voting Stock Held in Other Corporations.

See the above heading in Form No. 278.

Form No. 26.

Clause Restricting Increase of Capital Stock.

For a period of ..... years from the date of the filing of this certificate of incorporation the amount of the capital stock of the corporation, as authorized herein, shall not be increased without the consent of the subscribers [*insert name*] and [*insert name*], or such of them as shall be living at the time of any such proposed increase.

Form No. 27.

Limitation in Certificate of Incorporation of Stockholder's Right to Subscribe for New Stock.

No holder of either preferred or common stock shall be entitled as of right to purchase or subscribe for any part of any unissued stock of either class or of any additional preferred or common stock to be issued by reason of any increase of the authorized capital stock of the company of either class, or of bonds, certificates of indebtedness, debentures or other securities convertible into stock of the corporation, but any such unissued stock or such additional authorized issue of new stock or of other securities convertible into stock may be issued and disposed of pursuant to resolution of the board of directors to such persons, firms, corporations or associations and upon such terms as may be deemed advisable by the board of directors in the exercise of their discretion.

Form No. 28.

Shares of Stock to Be Issued at a Price Fixed by the Board of Directors.

The shares of the capital stock of said corporation may be issued for money, for labor done, or for property, and the said corporation may issue and may sell its authorized shares from time to time for such consideration as from time to time may be fixed by resolution of the board of directors at a regular meeting of the said board, or at a special meeting called for that purpose in such manner as the by-laws of the corporation shall provide in respect to special meetings; but in case the board of directors shall not so fix such consideration, each share of such stock shall be issued for one hundred dollars ($100) in cash.

Form No. 29.

Clause in Certificate of Incorporation Authorizing Contracts Between Corporations Having Identical Directors.

No contract or other transaction between the corporation and any other corporation shall be affected or invalidated by the fact that any one or more of the directors of this corporation is or are interested in, or is a director or officer, or are directors or officers of such other corporation, and any director or directors, individually or jointly, may be a party or parties to, or may be interested in, any contract or transaction of this corporation or in which this corporation is interested; and no contract, act or transaction of this corporation with any person or persons, firm or corporation, shall be affected or invalidated by the fact that any director or directors of this corporation is a party, or are parties to or interested in such contract, act or transaction, or in any way connected with such person or persons, firm or association, and each and every person who may become a director of this corporation is hereby relieved from any liability that might otherwise exist from contracting with the corporation for the benefit of himself or any firm, association or corporation in which he may be in anywise interested.

Restricting Voting Rights of Holders of Preferred Stock.

See Forms Nos. 275–277.

Statement of Preferred and Common Stock of Different Par Values.

See Form No. 274.

Provisions for Stock Preferences.

See Forms Nos. 262–270.

Retirement or Exchange of Preferred Stock.

See Forms Nos. 271, 272.

Convertible Preferred Stock.

See Form No. 273.

Provisions for Filling Vacancies in the Board of Directors.

See Form No. 284.

Clauses for Removal of Officers or Directors.

See Forms Nos. 285, 286.

Classification of Directors.

See Forms Nos. 287–289.

Provisions for Executive Committee.

See Forms Nos. 291–294.

SPECIFIC OBJECT CLAUSES.

Abattoir.

(*See* SLAUGHTERING CATTLE.)

Form No. 30.

Accountants.

To enter into contracts to open, keep, audit, examine and certify to the correctness of books and accounts of individuals, partnerships and corporations and to do a general auditing and accounting business so far as is permitted under the Business Corporations Law of the State of New York and for that purpose to employ bookkeepers, accountants, certified public accountants and such other persons as may be found necessary or desirable in carrying on said business.

(*See also* AUDIT COMPANY.)

Form No. 31.

Advertising.

To conduct a general advertising business, both as principals and agents; including the preparation and arrangement of advertisements and the manufacture and construction of advertising devices and novelties; to erect, construct, purchase, lease or otherwise acquire fences, billboards, signboards, buildings and other structures suitable for advertising purposes; to carry on the businesses of printers, publishers, painters and decorators in connection with the advertising business, and to make and carry out contracts of every kind that may be necessary or conducive to the accomplishment of any of the purposes of the company.

Form No. 32.

Agency Company.

The objects for which it is to be formed are to act as agent or representative of corporations, firms and individuals, and as such to develop and extend the business interests of firms, corporations and individuals.

Form No. 33.

Agricultural Implements.

To manufacture, buy, sell, exchange, lease, import, export and generally deal in plows, harrows, mowing machines and other implements of husbandry of every kind, nature and description with the accessories thereof and to carry on any trade or business incidental thereto or connected therewith. To apply for, purchase or otherwise acquire and to hold, own, use, lease, sell, assign, grant and convey all trademarks, patent rights, improvements, processes, formulæ, inventions and apparatus of all kinds, whether secured under letters-patent of the United States or in any foreign country or in any manner.

Form No. 34.

Air Power Motors.

The manufacture, purchase, use, leasing and selling of self propelling, or horseless vehicles, motors, engines, movable or stationary, propelled, operated or actuated by compressed air and gas, either in combination or separately, or by any other suitable and available power, and any and all other machines, devices, contrivances and appliances, for the use and employment of air and gas, compressed or otherwise, either in combination or separately, for any uses and purposes to which the same can be applied; the acquiring, holding and owning of inventions and patent rights pertaining to or available for such vehicles, motors and engines, machines, devices, contrivances and appliances, or the manufacture and use of the same, as well as licenses under inventions and patents pertaining to or available for such vehicles, motors, and engines, to manufacture, use, lease and sell the same thereunder; the selling of any and all such inventions and patent rights and the granting of any and all licenses thereunder; the manufacturing, purchasing, acquiring, using, leasing, selling or otherwise disposing of all articles or materials necessary or useful in connection therewith: the manufacturing, selling or disposing of compressed air, gas or other means or medium of actuating engines or motors in connection therewith.

Form No. 35.

Air Ships and Aeroplanes.

To manufacture, buy, sell, hire, lease, import, export, deal in, operate or otherwise use at any place or places in the Western Hemisphere air ships, aeroplanes, monoplanes, biplanes, machines, flying apparatus or other mechan-

ical contrivances and devices for aerial operation or navigation of any and every kind and description, and any future improvements or developments of the same.

To manufacture, buy, sell, hire, lease, import, export, deal in, operate or use, motors, engines or other machinery or devices of every kind and description, for the generation of power for the propulsion of such above-mentioned air ships, aero and other planes and machines, contrivances and devices for aerial operation, and all machinery, appliances, tools, supplies, materials or other paraphernalia used or capable of use in the construction of the same.

To purchase or otherwise acquire, hold, own, use and operate under any letters patent of the United States or of any other country or government, covering or relating to any of the machines, contrivances, devices, articles and things hereinbefore referred to or any future improvements therein or the manufacture, use or sale of the same, as well also any interest or interests in any such letters patent, or in any inventions, improvements and processes relating to any of the articles or things aforesaid, whether covered by letters patent or not, and to sell and assign the same, or any interests therein, and otherwise to deal in the same, and to grant and convey licenses in respect thereto.

Athletic Goods.

(*See* SPORTING AND ATHLETIC GOODS.)

Form No. 36.

Ammonia.

Buying, selling, dealing in and manufacturing anhydrous ammonia, aqua ammonia, other ammoniacal and kindred products, and all materials and appliances used in such business.

Form No. 37.

Ammunition.

To manufacture, purchase or otherwise acquire and to sell or otherwise dispose of guns, revolvers and firearms of all kinds and descriptions, gunpowder, dynamite and other explosives of every kind, bullets, shot and other projectiles of every kind and description and generally to carry on any business incidental thereto.

To manufacture, purchase or otherwise acquire chemicals, and chemical preparations necessary or desirable in connection with its business.

To apply for, purchase, lease or otherwise acquire and to own, hold, use, lease, or otherwise dispose of trademarks, tradenames, patents, formulæ and secret processes of all kinds.

Form No. 38.

Amusement Parks.

To purchase, lease or otherwise acquire and to hold, own, use, develop, mortgage, lease or otherwise dispose of all real or personal property necessary

or convenient for use as a public amusement resort. To purchase, lease or otherwise acquire and to manage both as principals and agents theatres, roof gardens, amusement parks and any business connected therewith. To employ actors, singers, musicians, acrobats and public performers of all kinds and descriptions. To purchase or otherwise acquire and to dispose of plays, copyrights and compositions both dramatic and musical. To purchase, lease, construct or otherwise acquire and dispose of ferris wheels, scenic railways and other amusement devices of every nature and description and generally to do all things necessary, convenient or incidental to such business either as principals, agents or factors in any part of the world as fully as natural persons might or could do.

Form No. 39.

Animal Fanciers.

To purchase, breed or otherwise acquire and to sell or otherwise dispose of domestic and wild animals, birds, fish and reptiles of all kinds and descriptions. To board, care for and otherwise keep for hire domestic and wild animals, birds, fish and reptiles. To employ veterinary surgeons and to contract for the treatment and treat sick animals, birds and reptiles and generally to engage in the business of breeders and animal fanciers.

Form No. 40.

Architects.

To carry on the business of architects and designers of buildings and structures of all kinds; the preparation and furnishing of plans, designs or other drawings and specifications, including estimates of cost, for the erection, alteration or repair of buildings and structures of any kind and description, and also the supervision and inspection of such work.

Asbestos.

(*See* FIREPROOFING.)

Form No. 41.

Asphalt.

To carry on the trade or business of mining, manufacturing, producing, adapting and preparing, and buying and selling and otherwise dealing in asphalt and cement; and any articles or products in the manufacture or composition of which asphalt or cement is used, including the acquisition by purchase, mining, manufacturing or otherwise of all materials, supplies, and other articles necessary or convenient for use in mining, manufacturing, producing, adapting and preparing asphalt and cement and such other articles or products; also to quarry, dig, mine, deal in and sell any and all kinds of minerals, stone and other products of the earth; also to pave, construct, repair, improve and maintain streets, highways and roads and any and all

public or private works, and generally to carry on any other manufacturing, trading, or contracting business, exporting or importing, which can conveniently be carried on in connection with any of the matters aforesaid; also to purchase, acquire, hold, use and dispose of patent rights, letters-patent, processes, devices, inventions, brands, labels, trademarks, and other rights, and also to do and transact all acts, business and things incidental to or relating to or convenient in carrying on its business as aforesaid.

Form No. 42.

Audit Company.

To examine, inspect and audit books of account, to report and certify the results of such examination, inspection and audit, to guarantee the correctness of such reports and certificates, and of any facts, particulars, knowledge, information and data, published, deposited, sold, exchanged, furnished or otherwise disposed of by it.

(*See also* ACCOUNTANTS.)

Form No. 43.

Automobiles.

The purposes for which, or either of which, said corporation is to be formed are the manufacture and sale of various kinds of motors, engines, machines, or other machinery or contrivances for the generation of steam, electricity, gasolene or other forms of power now known or which may hereafter be discovered; the manufacture and sale of cars, carriages, wagons, boats, and vehicles of every kind and description, for the transportation of passengers or goods, whether the same shall be propelled by motors, engines, machines or other contrivances operated by means of steam, electricity, gasolene or other forms of power; the manufacture and sale of machinery, machine supplies, and engineering appliances, whether incidental to the construction of motor vehicles or not; and the acquisition and sale of inventions, patent rights, letters-patent and trademarks covering any and all of the articles to be manufactured or dealt in by said corporation; the carrying on of any other lawful trade or business incident to the aforesaid purposes or either of them. The said corporation may also acquire, hold and dispose of stocks, bonds and other evidences of indebtedness of any corporation, domestic or foreign, and issue in exchange therefor its stock, bonds or other obligations.

Form No. 44.

Automobile Storage and Supplies.

The purposes for which said corporation is to be formed are as follows: To deal in, sell, operate and let for hire, automobiles, motorcycles and motor vehicles of every kind, nature and description.

To build, maintain and operate buildings, storage houses and garages for the storing, caring for and keeping for hire therein of automobiles, motorcycles and motor vehicles of every kind, nature and description.

And generally to buy, sell and deal in all goods, wares and merchandise necessary or incidental to the operation, repair or equipment of automobiles, motorcycles or motor vehicles of any and all kinds, manufactures and descriptions. And for the purpose of carrying on the businesses aforesaid to buy, sell and convey property, both real and personal, as the same shall be necessary, and generally to do all things that may be necessary to the conducting of said business.

Form No. 45.

Automobile Tires.

To manufacture, buy, sell, import, export and generally deal in tires for automobiles, bicycles, carriages and vehicles of all kinds and descriptions whether the said tires be made of rubber, metal, composition or other material or combination of materials.

Generally to buy, sell and deal in all goods, wares and merchandise necessary or incidental to the operation and repair or equipment of automobiles, motorcycles and other vehicles of all kinds and descriptions.

Form No. 46.

Awnings and Tents.

To manufacture, buy, sell, deal in, import and export awnings, tents, canopies, sails, flags, bunting, advertising and other banners, decorations of all kinds for festivals, celebrations and pageants, cordage, tent poles and supplies, awning hardware and supplies, and all materials necessary in any branch of such business.

Baggage Transfer.

(*See* FORM No. 157.)

Form No. 47.

Bakery.

To manufacture, buy, sell, import, export, trade, and deal in bread, biscuits, crackers, pastries, cakes, pies, confectionery, ice cream and ices, sherbets, fruit juices, extracts and soda fountain beverages, and generally to do all things that may be necessary to the conducting of said business.

Form No. 48.

Bakery.

The making and selling of bread, cake, pies, crackers, ice-cream and confectionery, and all other commodities usual in the baking business; and the purchasing, leasing, managing and operating of stores, bakeries, factories and baking plants and the selling thereof.

Form No. 49.

Baking Powder.

The objects for which the corporation is formed are manufacturing, buying, selling, importing, exporting, refining, and dealing in baking powders, argols, cream of tartar, tartaric acid and all other chemicals which are or may be component parts of baking powder, or may be conveniently produced or dealt in in connection therewith, and generally to carry on any manufacturing or other business which can conveniently be carried on in conjunction with any of the matters aforesaid.

Form No. 50.

Band.

To furnish for hire vocal and instrumental music, monologists, lecturers, readers, vaudeville performers, dancers, and general entertainers for theatres, concerts, hotels, cafés, restaurants, steamboats, pleasure parks, etc.

Form No. 51.

Bicycles.

To carry on the business of manufacturers of cycles, bicycles, tricycles, velocipedes, and carriages of all kinds, and of all articles and things used in the manufacture, maintenance, and working thereof, and also all apparatus and implements and things for use in sports or games.

Form No. 52.

Bicycles and Automobiles.

To manufacture and sell bicycles and all parts and accessories thereof, and to carry on any trade or business incidental thereto or connected therewith; to manufacture and sell automobile vehicles and electric and other motors, and to carry on any trade or business incidental thereto or connected therewith; to carry on any manufacturing or mercantile business lawful in the place where such business shall be carried on; to apply for, purchase, or otherwise acquire, hold, own, use, operate, sell, assign, and grant or conduct licenses in respect to any and all inventions, improvements, and processes used in connection with or secured under letters-patent of the United States or elsewhere; to acquire and undertake all or any part of the business, assets and liabilities of any person, firm, association or corporation; to take, acquire, purchase, hold, own, rent, lease, sell, exchange, mortgage, improve, cultivate, develop, and otherwise deal in and dispose of any and all property, real and personal, of every description incidental to or capable of being used in connection with the aforesaid businesses or any of them.

Form No. 53.

Biscuits and Crackers.

The business and objects of said corporation, which it proposes to carry on, are the manufacture, purchase, sale and export of biscuits, crackers, cakes, Italian paste, confectionery and other food products.

Form No. 54.

Bottling and Manufacturing Carbonated and Aerated Beverages.

To maintain, conduct and manage in the State of New York and elsewhere the business of manufacturing all kinds of carbonated and aerated waters, soda waters, ginger ales and similar beverages, and the bottling of the same, and to import, export, sell, manufacture, bottle, prepare, merchandise, trade and deal in all kinds of beverages and all kinds of syrups, flavors and other ingredients used in the manufacture and preparation of such beverages.

To own, acquire, manufacture, buy and sell all kinds of appliances, machines, tools and supplies used in the preparation, making and marketing of such beverages, including all kinds of containers, bottles, stopples, siphons, siphon-heads, boxes and cases, as well as the material necessary to the manufacture thereof, and all kinds of property and other materials in any way used or to be used in or about said beverages or said business.

Form No. 55.

Boxes.

To manufacture, buy, sell, import, export, trade and deal in boxes, chests, cartons and packing devices generally, whether composed of wood, metal, paper or other materials.

Breeders.

(*See* ANIMAL FANCIERS.)

Form No. 56.

Brewery.

To carry on the business of manufacturing, brewing and bottling all kinds of ale, beer, porter and other beverages, and to purchase, sell and deal in malt and hops and the products thereof.

Form No. 57.

Brick.

The manufacturing, buying, selling, dealing and trading in any and every kind of bricks, stone and building materials, goods and merchandise

by land or water, and for that purpose to purchase, own, charter and operate steamboats, steam tugs, barges and other boats, also to take, acquire, purchase, hold, own, rent, exchange, mortgage, improve, cultivate, develop and otherwise deal in and dispose of any and all property, real and personal, of every description, incident to or capable of being used in connection with the aforesaid businesses, or any of them.

Form No. 58.

Brick Makers.

To carry on the business of manufacturers of bricks, tiles, pipes, pottery, earthenware, china and terra cotta, and ceramic ware of all kinds.

To carry on the businesses of pavers and manufacturers of and dealers in artificial stone, whether for building, paving, or other purposes.

Form No. 59.

Bridge Builders.

To manufacture and sell bridges and bridge and structural work; to buy, sell, manufacture and trade in steel, iron and other metals, and their by-products, and to store and transport the same; also to construct, acquire, maintain, work or operate, lease, sell or otherwise dispose of any lands, appurtenances, plants, business, good will, mills, furnaces, factories, engines, boilers, machinery, apparatus, tools, appliances, and conveniences; also to buy, sell, manufacture and trade in structural iron and steel, plates, materials, supplies, or articles made partly or wholly from metals of any kind; also to buy, sell, manufacture and trade in such other raw materials, products or merchandise as may be conveniently or advantageously used or sold in connection with said business in any of its branches or otherwise; also to apply for, purchase, acquire, hold, own, use, operate, sell, assign or dispose of any or all inventions, improvements and processes used in connection with or secured under letters-patent of the United States, or other countries, or otherwise, and to acquire or grant licenses and rights in respect thereof, or otherwise; and, with a view to the working or development of the same, to carry on any similar business, whether manufacturing or otherwise, calculated, directly or indirectly, to effectuate the objects of such corporation.

Form No. 60.

Brokers.

To buy, sell, exchange, pledge and generally deal in and with government, municipal and industrial bonds and other securities and in and with the stock, debentures, trust receipts and other securities of corporations both domestic and foreign and generally to carry on the business of stock and

bond brokers, but nothing herein shall be construed as an attempt to secure powers not properly obtainable by corporations organized under the Business Corporations Law of the State of New York.

Brooms.

(*See* BRUSHES.)

Form No. 61.

Bronze.

Manufacturing and dealing in silicon and aluminum and other bronzes, and all kinds of metals and metallic compounds, and articles composed wholly or in part of metal, and electrical supplies, and purchasing, holding, selling, exchanging, leasing, pledging, and mortgaging, either directly or indirectly, through agents or trustees, real estate, personal assets, patents, patent rights and other rights, easements, interests, stocks and franchises, which and in such manner as may be advantageous or convenient in the prosecution of its business and authorized by the statute laws of the State.

Form No. 62.

Brushes.

To purchase, manufacture or dispose of, by sale or otherwise, all kinds of brushes, brooms, and dusters; to purchase, manufacture and dispose of, by sale or otherwise, other articles incident to the making of said brushes, brooms and dusters; to acquire and hold, sell or otherwise dispose of, such real estate or other property as the business of the company may require, and in general to perform all the functions intended by law or usage to a manufacturing corporation.

Form No. 63.

Building Company.

The purchasing of real estate, the making and purchasing of materials for the construction of buildings, the erection of buildings, and the owning, managing, operating, leasing and selling of buildings.

Form No. 64.

Building Contractors.

To contract for the construction, alteration, improvement, removal and destruction of buildings of every kind and description and generally to carry on the business of builders, decorators, wreckers, dealers in new and second hand building materials and general contractors.

To manufacture, purchase, hire or otherwise acquire and to own, hold, use and dispose of wagons, trucks, barges, tugs, steam and sail boats and all other appliances and materials necessary or desirable in carrying on its business.

Form No. 65.

Building Materials.

To manufacture, buy, sell and generally deal in brick, stone, lumber, cement and any and all materials capable of use in the construction of any kind of building and to generally carry on the business of dealers in new and second hand building materials.

Business College.

(*See* CORRESPONDENCE SCHOOL.)

Form No. 66.

Butchers.

To purchase or otherwise acquire and sell and generally deal in all kinds of meats and food products both as wholesale and retail dealers and as principals, agents and factors..

(*See also* CATTLE AND SLAUGHTERING CATTLE.)

Form No. 67.

Buttons.

To manufacture and generally deal in bone, ivory, metal, wooden, glass and composition buttons of all kinds and descriptions.

Form No. 68.

Car Builders.

To manufacture, purchase, import or otherwise acquire and to sell, lease, exchange, export and generally deal in passenger, freight, sleeping, dining, mail and express cars and other cars of all kinds and descriptions for use either upon steam, electric, street or other railroads and generally to engage in the business of car builders.

To manufacture, buy, sell, lease, import, export and generally deal in railroad equipment of all kinds and descriptions either as principals, agents or factors and to engage in manufacturing generally.

(*See also* RAILWAY CARS.)

Form No. 69.

Carpet Cleaners.

To construct, purchase, lease or otherwise acquire and to hold, own, use and otherwise dispose of buildings and equip and use the same for the purpose of conducting the business of carpet cleaners, renovators, dyers and cleaners of materials and fabrics of all kinds and descriptions.

To manufacture or otherwise acquire and to use and dispose of pneumatic and other appliances for the cleaning and renovating of fabrics and materials of every kind and description.

To manufacture or otherwise acquire and to use and dispose of chemicals, dyes and other chemical and industrial products and to purchase, apply for or otherwise acquire and hold, own, use and dispose of patents, trademarks, tradenames, secret processes and formulæ of all kinds and descriptions.

Form No. 70.

Carpenters and Builders.

(*See also* BUILDING CONTRACTORS.)

To conduct and carry on the business of general contractors and builders and of general carpentry and woodworking; the erection, construction, alteration, rebuilding, remodeling and repairing of all kinds of houses, buildings and other structures or parts thereof and works and excavations therefor; the performance of all kinds of work in connection therewith; the employment of mechanics, laborers, artisans, and workmen, and the making of contracts and sub-contracts for work and materials; the purchasing, acquiring, holding and selling of real estate; the acquiring and holding of mortgages upon real estate; the making, purchasing and selling of and dealing in materials for the construction of buildings or of parts thereof or which may be conveniently dealt in in connection with the business aforesaid; the owning, managing, operating, leasing, purchasing and selling of buildings and generally to transact all business of a similar nature necessary or incidental to the purposes aforesaid, and to do all things necessary or incidental thereto or connected with the business of contractors and builders or of carpenters and woodworkers.

Form No. 71.

Carriages and Wagons.

To manufacture, repair, buy, sell, exchange, import, export, trade and deal in carriages, buggies, coaches, coupés, carts, omnibuses, wagons, trucks, automobiles, motor cars, and wheeled vehicles of all kinds and bodies and parts for the same, cutters, sleighs and like vehicles for the conveyance of persons and property.

Form No. 72.

Cash Registers.

To manufacture, buy, sell and deal in cash registers, check printing registers, slip printing registers, tape-printing registers, autographic registers, adding machines, calculating machines, registering machines, and any and all similar registers, machines, apparatus and devices and to do all acts and things and to transact all business necessary or proper in connection with the said objects, or incidental thereto, or in any wise connected therewith; and, in general, to carry on any other business, whether manufacturing or otherwise, for the furtherance of the said objects.

Form No. 73.

Cattle.

To buy and sell at wholesale and retail, any and all kinds of cattle and live stock, and any and all kinds of meats, and such goods, wares and merchandise pertaining and belonging to the cattle, live stock, meat and butcher business; and to possess, lease, own, hold, erect and maintain abattoirs for the slaughter and killing of all kinds of animals and cattle usually used for food; and to prepare in any and every manner the carcasses of such animals and cattle into merchandise for the butcher and meat business; and to manufacture such into merchantable and vendible articles; and to manufacture provisions, sausages and other articles and merchandise made of meats and fat, and all kinds of goods kindred to the meat and butcher business; and to buy and sell, convey, hold, acquire, and mortgage all personal and real property necessary or pertaining or in any wise belonging to the meat, butcher, cattle and live stock business, or to carry on any part of said business.

Form No. 74.

Cattle.

To carry on the business of buying, breeding, grazing, pasturing, dealing in and selling cattle, sheep, hogs, horses, and other live stock, and all business incidental thereto.

Form No. 75.

Cement.

The objects for which said corporation is to be formed, including the nature of its business, are the following: Manufacturing, selling and dealing in Portland cement and other cements, lime and brick, and manufacturing, dealing in, selling and laying sidewalks and pavements, and drain, sewer and other kinds of pipes.

Form No. 76.

Cereals.

For the purpose of dealing in all kinds of cereals and of manufacturing and dealing in the products thereof and of doing all other things incident thereto.

(*See also* FLOUR.)

Form No. 77.

Cheese.

To manufacture, buy, sell, import, export, store, trade and deal in cheese and dairy products.

Form No. 78.

Chemists.

To carry on the business of chemists, druggists, dry-salters, oil and colour men, importers and manufacturers of and dealers in pharmaceutical, medicinal, chemical, industrial and other preparations and articles, compounds, cements, oils, paints, pigments and varnishes, drug, dyeware, paint and colour grinders, makers, and dealers in proprietary articles of all kinds, and of electrical, chemical, photographical, surgical, and scientific apparatus and materials.

(*See also* DRUGS.)

Cigars.

(*See* TOBACCO.)

Form No. 79.

Chocolate and Cocoa Products.

(*See also* CONFECTIONERY.)

To manufacture, buy, sell, import, export and deal in all kinds of chocolates, cocoa, and all products of cocoa beans and of the nut of the cocoa tree, made either separately or in combination with other substances, candies and confections of all kinds.

Form No. 80.

Clothing.

To manufacture and deal in clothing, haberdashery, boots and shoes and wearing apparel generally and any other articles which may be conveniently or advantageously handled in conjunction with the business aforesaid. To engage in the manufacture, purchase, sale, export and import of woolen and cotton and other fabrics of all kinds and any and all materials used in the manufacture of clothing and wearing apparel or articles usually dealt in therewith or in connection therewith.

Form No. 81.

Coal.

To buy and sell, deal in, export or import coal, coke and wood and similar combustible material, and to act as the agent of any individual or individuals, natural or artificial, in buying, selling or dealing for them in such materials and to engage in the business of handling, buying, selling, and dealing in and with coal for them or their account and for the purpose of such business, to own or rent or otherwise use or occupy storehouses, docks, piers, boats and barges and any real estate necessary to the carrying on of the said business.

Form No. 82.

Coffee.

The purchasing, selling, curing, ripening, polishing and burning or browning, raising, cultivating, or in any manner dealing, treating, curing or handling coffees.

Form No. 83.

Cold Storage.

The carrying on and conducting the business of storage, cold storage refrigeration, freezing and ice making and dealing in plants for said purposes; the manufacturing, producing and supplying in any manner cold air, refrigeration, ice and freezing compounds in any form for use, distribution and application for any and all purposes; the constructing, purchasing, acquiring, equipping, owning, maintaining, operating, selling and leasing plants, machines, equipments, machinery, apparatus, general supplies, inventions, patents and processes, together with all other property, rights and privileges for any of said purposes, or a part thereof.

Form No. 84.

Collection and Commercial Agency.

To act as a collecting agency for its patrons, take assignments of claims against debtors of its patrons and others, and sue thereon in its own name, if not prohibited, to act as mercantile agency, to investigate and recommend persons desirous of doing business with its patrons and others, and to issue certificates as to the responsibility of persons, firms, partnerships and corporations, associations and institutions, but nothing herein contained shall be deemed to grant any powers prohibited by the Penal Law.

Form No. 85.

Commission Merchants.

To do a general commission merchants and selling agents business; to buy, hold, own, manufacture, produce, sell and otherwise dispose of, either as principal or agent, and upon commission or otherwise, all kinds of personal property whatsoever, without limit as to amount; to buy, sell, hold, own, manufacture, produce, sell and otherwise dispose of, either as principal or agent, all articles of furniture, household or otherwise, without limit as to amount; to make and enter into all manner and kinds of contracts, agreements and obligations by or with any person or persons, corporation or corporations, for the purchasing, acquiring, manufacturing, repairing and selling of any articles of personal property of any kind or nature whatsoever, and generally with full power to perform any and all acts connected herewith or arising therefrom or incidental thereto, and all acts proper or necessary for the purposes of the business.

Form No. 86.

Constructing, Owning and Operating Buildings.

To acquire, by purchase or lease, or otherwise, lands and interests in lands, and to own, hold, improve, develop and manage any real estate so acquired, and to erect, or cause to be erected, on any lands owned, held or occupied by the corporation, buildings or other structures, with their appurtenances, and to manage, operate, lease, rebuild, enlarge, alter or improve any buildings, or other structures, now or hereafter erected on any lands so owned, held or occupied, and to mortgage, sell, lease, or otherwise dispose of any lands or interests in lands, and any buildings or other structures, and any stores, shops, suites, rooms or part of any buildings or other structures, at any time owned or held by the corporation;

To acquire, by purchase or lease or manufacture, or otherwise, any personal property deemed necessary or proper or useful in the equipment, furnishing, improvement, development or management of any property, real or personal, at any time owned, held or occupied by the corporation, and to invest, trade and deal in any personal property deemed beneficial to the corporation, and to mortgage, pledge, sell, let or otherwise dispose of any personal property at any time owned or held by the corporation.

Form No. 87.

Contractors and Builders.

To carry on the business of general contractors: to construct, erect, build, equip, improve, alter and repair roads, highways, tramways, railroads, railways, branches or extensions thereof, sidings, switches, stations, freight and storage houses and other buildings, bridges, reservoirs, wharves, canals and other water courses, sewers, tunnels and subways: to construct, erect, build, equip, improve, alter and repair plants for furnishing, by electricity or otherwise, light, heat and power: to install systems, machinery, appliances and devices for the generation, accumulation and distribution of electrical force and energy of every kind and nature.

(*See also* BUILDING CONTRACTORS, CONTRACTING AND BUILDING, PUBLIC WORK CONTRACTORS and CAR BUILDERS.)

Form No. 88.

Confectionery.

To manufacture, buy, sell, deal in and deal with candy, syrup and confections of all kinds, and the raw material from which they are made and products made therefrom, and all like or kindred products; to manufacture and prepare for market; to market and sell candy, syrups, confections and kindred products: and all other articles or products whatsoever used in their manufacture or composition: to acquire by purchase, manufacture or otherwise, all materials, supplies and other articles necessary or convenient for use in connection with and in carrying on the business herein mentioned or any part thereof.

Form No. 89.

Contracting and Building.

The erection, repairing, raising and improvement of buildings; the building or repairing of bridges; the making of street improvements, whether above or beneath the surface, and the business of general contracting; such as is usually done by contractors.

Form No. 90.

Cordage.

The manufacture and sale of cordage and binder twine, and any and all similar commodities, including the acquisition by purchase, manufacture or cultivation of all materials, supplies, machinery and other articles necessary or convenient for use in connection with and in carrying on the business of manufacturing and selling as aforesaid; the taking, acquiring, buying, holding, owning, selling, leasing, mortgaging, improving, cultivating and otherwise dealing in and disposing of real estate, manufactories, buildings, and improvements necessary or convenient in carrying on said business.

Form No. 91.

Correspondence School.

To establish an educational institution in which persons of both sexes may be taught by correspondence or otherwise, such branches of useful and practical knowledge as shall fit them for occupations requiring applied knowledge in the arts and sciences.

To impart instruction and conduct examinations in all branches of architecture, building, chemistry, civil, mechanical, electrical, mining and sanitary engineering; mechanical and free hand drawing and designing; painting, music, languages and literature, bookkeeping, stenography and all other branches and departments of human knowledge. To prepare, manufacture, sell and generally deal in books, maps, charts, lesson and examination papers, stationery, models, casts, drawings, engravings, instruments and school supplies of every class and description.

To prepare for publication, print, electrotype, bind, sell and distribute magazines, newspapers, pamphlets and publications of all kinds and to engage generally in the business of job and book printers, bookbinders, stationers, engravers and electrotypers.

Form No. 92.

Cotton Oil.

To carry on the business of manufacturing cottonseed oil and other vegetable oils, and each and every product of cottonseed, and all edible fats,

and other oleaginous substances, and all articles of use as food or otherwise, of which cottonseed or cottonseed oil or any product of either forms a component part or may be in any way utilized into any condition, combination, connection, article, substance, or form whatsoever; crushing, refining, treating, buying, selling, dealing and trafficking in any of the articles, products, or substances herein mentioned or referred to; compressing and manufacturing cotton into any form, substance, article or condition whatsoever, and trafficking in the same, erecting, purchasing, or acquiring, operating, equipping, maintaining, selling, leasing, letting, and in any way utilizing or disposing of mills, refineries, compresses, lands, warehouses, vessels, cars, manufactories, merchandise, inventions, patents, processes, machines, plants, business, good will, trademarks, brands, and branches in connection with any of the purposes herein referred to.

Form No. 93.

Cutlery.

To manufacture and generally deal in knives, scissors, razors, edged tools, surgical instruments and cutlery of all kinds and descriptions.

To manufacture and deal in leather goods and other products but only so far as such articles may be necessary or desirable in the cutlery business.

Form No. 94.

Dairy Products.

To manufacture, buy, sell and generally deal in butter, cheese, oleomargarine and butterine and dairy products of all kinds and descriptions.

To purchase or otherwise acquire and to sell or otherwise dispose of milk, eggs and other dairy and farm products of all kinds and descriptions.

To construct, maintain and operate refrigerating plants and cold storage warehouses and to do all things necessary or incident to the purposes as herein set forth.

Form No. 95.

Decorators.

The carrying on of the business of decorative work, consisting of constructing, decorating, painting and furnishing dwelling and apartment houses, hotels, theatres and other buildings, both public and private; the making, using and selling in the said business any kind of glass, and the buying and selling on commission or otherwise, exporting or importing, all manner and kinds of artistic objects for use or ornamentation, or any property used in the decoration or furnishing of buildings of any kind or nature.

Form No. 96.

Department Store.

(1) To establish and conduct a general department store.

(2) To carry on all or any of the businesses of dry goods merchants, cloth manufacturers, furriers, haberdashers, hosiers, manufacturers, importers, wholesale and retail dealers of and in textile fabrics of all kinds; milliners, dressmakers, mantua-makers, tailors, hatters, clothiers, furnishers, outfitters, glovers, lace manufacturers, feather dressers, boot and shoe makers; manufacturers and importers and wholesale and retail dealers of and in leather goods, household furniture, ironmongery, china and glassware, crockery and other household fittings and utensils, ornaments, bric-a-brac, stationery, notions and fancy goods; dealers in meats and provisions, drugs, chemicals and other articles and commodities of personal and household use and consumption; and generally of and in all manufactured goods, materials, provisions and produce.

(3) To carry on any of the businesses of coach and carriage builders, saddlers, harness-makers, house decorators, sanitary engineers, electrical engineers, and contractors in all of the branches thereof; gasfitters, coal and wood dealers, land, estate, and house agents, builders, contractors, auctioneers, cabinet-makers, upholsterers, furniture removers, owners of depositories, warehousemen, carriers, storekeepers; manufacturers of and dealers in hardware, jewelry, plated goods, perfumery, soap, toilet articles of all kinds, and articles required for ornament, recreation or amusement; gold and silversmiths, dealers in precious stones, watchmakers, newspaper proprietors, booksellers, dealers in musical instruments, manufacturers of and dealers in bicycles, tricycles and motor carriages, and sporting goods of all kinds; and also refreshment contractors, restaurant keepers, wine and liquor dealers, tobacconists, and dealers in mineral, aerated and other liquors; barbers and hairdressers, farmers, dairymen, market gardeners, nurserymen and florists, photographers and dealers in photographic supplies, printers, lithographers and engravers, dealers in domestic, trained and fancy animals.

(4) To buy, sell, manufacture, repair, alter and exchange, let on hire, export and deal in all kinds of articles and things which may be required for the purposes of any of the said businesses, or commonly supplied or dealt in by persons engaged in any such businesses, or which may seem capable of being profitably dealt with in connection with any of the said businesses.

(5) To provide and conduct refreshment-rooms, newspaper-rooms, reading and writing-rooms, dressing-rooms, telephones, and other conveniences for the use of customers and others.

(6) To grant to other persons or corporations the right or privilege to carry on any kind of business on the premises of the company on such terms as the company shall deem expedient or proper.

Form No. 97.

Development and Improvement of Real Property, with Right of Condemnation.

See section 16 of the Business Corporations Law.

To buy, acquire, hold, own, maintain, sell, convey and generally deal in, lease, mortgage, exchange and otherwise deal in and dispose of real estate and real property of all kinds or any interest and rights therein.

To carry on the business of developing and improving real property; laying out for public use roads, streets, avenues or highways, upon or through its lands; extending, continuing or connecting such roads, streets, avenues or highways upon or through other real property to be acquired, and, if unable to agree for the purchase thereof with the owners of any real property required for the purpose, to acquire title thereto by condemnation in the manner prescribed by law; to lay out and establish such roads, streets, avenues or highways, and the extensions, continuations or connections thereof, and to construct drains or sewers, and such bridges or culverts as may be necessary to maintain the grades of, or for the extension, continuation or connection of the roads, streets, avenues or highways, so laid out; to connect such roads, streets, avenues or highways, with or across roads, streets, avenues or highways, belonging to any other corporation or person, but in such manner as may not disturb the established grades thereof.

(*See also* REAL ESTATE.)

Dyers.

(*See* CARPET CLEANING.)

Form No. 98.

Distillers.

The objects for which the said corporation is to be formed are the carrying on of the general business of distilling spirits, including the distilling, redistilling and rectifying of wines, alcohol, spirits, gins and whiskies of all kinds and description, and dealing in the same and the by-products thereof throughout the United States and elsewhere; also malting and dealing in malt; and the purchasing, acquiring, leasing, holding and disposing of such real estate and personal property as may be necessary or proper for the safe, convenient and profitable conduct of such business, and the doing of any other business incident to the main purpose of the corporation.

(*See also* LIQUORS.)

Form No. 99.

Dock and Terminal Company.

To carry on the business of freighting, elevating, lighterage, storage, wharfage, warehousing, forwarding, docking, storing and berthing of ships, steam vessels, boats and every other kind of water craft; receiving, unloading, loading, transferring, storing, warehousing, elevating and forwarding by car, float, boat, and in any other way, all kinds of goods, wares, merchandise and any other commercial commodity or thing of value, and the doing of any act or thing connected therewith or incidental to such business, act or thing; erecting, constructing and maintaining elevators, coal bins, pockets and chutes, bulkheads, piers, basins, floating and other docks, warehouses, terminal, transfer and other facilities, buildings for manufacturing and trafficking, the purchasing, acquiring and holding property, rights, privileges and franchises necessary or incidental to the convenient transacting and conducting of the aforesaid business, and of selling, leasing, mortgaging

and conveying the same or any part thereof; the issuing of storage, dock and warehouse receipts negotiable and non-negotiable, covering all kinds of goods, wares, merchandise and any other commercial commodity or thing of value; the purchase and sale of ships, steamers, vessels and every other kind of water craft, and all goods, wares, merchandise, or any other commodity or thing of value; the making and manufacturing of engines, boilers, launches, boats, water crafts of all kinds, or any other article or thing of value; the collection and receipt of dockage, wharfage and storage dues and other compensation; the loaning of money on the pledge of goods, wares, merchandise and other property, or on the pledge of storage, dock or warehouse receipts therefor; and the advancing of freights, duties, fire and marine insurance and liens of every kind and nature upon goods, wares and merchandise or other property received on storage, or for the purpose of being warehoused or forwarded upon the pledge of said goods, wares, and merchandise or other property, or upon the pledge of storage, dock or warehouse receipts therefor.

Form No. 100.

Dredging.

Dredging, filling and reclaiming lands; general dredging work on any of the navigable rivers, lakes and harbors, in the various arms of the sea and rivers running into the same; dock building; river and harbor improvements.

Form No. 101.

Dressmakers.

To carry on the business of tailors, dressmakers, milliners and manufacturers and dealers in underwear and hosiery of every kind and description.

Form No. 102.

Drugs.

To manufacture, import, purchase, sell and deal in drugs, medicines, paints, chemicals, oils, dye-stuffs, glass ware, toilet articles, fancy goods, druggists' sundries, perfumeries, surgical apparatus, physicians and hospital supplies, and general merchandise.

(*See also* CHEMISTS.)

Form No. 103.

Drugs.

To manufacture, buy, sell, import, export, trade and deal in drugs, medicines, proprietary articles, druggists' sundries, chemicals, extracts, tinctures, pomades, ointments, liniments, toilet articles, perfumeries, surgical apparatus, physicians and hospital supplies, paints, oils, dye-stuffs, glass ware, fancy goods and general merchandise.

Form No. 104.

Dry Goods.

To do a dry goods and notions, jobbing and commission business; and generally to do a mercantile business in the State of New York, throughout the United States of America, and elsewhere.

(*See also* DEPARTMENT STORE.)

Form No. 105.

Electrical Work.

The purposes for which it is to be formed are the following, viz.: To carry on a general contracting business; to do electrical work of every kind and description, including the business of electricians, electrical and mechanical engineers and dealers, either as principals or agents, in electric motors, dynamos, and electrical machinery, appliances, plants and supplies of any nature or kind whatsoever; to construct, erect, install, alter, repair, equip and deal in works, plants, instruments and machinery for supplying and distributing electricity for light, heat, power or other purposes, street and other railways for operation by electricity or otherwise, telephone and telegraph lines including all instruments, poles, fixtures, wires and appliances for connecting electric apparatus at a distance with other electric apparatus as well as electric exchanges or centres, subways, conduits and ducts, power supply works, warehouses and buildings, public or private, tunnels, bridges, viaducts, docks, harbors, piers, wharves, canals, reservoirs, and all other works of public or private use; to make or otherwise acquire and carry out any contracts for or in relation to the construction, erection, equipment and improvement of public or private works or buildings, and to undertake, execute, carry out, dispose of or otherwise turn to account the same; to construct, repair, alter, trade and deal in and with any or all machinery, appliances and supplies used in the manufacture, generation, storage, accumulation, transmission or distribution of any or all types of electric current, and any or all manner of electric machinery, apparatus or supplies of any nature or kind whatsoever; to buy, sell, deal in, repair, alter, or lease fixtures, chandeliers, electroliers, brackets, lamps, globes and other supplies and appurtenances used for or in connection with the manufacture, generation, accumulation, storage, transmission, distribution, or use of electric current for light, heat, or power; to buy, sell and trade in other machinery, supplies and merchandise and to do any and every act or thing that may be appurtenant, incidental to or necessary in connection with the foregoing purposes.

Form No. 106.

Elevators.

To manufacture, erect, build, furnish, equip, construct, repair, maintain, operate, buy, sell, and in general to utilize and deal in and deal with elevators and all kinds of hoisting machinery, including the acquisition by purchase,

manufacture or otherwise of all materials, supplies, machinery and other articles necessary or convenient for use in connection with and in carrying on the business herein mentioned, or any part thereof.

To manufacture, purchase, or otherwise acquire, hold, own, mortgage, sell, assign, and transfer, invest, trade, deal in and deal with goods, wares and merchandise and property of every class and description, including any and all kinds of engines, dynamos, generators, pumps and any and all kinds of machinery, and all kinds of implements or articles of manufacture, and any and all kinds of mechanical apparatus.

Form No. 107.

Enameled Goods.

To manufacture dials of all kinds for watches, clocks, meters, indicators and all other purposes; also to manufacture all kinds of enamel, enameled goods and articles, ingredients, mixtures or compounds necessary for the above or for any other purpose; also to do all kinds of enameling and printing; also to manufacture any other articles or things incidental or appertaining to the above; and also to buy and sell any of the above, or any articles incidental or appertaining thereto.

Form No. 108.

Engineering.

To plan, design, construct, alter, repair, remove or otherwise engage in any work upon bridges, railroads, canals, piers, docks, wharves, buildings, foundations, mines, shafts, tunnels, wells, waterworks, and all kinds of excavation and subterranean work, and to make, execute and take or receive any contracts or assignments of contracts therefor or relating thereto or connected therewith, and to receive in payment therefor cash or stocks, bonds, or other securities of any corporation with which such contracts may be made, and any and all other property of any sort whatsoever, and to hold or sell the same, and to subscribe to the capital stock, bonds, debentures, or other securities of any such corporation.

Form No. 109.

Explosives.

The purposes for which it is formed are to conduct the business of manufacturing, buying, selling and dealing in, and otherwise acquiring and disposing of, apparatus, tools, machinery, appliances, explosives, chemicals, compounds and other goods, wares and merchandise of every kind and description, used or capable of being used, in connection with mining or quarrying ores and minerals; also to manufacture, buy, sell, deal in and use alkalies and chemicals of every kind, and all articles and things used in the manufacturing, maintaining and working thereof.

(*See also* AMMUNITION and POWDER.)

Form No. 110.

Express Business.

To transfer, carry and transport goods, wares and merchandise and personal property of every kind and description, from or to any points or places in the United States or elsewhere, by means of electric cars or vehicles, steam cars or vehicles, horses, wagons, boats, or any other means or method of transportation; to contract or arrange with railroads, ferries, steamboats or other companies, and with individuals to transfer, carry and transport such personal property for and on behalf of this corporation; and generally to do and transact an express and transportation business, with all the rights, privileges and powers necessary or desirable for the transaction of such business or incident to the conduct of the same.

To carry on a general transfer and express business in the city of New York and elsewhere; to purchase, lease or otherwise acquire such real estate and personal property as may be necessary for said business, and to do any and all acts incidental to or connected therewith.

Form No. 111.

Express (Live Stock).

To buy, sell, equip and maintain cars, and any and all other vehicles by land and water, for the purpose of transporting live stock, and to transport the same by any and all means of transportation by land and water.

Farm and Dairy Products.

(*See* DAIRY PRODUCTS.)

Farm Implements.

(*See* AGRICULTURAL IMPLEMENTS.)

Form No. 112.

Fire Extinguishers.

To manufacture, purchase or otherwise acquire and to sell or otherwise dispose of chemicals and chemical compounds and products and all other substances, materials and devices for use in extinguishing fires.

To manufacture and deal in fire escapes, lightning rods and other materials and devices for the protection of buildings and property against loss by fire.

Form No. 113.

Fire Proofing.

To manufacture, buy, import or otherwise acquire and to sell, export and generally deal in asbestos and other fire proofing materials and compounds

of all kinds and descriptions and to manufacture and deal in all kinds of materials and devices for insulation and for the protection of buildings, structures and property of every description from damage by fire or lightning.

Form No. 114.

Fisheries.

To catch, cure, can, purchase, sell, and otherwise acquire, dispose of and deal in and with fish and sea food of all kinds; to cut, manufacture, store, and deal in ice, natural and artificial; to do a general cold storage business in and of commodities, as principal, agent or consignee: to build, construct, purchase or otherwise acquire and operate any and all works, appliances and facilities and equipments useful or convenient in connection with any objects of the company, including the marketing of its commodities and products, and doing a general commission business.

Form No. 115.

Fisheries.

To carry on the business of catching, buying, selling and dealing in fish of all kinds; manufacturing such kinds of fish as are particularly suited thereto, into fish oil and fish guano; manufacturing fertilizer and other products capable of being made from fish guano or other guano, or other materials customarily used in manufacturing fertilizers, and dealing in all such products and all other materials, articles and products capable of being manufactured or used in connection with the manufacture and sale of any of the above-named products; to establish and maintain factories, agencies and depots for the manufacturing and sale of fish oils, guano, fertilizers and any and all products capable of being made therefrom; to carry on the business of storing, packing, salting, canning and otherwise preserving and dealing in all kinds of food fishes.

Form No. 116.

Flour.

To purchase, raise, import or otherwise acquire and to sell, export and generally deal in grain and cereals of every kind and to manufacture, buy and sell flour and other cereal products.

To purchase, build, lease or otherwise acquire and to hold, own, operate, use, mortgage, sell and otherwise dispose of factories, mills, grain elevators, warehouses, and structures of all kinds necessary or convenient for its business.

Flower Seeds.

(*See* GARDEN SEEDS.)

Form No. 117.

Food Products.

To buy, or otherwise acquire, to manufacture, market, prepare for market, sell, deal in and deal with, import and export food and food products of every class and description, fresh, canned or preserved or otherwise, and all food and other preparations.

To engage in any business, whether manufacturing or otherwise, which may seem advantageous or useful in connection therewith, and to manufacture, market or prepare for market any article or thing which the company uses in connection with its business.

In connection with the foregoing to manufacture, market and prepare for market, buy, sell, deal in and deal with, import and export tin, and any products of tin, glassware, and any article of glassware, or any other article, receptacle, package or thing which may be useful in connection with the manufacture or marketing, vending or shipping of the products of the company, or like products.

Form No. 118.

Furnaces and Stoves.

To manufacture and generally deal in stoves, furnaces, radiators, ranges, gas and electric appliances and devices of all kinds for heating by hot air, steam, or other agency.

Form No. 119.

Furniture.

To manufacture, purchase, import or otherwise acquire and to sell, export, exchange and otherwise dispose of and generally deal in all kinds of furniture, rugs, carpets, curtains, pictures, bronzes and other works of art and all other articles capable of being used to furnish or beautify private or public buildings, offices, gardens, parks and pleasure resorts.

Garage.

(*See* AUTOMOBILE STORAGE AND SUPPLIES.)

Form No. 120.

Garden Seeds.

To carry on the business of growing, cultivating, dealing in, importing and exporting garden, field and flower seeds, plants, trees, bulbs and shrubs, and the business of evaporating fruits and dealing therein.

Form No. 121.

Gas Fixtures and Lamps.

To manufacture, buy, sell, lease, and let gas fixtures, chandeliers, electroliers, brackets, lamps, globes, any and all of which may be of any form, kind or description; and to manufacture, buy, sell, lease, and let any other supplies or appurtenances used for or in connection with the use of gas, electricity or any other power, or material used for heating or lighting purposes; and to make, manufacture, buy, sell, lease, let any and all things, materials, substances, machines, tools, buildings and anything whatsoever necessary for the carrying on of the business under its charter.

General Contractors.

(*See* CONTRACTORS AND BUILDERS.)

Form No. 122.

Glass.

Manufacturing glass and glass ware of any and all kinds and description; to manufacture such machinery and appliances as are or might be useful in connection with the preparation of glass ware; to produce, as opportunity offers, whatever crude materials are necessary for the manufacture of glass; to buy such lands and erect such buildings as are needed for the purpose of carrying on the business of the corporation, and to sell and dispose of the same as authorized by law; to buy, own, and sell the plant or plants of other companies heretofore carrying on a similar business.

(*See also* PRISMATIC GLASS.)

Form No. 123.

Gold and Silver Ware.

To carry on the business of manufacturers of, dealers in and contractors for the sale, purchase and exchange of gold and silver ware, gold and silver plated ware, glass ware, crockery, cutlery, leather goods, tools, machinery, wooden ware and silks, and generally to manufacture, buy, sell, exchange and deal in the above specified products and in all materials used in the manufacture of each, any and all of such articles.

To carry on as principals, agents, commission merchants or consignees, the business of manufacturing and dealing in gold and silver ware, gold and silver plated ware, metal ware, glass ware, crockery ware, cutlery, leather goods, tools, machinery, wooden ware and silks, and all materials used in the manufacture of each, any and all of such articles, and to carry on as principals, agents, commission merchants or consignees any other business which may be conveniently conducted in conjunction with any of the matters aforesaid.

(*See also* JEWELRY.)

Form No. 124.

Grain Elevator.

Elevating, storing and transferring grain of all kinds, and building, constructing, purchasing, leasing or otherwise acquiring, using, managing and operating an elevator or elevators for the above purposes, and for the transaction of all such business as is, or may be, in any way connected therewith, or incidental to the foregoing purposes.

(*See also* FLOUR.)

Form No. 125.

Graphite.

To manufacture graphite, purify carbon, prepare graphite and carbon for paints, foundry facing, electrotyping and other purposes; to manufacture, buy, sell, deal in and deal with graphite, paints, stove polish, crucibles and other forms of graphite and carbon articles.

Form No. 126.

Hardware.

To carry on the trade or business of manufacturing, producing, adapting, preparing, buying and selling and otherwise dealing in, hardware and hardware supplies incident thereto, and any articles in the manufacture or composition of which metal is a factor; and to manufacture, produce, purchase, adapt, prepare, use, sell or otherwise deal in, any materials, articles and things, required for or in connection with, or incidental to the manufacture, use, purchase and sale of any and all of the aforesaid wares and articles; and also to carry on any other manufacturing or distributing business such as commission merchants, factors, agents or otherwise, which can conveniently be carried on in conjunction with any of the matters aforesaid.

Form No. 127.

Holding Company (Metropolitan Securities Co.).

The purposes for which it is to be formed are as follows: To subscribe for, purchase, invest in, hold, own, assign, pledge or otherwise dispose of shares of capital stock, bonds, mortgages, debentures, notes and other securities, obligations, contracts and evidences of indebtedness of corporations of the State of New York and any other State, including corporations which own, operate or lease or which are organized for the purpose of constructing, owning, operating or leasing street surface railroads, elevated railroads, rapid transit railroads, underground railroads, tunnels, bridges, tunnel railroads, railway terminals or railroads of any character or description in the city of New York, or its suburbs, or any territory adjacent

thereto, and corporations engaged in furnishing or organized to furnish electricity for any lawful purposes or power in any form for use upon, or which may be used upon street railroads or other railroads, and corporations whose funds are or may be invested in the shares of stock, bonds or other securities of any corporations of the character hereinbefore described; to exercise in respect of any such shares of stock, bonds and other securities of corporations, any and all rights, powers and privileges of individual ownership, including the right to vote, to issue bonds and other obligations, and to secure the same by pledging or mortgaging the whole or any part of the property of the company, and to sell or pledge such bonds and other obligations for proper corporate purposes; and to do any and all acts and things tending to increase the value of the property at any time held by the company.

The said corporation shall be and is hereby authorized to purchase, acquire, hold and dispose of the stocks, bonds and other evidences of indebtedness of any corporation, domestic or foreign, and issue in exchange therefor its stock, bonds or other obligations.

Hosiery.

(*See* KNIT GOODS.)

Form No. 128.

Hotel.

To carry on the business of hotel and innkeepers, restaurant keepers, caterers, keepers of livery stables and stables for horseless conveyances of all kinds, warehousemen, tobacconists, dealers in provisions, wine and liquor dealers, barbers and hairdressers, newsdealers, and proprietors or managers of theatres, opera houses and other places of public entertainment.

To purchase, lease, hire or otherwise acquire, to hold, own, maintain, improve, alter, and to sell, convey, mortgage, or otherwise dispose of real estate and personal property and any interest therein, in or out of this State, and in such place or places in the several States and Territories of the United States, the District of Columbia, colonial possessions or territorial acquisitions of the United States and any foreign countries, as shall from time to time be found necessary and convenient for the purposes of the company's business; to have one or more offices and to carry on all or any part of its operations and business in any State or Territory of the United States, and in any foreign country or place.

Form No. 129.

Hotel.

To buy and sell hotels, restaurants and boarding-houses; to manage and conduct hotels. restaurants, cafes and boarding-houses, and to lease and hire the same; to build and construct hotels, apartment and other buildings, and generally to do and perform everything necessary for the aforesaid purposes.

Form No. 130.

Ice.

[A company organized for furnishing water has implied power to harvest and sell ice. Peo. ex rel. Goff v. Kirk, 65 Misc. 657 (1908).]

Manufacturing, preparing, cutting, gathering, collecting, harvesting, storing, preserving, packing, buying, selling, dealing in and transporting all kinds of ice; to erect, establish, manufacture, make, construct, acquire, hold, operate, buy, sell, trade and deal in all kinds of refrigerating plants, ice machines, ice-making apparatus and refrigerating processes; to construct, purchase, charter or otherwise acquire, and to hold, own, use, equip, operate and dispose of any and all steamships, steamboats, sailing ships, barges or vessels of any class, kind or nature whatsoever which may be necessary, useful or convenient in or about the operations or business of the said company.

Form No. 131.

Ice Machines.

To manufacture, buy, sell and lease ice machinery and other articles; to own, control, buy and sell patents and to license thereunder; to own, buy, sell, lease and mortgage real estate and personal property; and to do all acts that may be convenient or necessary in a general manufacturing business.

Ink.

(*See* STATIONERS.)

Form No. 132.

Inspection of Elevators.

The protection, keeping in order, operation and the guaranteed inspection of freight and passenger elevators in apartment-houses, office buildings, hotels, and any buildings where elevators may be used and maintained.

Form No. 133.

Insurance Agents.

To act as agents or brokers in the business of marine, fire, life, health, accident and disability insurance, and in any other kind of insurance in all its branches.

Form No. 134.

Iron and Steel.

To manufacture iron, steel, manganese, coke, copper, lumber and other materials, and all or any articles consisting, or partly consisting, of iron, steel, copper, wood or other materials, and all or any products thereof.

To acquire, own, lease, occupy, use or develop any lands containing coal or iron, manganese, stone or other ores, or oil, and any wood lands, or other lands for any purpose of the company.

To mine, or otherwise to extract or remove, coal, ores, stone and other minerals and timber from any lands owned, acquired, leased or occupied by the company, or from any other lands.

To buy and sell, or otherwise to deal or to traffic in, iron, steel, manganese, copper, stone, ores, coal, coke, wood, lumber and other materials, and any of the products thereof, and any articles consisting, or partly consisting, thereof.

Form No. 135.

Jewelry.

To manufacture, buy, sell and deal in watches, diamonds, jewelry, ornaments and fancy articles of various kinds, and other kinds of merchandise and property, and likewise to buy and sell patent rights and licenses for any and all useful improvements in jewelry, ornaments and fancy articles.

(*See also* GOLD AND SILVER WARE.)

Form No 136.

Knit Goods.

The manufacture and sale of hosiery, underwear and other goods for human use, from wool, cotton, flax, hemp, silk or any other material that can be spun into a thread, and the manufacture and sale of garments, or cloth of any description.

Form No. 137.

Lamps.

To manufacture, use, sell and deal in lamps, machinery and appliances for the production, use or application of light or heat, also to manufacture, use, sell and deal in all articles and things to which the same may be applied or which may be necessary or convenient in connection therewith; to own, hold, purchase, acquire, mortgage, sell or otherwise dispose of all such tools, machinery, patterns and other personal or real property, and to apply for, purchase, or otherwise acquire, and to hold, own, use, operate, and to sell, assign or to otherwise dispose of, to grant licenses in respect of, or otherwise turn to account any and all such inventions, improvements and processes used in connection with or secured under letters-patent of the United States or elsewhere, as may be necessary or convenient for furthering the business of the corporation.

(*See also* GAS FIXTURES AND LAMPS.)

Form No. 138.

Land and Development.

To take, lease, purchase or otherwise acquire, and to own, use, hold, sell, convey, lease, exchange, mortgage, improve, develop, cultivate, and otherwise handle, deal in and dispose of real estate, real property and any interest or right therein.

To convert and appropriate any land that may be acquired by the corporation into and for ways, roads, paths, streets, alleys, lanes, sidewalks, courts, lawns, parks, boulevards, squares, building lots, additions, town-sites and pleasure grounds, and to plot, clear, grade, survey, develop, improve, cultivate, manage and administer any land owned or controlled by the corporation.

To erect or have erected, to construct or have constructed, houses, buildings, store-rooms, factories, tenements, edifices, works and structures of every description and to rebuild, enlarge, improve, alter, repair, raze and remove existing houses, buildings and structures of every kind and description and to buy, sell, own, use, manage and lease the same or similar structures.

Form No. 139.

Laundry.

To carry on the business of a steam and general laundry, and to wash, clean, purify, scour, bleach, wring, dry, iron, color, dye, disinfect, renovate, and prepare for use all articles of wearing apparel, household, domestic and other linen, and cotton and woolen goods and clothing, and fabrics of all kinds, and to buy, sell, hire, manufacture, repair, let on hire, alter, improve, treat and deal in all apparatus, machines, materials, and articles of all kinds, which are capable of being used for any such purposes.

Form No. 140.

Lead.

The objects for which said company is formed are as follows, viz.: To acquire by purchase, lease or otherwise, and to own, sell, lease, mortgage, convey, develop, improve and operate mines; to own, acquire, construct, enlarge, improve, operate and carry on works for smelting, parting, refining or working any base or precious metals, or the products thereof, and factories for the manufacture of lead in any and all commercial and medicinal forms and qualities, and for the manufacture of pyroligneous acid, acetate of lime and charcoal by the process of destructive distillation, carbon dioxide, magnesia and the products thereof, together with factories or works for the purpose of producing, refining or manufacturing linseed and castor oils and vegetable, mineral or other oils and the products thereof, and compositions, articles and apparatus from and in connection therewith, and to manufacture the products of said mines and said substances; and generally to carry on such manufacturing or other business as may be necessary or convenient for the business and operations of the company, or any part thereof; to buy, sell,

trade and deal in the products of said mines, factories, works and properties in their crude form, or in any state or stage of production or manufacture, as well as the properties themselves, including base and precious metals, lead and oils of every kind and quality, and in any form or condition, and such other substances, products and materials as are commonly or conveniently used, manufactured, bought or sold in connection with said business or businesses, or any part or parts thereof, or as are necessary or convenient in and about or connected directly or indirectly with the transaction of the business of the said company.

Form No. 141.

Lead and Oil.

To mine lead and any other mineral or minerals and to sell or lease to others the right to mine such lead and other mineral or minerals; to acquire, deal in, buy, sell and otherwise dispose of ores, minerals and metals and to smelt, reduce, refine, mill and otherwise treat ores, minerals and metals; to corrode lead and other metals and to produce, manufacture, acquire, deal in, buy, sell and otherwise dispose of all products and compounds of lead and all combinations into which lead or any of its elements enters; and all products and compounds of other minerals, and all combinations into which any other mineral or any element thereof enters; to acquire, hold and deal in oil lands, and search for, win, get, produce, refine, manufacture, acquire, deal in, buy, sell and otherwise dispose of mineral, vegetable or other oils and any liquid, chemical or drug useful in connection with the said purposes or either of them, and in connection with the products, combinations and compositions thereof; to purchase, acquire, own, erect, construct, lease, sell, supply, hold or hire and maintain any lands, plant, plants, machinery, business or other things incidental to or connected with any of the purposes aforesaid.

To grow, handle, buy, sell, deal in, deal with and mill flaxseed and other agricultural products; to acquire, own, hold and deal in lands or any interest therein suitable for growing flaxseed and other agricultural products; also to acquire, own, hold, buy, sell and deal in lands, buildings, elevators, tanks, mills and other structures suitable or advisable for storing, treating, handling, purchasing, selling, dealing in, milling and otherwise dealing with and utilizing in any manner whatsoever flaxseed, linseed oil and other agricultural products, and all things of whatsoever nature useful or necessary in the growing, purchasing, selling, owning, treating, handling, dealing in or dealing with, milling and otherwise utilizing flaxseed, linseed oil and all other products thereof and other agricultural products, and to buy, sell, produce, deal in, deal with and refine linseed oil and all other products or by-products of flaxseed.

Form No. 142.

Leather.

Manufacturing and selling leather, lumber, and belting, including the acquisition and use in the manner and to the extent permitted by law, of all necessary and convenient lands, timber, bark, mills, plants, machinery, supplies

and other articles and property necessary to or convenient in connection with the manufacturing and sale of leather, lumber and belting, as aforesaid; and in general to engage in any lawful business whatever, which may be found convenient or necessary in connection with the business of manufacturing and selling leather, lumber and belting, as aforesaid.

Form No. 143.

Liquors.

To manufacture, buy, sell, import, export and generally deal in spirits, wines, liquors and beverages of all kinds and descriptions and all materials necessary or incidental to the business of distilling, and in general to carry on the business of distillers and wholesale and retail liquor dealers in all its branches and any business incidental thereto.

(*See also* DISTILLERS.)

Lithographers.

(*See* PRINTING AND PUBLISHING.)

Form No. 144.

Lumber.

To acquire by purchase or otherwise, own, buy, sell and deal in standing timber and timber lands, and to buy, cut, haul, drive and sell timber and logs, and to saw and otherwise work the same, and to buy, manufacture and sell lumber, bark, wood, pulp and all products made therefrom.

Form No. 145.

Machinery.

Manufacturing, buying and selling engines, boilers, machinery, tools, machine shop, foundry and factory supplies, and all kinds of heavy hardware.

Form No. 146.

Malt.

Manufacturing, selling and dealing in malt and its by-products or products incidental thereto, and all other products in the manufacture of which malt is or may be used, and the business incidental thereto.

Form No. 147.

Matches. (Diamond Match Co.)

To manufacture and sell matches, and all materials and machinery used in the manufacture thereof, or incidental thereto, and to transact a general match business.

Form No. 148.

Mercantile Reporting Company.

To enter into contracts with merchants for the purpose of supplying the merchants with financial reports or opinions concerning the business responsibility of the customers of such merchants. Such financial reports or opinions shall state only the financial condition of the subject of the report in respect to assets, liabilities, surplus, solvency or insolvency, and kindred things, at the time of the investigation or date of the financial report or opinion; provided, however, that the corporation shall not assume liability for subsequent changes of the financial condition of the subject of the report or results thereof. These contracts shall provide among other things, that the company is responsible to the merchants for the accuracy in material respects of such financial reports or opinions and shall provide a measure of damages for the liability of the company to the merchants in the event that the financial report or opinion is inaccurate in material respects, and not otherwise. The measure of damages so to be provided in the contract shall not in any event exceed the amount of credit extended by the merchant to the subject of the financial report or opinion and the company reserves the right to limit its liability to a definite sum, to be fixed in the contracts between the company and the merchants. The damages to be paid by the company to the merchants shall not at any time exceed the amount of loss actually sustained by the merchants.

A corporation may be organized under the Business Corporations Law for the purpose of carrying on the business set forth in the foregoing statement. The clause providing for the liability of the company in case of inaccurate reports does not contemplate an insurance business. Peo. ex rel. Daily Credit Service Corpn. v. May, 162 A. D. 215 (1914), affd., 212 N. Y. 561.

Form No. 149.

Mining.

To purchase, take, on lease, or otherwise acquire, any mines, mining rights, and metalliferous land, and any interest therein, and to explore, work, exercise, develop, and turn to account the same. (2) To crush, win, get, quarry, smelt, calcine, refine, dress, amalgamate, manipulate, and prepare for market, ore, metal, and mineral substances of all kinds, and to carry on any other metallurgical operations which may seem conducive to any of the company's objects. (3) To buy, sell, manufacture, and deal in minerals, plant, machinery, implements, conveniences, provisions, and things capable of being used in connection with metallurgical operations, or required by workmen and others employed by the company. (4) To construct, carry out, maintain, improve, manage, work, control, and superintend any roads, ways, tramways, railways, bridges, reservoirs, watercourses, aqueducts, wharves, furnaces, sawmills, crushing works, hydraulic works, electrical works, factories, warehouses, ships, and other works and conveniences which may be necessary, directly or indirectly, in connection with any of the objects of the company, and to contribute to, subsidize, or otherwise aid or take part in any such operations.

Form No. 150.

Motion Picture Films.

To manufacture, purchase, sell, import, export, rent, lease, repair and operate motion picture films, motion picture cameras and motion picture projecting machines and apparatus, lantern slides, and apparatus and devices of every kind that may be necessary or incidental to the foregoing business or in connection with the production upon the theatrical stage of motion picture exhibitions and the giving of vaudeville performances in conjunction therewith.

Musical Instruments.

(*See* PIANOS AND ORGANS.)

Form No. 151.

Natural Gas.

Purchasing, leasing, or otherwise acquiring lands, or the oil, gas and mineral rights in lands, for the purpose of producing therefrom oil, gas or other volatile or mineral substances; the development of the said lands by drilling oil and gas wells thereon and the installation of plants, machinery and appliances for such purposes and the marketing and selling of the said products.

Newspapers.

(*See* PRINTING AND PUBLISHING.)

Form No. 152.

Oil.

To produce, purchase, store, refine and deal in petroleum and its products at both wholesale and retail, and to manufacture all or any of the products of petroleum, and packages for holding the same. The corporation may also purchase, acquire, hold and dispose of the stocks, bonds and other evidences of indebtedness of any corporation, domestic or foreign, and issue in exchange therefor its stock, bonds or other obligations.

Form No. 153.

Standard Oil Company. (New Jersey.)

To do all kinds of mining, manufacturing and trading business; transporting goods and merchandise by land or water in any manner; to buy, sell, lease and improve lands; build houses, structures, vessels, cars, wharves, docks and piers; to lay and operate pipe-lines; to erect and operate telegraph and telephone lines and lines for conducting electricity; to enter into and carry out contracts of every kind pertaining to its business; to acquire, use, sell and grant licenses under patent rights; to purchase or otherwise acquire, hold,

sell, assign and transfer shares of capital stock and bonds or other evidences of indebtedness of corporations, and to exercise all the privileges of ownership, including voting upon the stocks so held; to carry on its business and have offices and agencies therefor in all parts of the world; and to hold, purchase, mortgage and convey real estate and personal property outside of the State of New Jersey.

Form No. 154.

Optical Goods.

To carry on the business of opticians, to manufacture, purchase and sell eye-glasses, opera glasses, field glasses, magnifying lenses for all purposes, and apparatus for carrying on the business of opticians and dealers in optical goods generally.

Organs.

(*See* PIANOS AND ORGANS.)

Form No. 155.

Paints.

To manufacture, import and export, sell and generally deal in chemicals, dyes, paints, varnishes, putty, white lead, enamels, colors, pigments, oils, turpentine and similar materials of all kinds and descriptions and generally to engage in the business of manufacturers and dealers in paints and varnishes.

Form No. 156.

Paper.

The purposes for which said corporation is formed are the maintaining, conducting and managing in the State of New York and elsewhere, the business of manufacturing, producing, purchasing, selling and dealing in any and all kinds of paper, and in all ingredients, products and compounds thereof, and in any and all materials that now are or hereafter may be used in, or in connection with such manufacture, including the manufacture and production of wood pulp and any other fibre, and, as a part of and incident to such business, mining of iron pyrites, clay, sulphur, coal, agolite and in fibrous minerals and materials; the purchase, lease or other acquisition and the development of woodlands, and the manufacture, sale and disposition of any surplus products of said woodlands; and the production and sale of any surplus or by-products in such business; with the right in connection with its business to purchase or acquire, and to own, use, sell and assign patents, patent rights, inventions and processes connected with the manufacture of wood-pulp or paper, or of any other materials and products used in or connected with such manufacture, or with any other lawful business of the corporation or resulting therefrom; to purchase, acquire, build, own and rent or sell dwellings; to establish, own and carry on stores for the selling of

merchandise; to purchase, acquire, hold, sell and convey in the State of New York and elsewhere in the United States and Canada or elsewhere, such real estate and personal property as may be necessary or proper for the business or purposes of the corporation; and generally to do any and all things which may be necessary or proper in connection with said business, and which may not be contrary to law.

Form No. 157.

Passenger and Baggage Transfer.

The purchase and sale of horses, the manufacture, purchase and sale of carriages, whether drawn by animal power, or propelled by steam, electricity or other motive power, the leasing and hiring of buggies, carriages, coupés, coaches, carts, wagons, automobiles, motor vehicles, whether drawn by animal power or propelled by steam, electricity or other motive power; the leasing and letting for hire of horses; the transferring, delivering and storing of all kinds of freight, baggage and other commodities; the boarding of horses and other animals; the storage and care of all kinds of vehicles; the conducting and carrying on of a general livery; boarding stable, and passenger, baggage and freight transfer business at the city of , , and at various other cities, towns and villages in the State of New York, together with all other business connected therewith, or in any way incidental thereto.

Form No. 158.

Patent Medicines.

To prepare, compound, manufacture, buy, sell, import, export and generally deal in and with drugs, medicines, chemicals, and all kinds of pharmaceutical, chemical and medicinal preparations and materials.

To conduct and carry on in all its branches the business of chemists, druggists and manufacturers and dealers in medical, chemical, pharmaceutical and other compounds, preparations and materials.

To apply for, obtain, purchase or otherwise acquire and to register, hold, own, use, sell or otherwise dispose of any and all trademarks, tradenames, processes, formulæ, trade secrets, inventions and devices of all kinds, whether secured under letters-patent of the United States or of any foreign country.

To purchase, lease or otherwise acquire and hold lands, buildings, tenements, factories and real estate for the plant, offices, workshops, warehouses, laboratories and manufactories of the company and to lease, mortgage and convey such real estate in such manner as may appear to be for the best interests of the company.

Form No. 159.

Paving.

Manufacturing and selling cement, lime, plaster, brick, concrete, artificial stone and paving materials of all kinds; laying, constructing and repairing sidewalks, floors and pavements, either of natural or artificial materials.

Form No. 160.

Photography.

To engage in and conduct a general photographic business; to buy, sell, own, hold, deal in and deal with all materials of any and every character necessary or useful in connection with the said business; to buy, sell, own, hold, deal in and deal with works of art, pictures and prints of all kinds and description, bric-a-brac, objects of vertu, statuary, glass ware, china ware, furniture, tapestries, laces, gold and silver ware and other ornamental metal ware, and fancy goods of every kind and description.

Form No. 161.

Pianos and Organs.

To manufacture, purchase or otherwise acquire, to import, export, lease, sell and generally deal in pianos, organs and musical instruments of all kinds and descriptions and all supplies, articles, appliances and materials related thereto or in any manner necessary or convenient in said business.

Form No. 162.

Plumber's Supplies.

To manufacture, purchase, sell and generally deal in plumber's supplies, sanitary fixtures and all wares and articles which are or may be used by plumbers and to carry on said business as wholesalers, retailers, importers, exporters, principals, agents or factors as freely as natural persons might or could do and in any part of the world.

Form No. 163.

Pottery.

To manufacture, buy, sell and deal in pottery, ceramic and earthenware generally, and to mine, manufacture, prepare, buy, sell and deal in all products and materials used in or pertaining to such manufacture.

Form No. 164.

Poultry Farm.

Raising and selling of poultry, selling of eggs, and manufacturing and selling of chicken food.

Form No. 165.

Powder.

Manufacturing powder, dye stuffs and chemicals, and to manufacture goods, wares and fabrics of wood, metal, glass, leather, paper, wool, cotton, silk or other material, and for the purposes aforesaid may construct, repair and maintain upon their own lands suitable dams, canals, watercourses, machine shops, buildings and machinery, and may purchase and hold such real estate and personal property as may be necessary to effect the objects of the corporation.

Form No. 166.

Powder.

Manufacturing and selling gun and blasting powder of all kinds, also all kinds of explosives and iron explosives, and the transaction of any and all business and the doing of any and all acts or things connected with the transaction of a general manufacturing business.

(*See also* AMMUNITION and EXPLOSIVES.)

Form No. 167.

Printers and Publishers.

To prepare for publication, print, electrotype, bind, sell and distribute and generally deal in magazines, newspapers, pamphlets, books and publications of all kinds and to engage generally in the business of job and book printers, bookbinders, stationers, engravers and electrotypers.

To apply for, purchase or otherwise acquire and to dispose of copyrights in the United States and elsewhere.

To purchase or otherwise acquire and to sell, either as principals or agents and as freely as natural persons might or could do, books, magazines, music, newspapers and publications of all kinds and descriptions, stationery and stationers' supplies and generally to carry on the business of wholesale and retail booksellers and stationers.

Form No. 168.

Prismatic Glass.

To manufacture, sell, barter, trade in, repair and in any manner whatsoever to deal in all kinds and descriptions of glass, prisms, prismatic lights, illuminating tiles of all kinds, vault and sidewalk lights and prisms, skylights, ornamental and stained glass of all kinds, metallic bars, all plain and ornamental iron work, sash, and generally to do all manner of acts that may lawfully be done in relation thereto.

Form No. 169.

Public Work Contractors.

To construct, erect, build, equip, improve, and repair public works and conveniences of all kinds, including railways, tramways, docks, harbors, piers, warehouses, wharves, canals, tunnels, subways, reservoirs, embankments, irrigation systems, reclamation, improvement, sewage, drainage, sanitary, water, gas, electric light, telephonic, telegraphic, and power supply works, and hotels, warehouses, markets and public buildings, and all other works or conveniences of public utility; to purchase, or otherwise acquire, any contracts and concessions for or in relation to the construction, building, erection, equipment, improvement and repair of public works and conveniences, and to undertake, execute, carry out, dispose of, or otherwise turn to account the same; to carry on the business of miners, metallurgists, builders and contractors, engineers, farmers, graziers, shipbuilders, merchants, importers and exporters, and to buy, sell and deal in property of all kinds.

(*See also* GENERAL CONTRACTORS.)

Form No. 170.

Quarry.

To quarry, manufacture and prepare for market and for all building and other purposes, marble, granite, stone and building materials of every name and nature.

To enter into contracts for the erection, construction and completion of buildings and structures of all kinds.

To do a general quarrying, construction and building business, and everything in the line thereof.

To import, export, buy, sell, manufacture, merchandise, trade and deal in marble, granite, and stone and other building materials, and other goods, wares and merchandise.

To take, acquire, buy, build, construct, erect, hold, own, sell, lease, and mortgage any land, real estate or interest in real estate, quarries, buildings, factories, plants, engines, machinery, implements, and other works and conveniences which may seem directly, or indirectly, conducive to any of the business of the company.

To carry on any other business of the same general character, whether manufacturing or otherwise, which may seem to the company capable of being conveniently carried on in connection with the above, or calculated, directly or indirectly, to enhance the value of the company's property or rights.

Form No. 171.

Railway Cars.

The manufacturing and selling of railway cars, passenger, freight and street cars; the manufacturing and selling of car trucks, car wheels, and any and all parts of cars or car trucks, including truck frames and all the accessories thereof, and all car equipments and appliances and apparatus; the manu-

facture and sale of all of the products of steel, or all iron or all other metals, and of wood, or all other materials; the manufacture and sale of iron castings, steel castings, machine bearings, malleable iron; the manufacture and sale of all kinds of springs, including car springs; the manufacture and sale of all kinds of water pipes and gas pipes, or other pipes; to manufacture, purchase or otherwise acquire, to hold, mortgage, pledge, sell, assign and transfer or otherwise dispose of, to invest, trade, deal in and with the products, materials, goods, wares and merchandise and property of every class and description, including the right to enter into or upon any and all mercantile business or businesses, and for that purpose to acquire by purchase, lease or otherwise, stores or property available therefor, and to operate and maintain any and all stores or warehouses or business houses necessary or expedient for such purposes; to make, purchase, sell and deal in manufactured articles, and to acquire and dispose of rights to make and use the same; to purchase, lease, or otherwise acquire all or any part of the business and assets of any person, firm or corporation now or hereafter engaged in a business similar to that proposed to be carried on under this certificate of incorporation, and in the purchase of any such business or assets to assume any and all liabilities that may be then existing upon any such business or assets so purchased; to purchase or otherwise acquire mines and mining lands; to mine any and all metals; to engage in mining in all of its branches, and to sell or dispose of the products of such mining; to engage in smelting in all its branches; to purchase or otherwise acquire lumber lands; to cut and mill lumber; to establish and operate lumber mills, and to sell and dispose of and deal in lumber, and to engage in the lumber business in all of its branches; to establish and operate rolling-mills; to acquire by lease, purchase or otherwise any and all real estate necessary and convenient for the establishment and operation of rolling-mills, and to operate and maintain the same.

(*See also* CAR BUILDERS.)

Form No. 172.

Railway Equipment.

(Transit Development Company, being the equipment company of the Brooklyn Rapid Transit System.)

To carry on the business of general contractors, including the contracting with other corporations or persons for the supply of power or for the construction, equipment or improvement of railroads, bridges, wharves, tunnels and subways and to carry out such contracts.

To contract with railroad corporations, or other corporations or persons, for the carriage and transportation of goods, wares and merchandise and personal property of every description, and to carry out such contracts, including the carrying on of a general express and freight business.

Razors.

(*See* CUTLERY.)

Form No. 173.

Real Estate.

The purpose or purposes for which it is to be formed are the buying, selling, renting and exchanging of real property, improved and unimproved, the building, construction and alteration of houses thereon, and the management and development of real property generally; to purchase, manufacture, acquire, hold, own, mortgage, pledge, lease, sell, assign and transfer, to invest, trade, deal in and deal with goods, wares and merchandise and property of every kind and description, and to carry on any of the above business or any other business connected therewith, wherever the same may be permitted by law, either manufacturing or otherwise, and to the same extent as the laws of this State will permit, and as fully and with all the powers that the laws of this State confer upon corporations and organizations under this act, and to do any and all of the business above mentioned and set forth to the same extent as natural persons might or could do.

(*See also* FORM NO. 4.)

Form No. 174.

Real Estate Agency and Brokerage.

To transact a general real estate agency and brokerage business, including the management of estates; to act as agent, broker or attorney in fact for any persons or corporations in buying, selling, and dealing in real property and any and every estate and interest therein, and choses in action secured thereby, judgments resulting therefrom, and other personal property collateral thereto, in making or obtaining loans upon such property, in supervising, managing and protecting such property and loans and all interests in and claims affecting the same, in effecting insurance against fire and all other risks thereon; to cause to be registered or recorded mortgages and deeds of trust of real property or chattels real and all other securities collateral thereto; to investigate and report upon the credit and financial solvency and sufficiency of borrowers and sureties upon such securities; to purchase and hold real property and any and every estate and interest therein, and choses in action secured thereby, judgments resulting therefrom, and other personal property collateral thereto; to improve, manage, operate, sell, mortgage, lease and otherwise dispose of any property so acquired; to loan upon such property, and to take mortgages and assignments of mortgages of the same; and to transact all or any other business which may be necessary or incidental or proper to the exercise of any or all of the aforesaid purposes of the corporation.

Form No. 175.

Restaurants.

To carry on the business of restaurant-keepers, caterers, tobacconists, dealers in provisions, wine and liquor dealers and to manage and conduct restaurants, cafés and saloons in any part of the United States and in foreign countries.

(*See also* HOTELS.)

Form No. 176.

Rubber.

Making, purchasing and selling rubber boots and shoes and all goods of which rubber is a component part, and the various materials entering into the manufacture of any and all such goods, and also the acquiring and disposing of the right to make and use such goods and materials, and the doing and transacting all acts, business and things incident to or relating to or convenient in carrying out its business as aforesaid, which are authorized by law.

(*See also* AUTOMOBILE TIRES.)

Form No. 177.

Rubber Stamps, Etc.

To manufacture, buy, sell and deal in rubber stamps, rubber type, cushion stamps, daters, dating machines, inks, ink pads, numbering machines, check protectors, cancellation stamps, stencils, corporate, notarial and society seals, enamel and metal signs, burning brands and similar articles.

Form No. 178.

Sanitarium.

To establish, maintain and operate an institution or institutions in which persons may obtain accommodations for rest, physical exercise and hygienic treatment.

Form No. 179.

Saw Mills.

To carry on business as timber merchants, sawmill proprietors, and timber growers, and to buy, sell, grow, prepare for market, manipulate, import, export, and deal in timber and wood of all kinds, and to manufacture and deal in articles of all kinds in the manufacture of which timber or wood is used, and to carry on business as shipowners, and, so far as may be deemed expedient, the business of general merchants, and to buy, clear, plant, and work timber estates, and to carry on any other businesses which may seem to the company capable of being conveniently carried on in connection with any of the above, or calculated directly or indirectly to render profitable or enhance the value of the company's property or rights for the time being.

Form No. 180.

Securities.

To loan money secured by mortgages on personal property or real estate; also to buy, sell and deal in bonds, notes, loans secured by mortgages or other liens on personal or real estate, also to purchase, hold, improve, sell or

exchange real estate, also to purchase, sell and deal in notes, bonds, stocks, securities or investments of any kind, with full power to borrow such moneys as it may require for the purpose of its business.

Form No. 181.

Shirts, Collars and Cuffs.

To manufacture, buy, sell, import, export, trade and deal in shirts, waists, collars and cuffs, ties, cravats, scarfs and neckwear generally, and all kinds of wearing apparel for both sexes, and any and all materials adapted for such purposes.

Form No. 182.

Silk.

The purposes for which it is to be formed are as follows:

To buy, sell, manufacture, work, prepare, treat, and in all ways handle and deal in silk, wool, and other textile fabrics of all kinds, and the cotton, linen, silk, wool and other threads and raw materials entering into the composition of textile fabrics of all kinds.

To manufacture, buy, sell and in all ways handle and deal in, any and all articles of use, wear or ornament into the manufacture of which silk or other fabrics enter in whole or in part.

To provide, own, maintain, sell, lease, mortgage, convey, improve, and in all ways use and operate and make any lawful contracts pertaining to factories, buildings, machinery, equipments, works and facilities generally for the manufacturing, selling, working, preparing, treating, handling and dealing in silk and other textile fabrics, the threads, parts, and raw materials thereof, and the articles, whether of use, wear or ornament, into the production of which such silk or other textile fabrics, threads or other raw material enter in whole or in part.

Form No. 183.

Soap.

To carry on the business of manufacturers of soap, candles, perfumes and toilet articles; to buy, sell, manufacture, refine, prepare and deal in all kinds of oils and oleaginous and saponaceous substances, and all kinds of unguents and ingredients; to manufacture all kinds of boxes and cases either wholly or partly of card, wood, metal or otherwise.

Form No. 184.

Slate and Tile.

To buy and sell slate, tile, marble, and all kinds of building materials, and to manufacture and sell marble, tile and slate fixtures and articles, and to furnish buildings and structures with the same, and likewise to erect, improve and alter buildings.

Form No. 185.

Slaughtering Cattle.

To carry on the business of slaughtering cattle, calves, pigs, sheep, lambs and other animals for food purposes, and dealing in and contracting for the purchase and sale of all kinds of products, hides, oil, fat, offal, horn, glue, fertilizers and other by-products arising out of the slaughtering of animals for food purposes or in connection therewith, and to manufacture, buy, sell, exchange and deal in the above specified products and in all materials used in the manufacture of food products, fertilizers, or in any of the matters aforesaid.

To carry on as principals, agents, commission merchants or consignees, the business of buying and selling all kinds of live stock, and the business of manufacturing oils, fats, tallows, fertilizers, glue, bone business, and dealing in hides, fats, offal, horn and any of the materials used in the manufacture of the products therefrom, and to carry on as such principals, agents, commission merchants or consignees any other business which may be conveniently conducted in conjunction with any of the matters aforesaid.

Form No. 186.

Sporting and Athletic Goods.

To buy, sell, manufacture, import, export, trade and deal in all kinds of sporting and athletic goods, including material and supplies for golf links and golf players, tennis courts and tennis players, boxing gloves, punching bags, exercising machines, dumb-bells, camper's supplies, fishing tackle, guns, pistols, rifles, ammunition, air guns, hunter's belts, huntsmen's clothing, dog collars, paraphernalia for indoor games, playing cards, dice, chess, dominoes, backgammon, bridge, checkers, etc.

Form No. 187.

Stationers, etc.

To carry on the businesses of stationers, printers, lithographers, stereotypers, electrotypers, photographic printers, photo lithographers, engravers, die sinkers, bookbinders, account book manufacturers, dealers in parchment, dealers in stamps, advertising agents, designers, draughtsmen, ink manufacturers, booksellers, publishers, paper manufacturers, and dealers in the materials used in the manufacture of paper, and dealers in or manufacturers of any other articles or things of a character similar or analogous to the foregoing, or any of them, or connected therewith.

Form No. 188.

Steam.

The objects for which the corporation is formed are the manufacturing, producing, vending, and supplying of hot water, or steam, hot air or other aeriform fluids for motive power, heating, cooking or other useful applications

in the streets, public places, public and private buildings in the city of , and manufacturing and laying of mains and pipes as conductors for conveying such hot water, hot air or steam or fluids from the streets, avenues, lanes, alleys, squares and highways of said city, for the purpose of supplying the same to the city and its inhabitants.

Stock Brokers.

(*See* BROKERS.)

Stock Yards.

(*See* SLAUGHTERING CATTLE.)

Form No. 189.

Storage Batteries.

To manufacture, buy, sell, lease and rent all kinds of storage batteries, all kinds of electrical machinery and appliances and all kinds of machines and machinery and all kinds of property and any material in any way used or to be used in or about said articles or said business.

Stoves.

(*See* FURNACES AND STOVES.)

Form No. 190.

Surgical Instruments.

To manufacture and generally deal in surgical instruments and appliances of all kinds and descriptions.

Form No. 191.

Sugar.

To manufacture, refine, purchase, sell and deal in sugar, molasses and melada, glucose, syrup, starch, feed and such other products and by-products as are incidental thereto.

To propagate, cultivate and develop the different varieties of the grape, and to manufacture sugar, wines and brandies therefrom, and to cultivate sugar cane, sugar beets, cotton, tobacco, indigo, rice, wheat, rye, oats, corn and other products of the earth; to manufacture and prepare the same for market, and to buy, sell, deal in and transport the same.

Form No. 192.

Taximeters and Automobile Supplies.

(*See also* AUTOMOBILE STORAGE AND SUPPLIES.)

To manufacture, purchase, acquire, import, export, license, operate, lease, sell, use, and trade in, certain devices or machines, known as taximeters, and all and any other machines, contrivances, supplies, accessories and appliances pertaining to or available for motors, automobiles, engines, cabs, hacks or other vehicles, or for any other uses and purposes to which the same can be applied: to manufacture, purchase, acquire, import, export, license, operate, lease, sell, use, and trade in motors, automobiles, engines, cabs, hacks, and other vehicles; to acquire, by purchase, license, lease, or otherwise, inventions, patent rights, letters patent, trade marks covering any and all of the articles to be manufactured, acquired, or dealt in by said corporation; to carry on any other lawful trade, or business incidental to the aforesaid purposes or either of them.

Form No. 193.

Theatrical.

The purposes for which it is to be formed are as follows: To encourage and cultivate a taste for music, literature and the arts, and to erect, maintain, purchase or rent one or more buildings for that purpose; to give or cause to be given in the cities of New York and Boston, and any other cities or towns in the United States and elsewhere, operatic or dramatic representations, concerts and other entertainments; to acquire, equip and maintain by purchase, lease or otherwise, one or more theatre or opera houses; to acquire all necessary costumes, scenery, properties, musical libraries, and other material for use in connection with the giving of operatic or dramatic entertainments.

Form No. 194.

Theatrical.

To purchase, lease, own and manage theatres, opera houses and similar places of amusement; to sell, mortgage, let or otherwise dispose of such theatres, and other places of amusement, and to carry on the business of managers and proprietors of theatres, opera houses and other similar place of amusement; to employ singers, musicians and other persons for the purposes of the business; to acquire, own and dispose of plays, copyrights and dramatic and musical productions and rights of every kind therein for the purposes of the business, and generally to acquire, hold, manage and dispose of property of every kind pertaining to such business, and to do everything necessary and proper to the conduct of such business.

Form No. 195.

Theatrical.

To carry on the business of theatre proprietors and managers, and in particular to provide for the production, representation and performance of opera, stage plays, operettas, burlesques, vaudevilles, ballets, pantomimes, spectacular pieces, promenade and other concerts, and other musical and dramatic performances and entertainments.

Form No. 196.

Tobacco.

To carry on the businesses of manufacturers of and dealers in tobacco, cigars, cigarettes, matchlights, pipes, and any other articles required by or which may be convenient for smokers, and of snuff grinders and merchants and box merchants, and to deal in any other articles and things commonly dealt in by tobacconists.

Form No. 197.

Tobacco.

The purposes for which it is formed are to cure leaf tobacco, and to buy, manufacture and sell tobacco in all its forms and to purchase and establish factories and establish agencies and depots for the sale and distribution of tobacco in all its forms, and to transport or cause the same to be transported, as an article of commerce, and to do all things incidental to the business of trading and manufacturing aforesaid.

Form No. 198.

Typewriters.

To carry on the business of manufacturing, buying, leasing, selling and generally dealing in writing machines, typewriters, typewriter materials, and appliances and articles connected therewith.

To establish and maintain factories, warehouses, salesrooms, agencies, depots and offices for the manufacture, sale and distribution of its products and merchandise.

Form No. 199.

Trucking.

To carry on a general trucking, contracting and stevedore business, and to that end, to manufacture, acquire, deal in, advertise and dispose of trucks, carriages and other vehicles and kindred appliances, and to trade and deal in draft animals and apparatus and other things properly appertaining and belonging to said business.

Form No. 200.

Undertakers.

The purpose for which said corporation is to be formed is the transaction of a general undertaking, burial and funeral furnishing business; to act as embalmers, funeral directors, liverymen, owners of or agents for crematories, mortuary chapels, etc.

Watches.

(*See* JEWELRY.)

Form No. 201.

Water.

[A company organized for furnishing water has implied power to harvest and sell ice. Peo. ex rel. Goff v. Kirke, 65 Misc. 657 (1908).]

To acquire water by purchase, development or otherwise; to construct reservoirs or water towers, erect pumping machinery, laying of water mains, pipes, gates, valves and hydrants; to furnish and sell water to manufactories, private corporations and individuals for fire protection, manufacturing and domestic use, and collect payment or rentals for the same.

(See section 15 of the Business Corporations Law and notes thereunder.)

Form No. 202.

Wharf and Warehouse.

To carry on the business of storage, wharfage, warehousing and forwarding, and the doing of each and every act or acts, thing or things, incidental to or growing out of, or connected with said business, including the owning, leasing, holding, erecting and maintaining of docks, bulkheads, piers, basins and warehouses; the storage of all kinds of goods, wares and merchandise; the storage and docking of ships, steam vessels and boats of every kind and description; the loading and unloading thereof; the issue of storage, dock and warehouse receipts, negotiable and non-negotiable, covering all kinds of goods, wares and merchandise; the purchase and sale of goods, wares and merchandise, ships, steamers, vessels and boats of all kinds; the collection and receipt of dockage, wharfage and storage dues and other compensation; the purchasing, holding, acquiring, selling, leasing, mortgaging and conveying real estate and personal property necessary for the convenient conducting of the aforesaid business; the loaning of money on the pledge of goods, wares, merchandise and other property or on the pledge of storage, dock or warehouse receipts therefor; and the advancing of freights, duties, fire and marine insurance and liens of every kind and nature upon goods, wares and merchandise received on storage or for the purpose of being warehoused or forwarded upon the pledge of said goods, wares and merchandise or upon the pledge of storage, dock or warehouse receipts therefor.

Form No. 203.

Woolen and Worsted.

To carry on the trade or business of manufacturing, producing, adapting, preparing, buying and selling and otherwise dealing in woolen and worsted goods and other fabrics, and to manufacture, produce, purchase, adapt, prepare, use, sell or otherwise deal in any materials, articles or things required for, in connection with, or incidental to, the manufacture, use, purchase, sale of, or other dealing in woolen and worsted goods and other fabrics; and generally to carry on any other manufacturing business which can conveniently be carried on in conjunction with any of the matters aforesaid.

(*See also* FORM NO. 5.)

General Forms and Precedents — *Continued.*

Form No. 204.

Waiver of Notice of Incorporators' Meeting.

We, the undersigned, being all the incorporators of the [*insert name*] Company, and all the subscribers to the capital stock thereof, hereby waive all notice whatsoever of the first meeting of the incorporators and subscribers to the capital stock of said company and do agree and consent that the same be held at the office of ....., No. ..... street, New York city, on the ..... day of ....., 19.., at .... o'clock, A. M., and that all and any lawful business may be transacted at said meeting as may be deemed advisable by the incorporators and subscribers present thereat.

Dated, ..., 19...

[*Signatures.*]

Form No. 205.

Proxy. First Stockholders' Meeting.

KNOW ALL MEN BY THESE PRESENTS, That I, the undersigned, one of the incorporators of [*insert name*] Company, and a subscriber to ..... shares of the stock thereof, do hereby constitute and appoint ....., to be my lawful attorney, substitute and proxy for me [*If desired insert here: with full powers of substitution and revocation*], to represent me at the first meeting of the stockholders of said company to be held October 25, 1909, and

at any adjourned or postponed meeting thereof, hereby granting my said attorney and proxy full power and authority to act for me and in my stead, and with the same effect as I might or could do were I personally present at such meeting, and I hereby ratify and confirm all that my said attorney and proxy, or his substitute, shall lawfully do at such meeting in my name, place and stead.

Witness my signature this 24th day of October, 1909.

Witness, Orlando Higgins.

James Schuyler.

Form No. 206.

By-Laws for Stock Corporations.

See the General Corporation Law, § 11.

BY-LAWS OF THE ..... COMPANY.

Article I.— Meeting of Stockholders.

Section 1. The annual meeting of the stockholders of this company shall be held at the office of the corporation, in the ..... of ....., on the [e. g., *second Monday in January*] of each and every year, at 12 o'clock, noon, for the election of directors and such other business as may properly come before said meeting. Notice of the time, place and object of such meeting shall be given by publication thereof, at least once in each week for two successive weeks immediately preceding such meeting, in the manner required by the Stock Corporation Law, section 25, and by serving personally or by mailing, at least ..... days previous to such meeting, postage prepaid, a copy of such notice, addressed to each stockholder at his residence or place of business, as the same shall appear on the books of the corporation. No business, other than that stated in such notice, shall be transacted at such meeting without the unanimous consent of all the stockholders present thereat, in person or by proxy.

Section 2. Special meetings of stockholders, other than those regulated by statute, may be called at any time by a majority of the directors. It shall also be the duty of the president to call such meetings whenever requested in writing, so to do, by stockholders owning ..... of the capital stock. A notice of every special meeting, stating the time, place and object thereof, shall be

given by mailing, postage prepaid, at least ..... days before such meeting, a copy of such notice addressed to each stockholder at his post-office address as the same appears on the books of the corporation.

Section 3. At all meetings of stockholders there shall be present, either in person or by proxy, stockholders owning ..... of the capital stock of the corporation in order to constitute a quorum, except at special elections of directors pursuant to section 30 of the General Corporation Law.

Section 4. At all annual meetings of stockholders the right of any stockholder to vote shall be governed and determined as prescribed in the General Corporation Law, sections 23, 26 and 27.

Section 5. If, for any reason, the annual meeting of stockholders shall not be held as hereinbefore provided, such annual meeting shall be called and conducted as prescribed in the General Corporation Law, sections 28, 29, 30 and 31.

Section 6. At all ..... meetings of stockholders, only such persons shall be entitled to vote in person and by proxy who appear as stockholders upon the transfer books of the corporation for ..... days immediately preceding such meeting.

Section 7. At the annual meetings of stockholders the following shall be the order of business, viz.:

1. Calling the roll.
2. Proof of proper notice of meeting.
3. Report of President.
4. Report of Treasurer.
5. Report of Secretary.
6. Report of Committees.
7. Election of Directors.
8. Miscellaneous business.

Section 8. At all meetings of stockholders all questions, except the question of an amendment to the by-laws, and the election of directors and inspectors of election, and all such other questions, the manner deciding which is specially regulated by statute, shall be determined by a majority vote of the stockholders present in person or by proxy; provided, however, that any qualified voter may demand a stock vote, and in that case, such stock vote shall immediately be taken, and each stockholder present, in person or by proxy, shall be entitled to one vote for each share of stock owned by him. All voting shall be viva voce, except that a stock vote

shall be by ballot, each of which shall state the name of the stockholder voting and the number of shares owned by him, and in addition, if such ballot be cast by a proxy, it shall also state the name of such proxy.

Section 9. At special meetings of stockholders the provisions of sections 23, 26, 27 and 31 of the General Corporation Law shall apply to the casting of all votes.

Article II.— Directors.

Section 1. The directors of this corporation shall be elected by ballot, for the term of one year, at the annual meeting of stockholders, except as hereinafter otherwise provided for filling vacancies. The directors shall be chosen by a plurality of the votes of the stockholders, voting either in person or by proxy, at such annual election as provided by section 25 of the Stock Corporation Law.

Section 2. Vacancies in the board of directors, occurring during the year, shall be filled for the unexpired term, by a majority vote of the remaining directors at any special meeting called for that purpose, or at any regular meeting of the board.

Section 3. In case the entire board of directors shall die or resign, any stockholder may call a special meeting in the same manner that the president may call such meetings, and directors for the unexpired term may be elected at such special meeting in the manner provided for their election at annual meetings.

Section 4. The board of directors may adopt such rules and regulations for the conduct of their meetings and management of the affairs of the corporation as they may deem proper, not inconsistent with the laws of the State of New York, or these by-laws.

Section 5. The board of directors shall meet on the [e. g., *second Monday*] of every month, and whenever called together by the president upon due notice given to each director. On the written request of any director the secretary shall call a special meeting of the board.

Section 6. All committees shall be appointed by the board of directors.

Article III.— Officers.

Section 1. The board of directors, immediately after the annual meeting, shall choose one of their number by a majority vote to be president, and they shall also appoint a vice-president, secre-

tary and treasurer. Each of such officers shall serve for the term of one year, or until the next annual election.

Section 2. The president shall preside at all meetings of the board of directors, and shall act as temporary chairman at, and call to order all meetings of the stockholders. He shall sign certificates of stock, sign and execute all contracts in the name of the company, when authorized so to do by the board of directors; countersign all checks drawn by the treasurer; appoint and discharge agents and employees, subject to the approval of the board of directors, and he shall have the general management of the affairs of the corporation and perform all the duties incidental to his office.

Section 3. The vice-president shall, in the absence or incapacity of the president, perform the duties of that officer.

Section 4. The treasurer shall have the care and custody of all the funds and securities of the corporation, and deposit the same in the name of the corporation in such bank or banks as the directors may elect; he shall sign all checks, drafts, notes and orders for the payment of money, which shall be countersigned by the president, and he shall pay out and dispose of the same under the direction of the president; he shall at all reasonable times exhibit his books and accounts to any director or stockholder of the company upon application at the office of the company during business hours; he shall sign all certificates of stock signed by the president; he shall give such bonds for the faithful performance of his duties as the board of directors may determine.

Section 5. The secretary shall keep the minutes of the board of directors, and also the minutes of the meetings of stockholders; he shall attend to the giving and serving of all notices of the company, and shall affix the seal of the company to all certificates of stock, when signed by the president and treasurer; he shall have charge of the certificate book and such other books and papers as the board may direct; he shall attend to such correspondence as may be assigned to him, and perform all the duties incidental to his office. He shall also keep a stock-book, containing the names, alphabetically arranged, of all persons who are stockholders of the corporation, showing their places of residence, the number of shares of stock held by them respectively, the time when they respectively became the owners thereof, and the amount paid thereon, and such book shall be open for inspection as prescribed by section 29 of the Stock Corporation Law.

Article IV.— Capital Stock.

Section 1. Subscriptions to the capital stock must be paid to the treasurer at such time or times, and in such installments, as the board of directors may by resolution require. Any failure to pay an installment when required to be paid by the board of directors shall work a forfeiture of such shares of stock in arrears, pursuant to section 54 of the Stock Corporation Law.

Section 2. Certificates of stock shall be numbered and registered in the order they are issued, and shall be signed by the president or vice-president and by the secretary or treasurer, and the seal of the corporation shall be affixed thereto. All certificates shall be bound in a book, and shall be issued in consecutive order therefrom, and in the margin thereof shall be entered the name of the person owning the shares therein represented, the number of shares, and the date thereof. All certificates exchanged or returned to the corporation shall be marked canceled, with the date of cancellation, by the secretary, and shall be immediately pasted in the certificate book, opposite the memorandum of its issue.

Section 3. Transfers of shares shall only be made upon the books of the corporation by the holder in person or by power of attorney duly executed and acknowledged and filed with the secretary of the corporation, and on the surrender of the certificate or certificates of such shares.

Section 4. Whenever the capital stock of the corporation is increased, each bona fide owner of its stock shall be entitled to purchase, at the par value thereof, an amount of stock in proportion to the number of shares of stock he owns in the corporation at the time of such increase.

Article V.— Dividends.

Section 1. Dividends shall be declared and paid out of the surplus profits of the corporation as often and at such times as the board of directors may determine, and in accordance with section 28 of the Stock Corporation Law.

Article VI.— Inspectors.

Section 1. Two inspectors of election shall be elected at each annual meeting of stockholders to serve for one year, and if any inspector shall refuse to serve or shall not be present, the meeting may appoint an inspector in his place.

ARTICLE VII.— SEAL.

Section 1. The seal of the corporation shall be in the form of a circle, and shall bear the name of the corporation and the year of its incorporation.

ARTICLE VIII.— AMENDMENTS.

Section 1. These by-laws may be amended at any stockholders' meeting by a vote of the stockholders owning a majority of the stock, represented either in person or by proxy, provided the proposed amendment is inserted in the notice of such meeting. A copy of such amended by-law shall be sent to each stockholder within ten days after the adoption of the same.

ARTICLE IX.— WAIVER OF NOTICE.

Section 1. Whenever under the provisions of these by-laws or of any of the corporate laws the stockholders or directors are authorized to hold any meeting after notice or after the lapse of any prescribed period of time, such meeting may be held without notice and without such lapse of time by a written waiver of such notice signed by every person entitled to notice.

By-laws are not required to be filed in any public office. After adoption they should be entered in the book of minutes of the corporation.

Form No. 207.

Proposal to Sell Property For Stock.

To the [*insert name*] Company.

GENTLEMEN:

We, the undersigned, being all of the members of the firm of Horatio Taylor & Co., owning and conducting the business of manufacturers of harness and saddlery at No. 617 Mercer street, New York city, do hereby submit the following offer for your consideration and acceptance, to wit:

We do hereby offer to sell, assign and convey to your company by a good and sufficient bill of sale and warranty, the above mentioned business, including all our right, title and interest in and to the same and the good will thereof and the lease, stock on hand and in process of manufacture, raw materials, tools, machines,

fixtures and appurtenances, horses and wagons, trademarks, tradenames, brands, formulæ, books, bills and accounts receivable, contracts, and personal property of every name and description used in the conduct of said business and owned by said firm; and to accept in consideration and full payment for said sale, transfer and conveyance, ... shares of the capital stock of your company and also the assumption by your company of our outstanding indebtedness which does not exceed the sum of $..... This offer to be deemed withdrawn and of no effect unless accepted within ..... days from the date hereof. If this proposition is accepted, said shares of stock are to be issued to the undersigned or our nominees or assigns, in such proportions as may be designated by us.

IN WITNESS WHEREOF we have set our hands this ..... day of ..... 19...

[*Signatures.*]

For resolution accepting the foregoing proposal, see proceedings of meeting, Form No. 214.

Form No. 208.

Bill of Sale of Business, Stock in Trade, Etc.

KNOW ALL MEN BY THESE PRESENTS, That we, the undersigned, composing the firm of Horatio Taylor & Co. of the city of New York, party of the first part, for and in consideration of $..... of the capital stock of the [*insert name*] Company, a domestic stock corporation, the receipt whereof is hereby acknowledged, and other good and valuable considerations, to wit: the assuming of said firm's indebtedness, amounting to $..... by the aforesaid corporation, party of the second part hereto, we, the members of the said firm of Horatio Taylor & Co., have bargained and sold and by these presents do grant, sell and convey unto the said party of the second part, its successors and assigns, the business of manufacturers of harness and saddlery now conducted by the party of the first part at No. 617 Mercer street, New York city, including the good will thereof, the lease, stock on hand and in process of manufacture, raw materials, tools, machines, fixtures and appurtenances, horses and wagons, trademarks, tradenames, brands, formulæ, books, bills and accounts receivable, contracts, and personal property of every name and description used in the

conduct of said business and owned by the party of the first part. [*And also the right to use the firm name of the party of the first part by the party of the second part as its corporate name, if so desired.*]

To have and to hold the same unto the said party of the second part, its successors or assigns, forever. And said party of the first part stipulates and agrees with said party of the second part, its successors and assigns, that the indebtedness of said firm does not exceed the sum of $..... And said party of the first part covenants and agrees to and with said party of the second part, to warrant and defend the sale of the said business, and other property hereby sold and conveyed unto the said party of the second part, its successors and assigns, against all and every person and persons whomsoever.

IN WITNESS WHEREOF we have hereunto set our hands and seals this ..... day of ....., 19 ...

.....

Signed, sealed and delivered
in the presence of

.....

Form No. 209.

Assignment of Incorporator's Subscription.

I, the undersigned, in consideration of the sum of one dollar to me in hand paid, and for other good and valuable considerations received, do hereby sell, assign, transfer and set over unto ....., all my right, title and interest as an incorporator and as a subscriber to the capital stock of the [*insert name*] Company, to the extent of ..... shares of the capital stock thereof, and I hereby authorize and direct said company to enter such transfer upon its books and to issue the certificate for said shares to the aforesaid transferee or his nominee or assigns.

Dated, ..., 19...

Witness: [*Signature.*]

[*Signature.*]

Form No. 210.

Notice to Dealers.

After a partnership has been dissolved and its assets turned over to the new corporation personal notice of the dissolution of the firm should be given to all persons with whom the firm has been dealing in order to relieve the partners from future liability. It is also necessary to give notice of the dissolution of the firm by advertising in a newspaper. A form of notice may be given to persons with whom the firm has dealt as follows:

NEW YORK CITY,.....19...

To.....

DEAR SIRS:

We desire to inform you that the firm of Horace Taylor & Co. composed of..... and ..... doing business in the city of New York at No. 617 Mercer street, has been dissolved by mutual agreement, and that the business, property and all assets formerly belonging to said firm have been transferred to the [*insert name*] Company, a corporation organized under the laws of the State of New York, formed to carry on the business formerly carried on by the said firm and that said corporation has assumed the indebtedness of said firm, and will continue said business.

Yours truly,

[*Signatures of the members of the old firm and the corporation.*]

A partnership, notwithstanding formal dissolution, continues as to third persons acting in good faith, who have neither actual nor constructive notice that the firm has been dissolved. The rule is that as to all persons who have had actual dealings with the firm, actual notice of the dissolution must be given. Bank of Monongahela Valley v. Weston, 159 N. Y. 201, 211 (1899), and cases cited. As to all who have had no dealings with the firm, but knew of its existence, though not of its dissolution, it is necessary that notice should be published by advertisement in a newspaper. Id.

Form No. 211.

Notice of Dissolution of Firm.

[For publication in newspaper.]

NOTICE is hereby given that the partnership heretofore existing between ..... and ....., under the firm name of ....., has been dissolved, and that the said business will be continued by the [*insert name*] Company, which has assumed the indebtedness of said firm.

[*Signatures of members of firm.*]

Form No. 212.

Minutes of First Meeting of Incorporators.

The first meeting of the incorporators and subscribers to the capital stock of the [*insert name*] Company was held at No. ..... street [*or at the* ..... *Hotel, or at the office of* ....., *No.* ..... *street, as the case may be*], in the city [*village or town*] of ....., State of New York, on the ..... day of ....., 19.., at ..... o'clock in the forenoon.

Mr. George L. Hunter called the meeting to order and stated the purposes thereof.

Upon motion Mr. George L. Hunter was chosen chairman of the meeting, and Mr. Matthew Miller secretary thereof.

All the incorporators, being also all the subscribers to the capital stock of the company, were personally present as follows, to wit:

Name.	Shares subscribed
James A. Byrne	1
Matthew Miller	1
George L. Hunter	1

[*Or, all the incorporators, being also all the stockholders of the company, were present, either in person or by proxy, as follows:*]

Present in person.	Shares subscribed
James A Byrne	1
Matthew Miller	1
George L. Hunter	1

Present by proxy.	Name of proxy.	Shares subscribed
Jonas L. Hall	William J. Phelps	1
Henry R. Fulton	Frank M. Clark	1

A written waiver of notice and an agreement duly signed by all the incorporators, fixing the time and place of this meeting was presented by the secretary and it was ordered that a copy thereof be prefixed to the record of the minutes of this meeting.

[*For Waiver, See Form No.* 204.]

The chairman then presented a copy of the certificate of incorporation and stated to the meeting that on October 15th, 1909, an

original certificate of incorporation, duly executed and acknowledged, had been duly filed and recorded in the office of the Secretary of State, at Albany, N. Y., that on October 16th, 1909, a duplicate [*or certified copy*] thereof had been duly filed and recorded in the office of the clerk of the county of .....; that the organization tax had been duly paid to the Treasurer of the State of New York, and that the statutory filing and recording fees had been paid to the Secretary of State and said county clerk respectively.

It was thereupon

Ordered, That said copy of the certificate of incorporation be filed and that a copy thereof be prefixed to the record of the minutes of this meeting.

The chairman submitted for the consideration of the meeting the proposed by-laws, and stated that the same had been prepared by the counsel of the company, in accordance with the instructions of the incorporators.

After discussion and consideration, and by unanimous vote, it was

Resolved, That the by-laws now submitted to this meeting be and hereby are adopted as the by-laws of the corporation and that said by-laws be prefixed to the minutes of this meeting.

[*See form for by-laws, Form No.* 206.]

The secretary presented to the meeting a written proposal from the firm of Horatio Taylor & Co. offering to sell and transfer to this company the business of manufacturers of harness and saddlery now owned and conducted by said firm at No. 617 Mercer street, New York city.

It was thereupon

Ordered, That said proposal be placed on file and that a copy thereof be prefixed to the record of the minutes of this meeting.

[*See proposal, Form No.* 207.]

After discussion and consideration of the offer made, and by the affirmative vote of all present [*or by an unanimous vote*] the following preambles and resolution were adopted:

Whereas, The firm of Horatio Taylor & Co. has offered to sell, transfer and assign to this company the business of manufacturers of harness and saddlery now owned and conducted by said firm at No. 617 Mercer street, New York city, and all the right, title and interest of said firm in and to the same, including the good will

thereof, lease, stock on hand and in process of manufacture, raw materials, tools, machines, fixtures and appurtenances, horses and wagons, trademarks, tradenames, brands, formulæ, books, bills and accounts receivable, contracts, and personal property of every name and description used in the conduct of said business and owned by said firm, and

Whereas, Said firm offers to accept as full consideration for said sale, transfer and assignment of said business and property ..... shares of the capital stock of this company and the assumption by this company of its indebtedness not exceeding $..... and

Whereas, It appears that said business and property has an actual value to the amount of the consideration demanded therefor and that it is to the best interests of this company to accept said offer, now, therefore, it is hereby

Resolved, That said offer, as set forth in said proposition, be and hereby is approved, and it is recommended that the board of directors of this company should accept the said proposition and cause the issuance of the ..... shares of the capital stock of this company and the assumption of the indebtedness of said firm not exceeding $..... as full consideration and payment for the business and property so to be sold, assigned and conveyed to this company.

There being no further business before the meeting it was adjourned.

MATTHEW MILLER,
Secretary.

GEORGE L. HUNTER,
Chairman.

Form No. 213.

Waiver of Notice of Directors' First Meeting.

We, the undersigned, being all of the directors of the [*insert name*] Company, hereby waive all notice whatsoever of the first meeting of directors of said company, and do agree and consent that the same be held at the office of ..... No. ..... street, New York city, on the ..... day of ....., 19..., at ..... o'clock, A. M., and that all and any lawful business may be transacted at said meeting as may be deemed advisable by the directors present thereat.

Dated, ..., ... 19...

Form No. 214.

Minutes of First Meeting of Directors.

The first meeting of the board of directors of the [*insert name*] Company was held at No. ..... street [*or at the ..... Hotel, or at the office of ..... No. ..... street, as the case may be*], in the city [*village or town*] of ....., State of New York, on the ..... day of ....., 19.., at ..... o'clock in the forenoon.

There were present ....., ... and ....., being all of the directors of the company.

Mr. ..... called the meeting to order, and on motion, ... and ..... were chosen chairman and secretary respectively of the meeting.

The secretary presented a written waiver of notice of the meeting signed by all the directors, and upon motion it was ordered that the same be filed and that a copy thereof be prefixed to the record of the minutes of this meeting.

[*For form of waiver, see Form No.* 213.]

The secretary presented the minutes of the first meeting of incorporators and stockholders, held this day.

The secretary presented the by-laws adopted at the first meeting of incorporators and stockholders and thereupon said by-laws were unanimously ratified, confirmed and approved as and for the by-laws of the company.

Upon motion duly adopted, it was

> *Resolved,* That the seal of this corporation be the impression upon wax or paper of the device prescribed by the by-laws, and in the form impressed upon this page.

The secretary presented a form of stock certificate for approval, which was, upon motion, duly adopted as the stock certificate of the company, and the secretary was instructed to affix a sample copy thereof to the minute book immediately preceding the record of this meeting.

[*For forms of stock certificate, see Forms Nos.* 243–249.]

Upon motion duly made and adopted it was

Resolved, that the funds of this company, until further ordered, be deposited in its name with the ..... Bank [*or* ..... *Trust Company*], and that the same be subject to check made in the corporate name, signed by the president [*or as the case may be*], and countersigned by the treasurer [*or secretary*] and that a copy of this resolution certified by the secretary be transmitted to the said bank [*or Trust Company*].

[*For certified resolution for bank, see Form No.* 205.]

Upon motion duly adopted it was

Resolved, that the principal office of the company be located at No..... street, in the city, [*village or town*] of ....., State of New York.

Further resolved, that the proper officers of this company be and hereby are authorized and directed to make and execute in the name and on behalf of this corporation, the lease of the said office.

[*If officers are to have salaries the following is suggested*]:

Upon motion unanimously adopted, it was

Resolved, that the annual compensation of each of the officers of the corporation be and is hereby fixed as follows:

President. . . . . $.....
Vice-president. . . . . $.....
Treasurer. . . . . $.....
Secretary. . . . . $.....

Upon motion, the following officers were elected for the ensuing year, to wit:

President, ...
Vice-president, ...
Treasurer, ...
Secretary, ...

The secretary presented a written proposal from the firm of Horatio Taylor & Co. offering to sell and transfer to this company the business of manufacturers of harness and saddlery now owned and conducted by said firm at No. 617 Mercer street, New York city.

[*For form of proposal, see Form No.* 207.]

There was also presented a resolution of the stockholders, approving the said proposal and recommending that the board of directors accept the same upon the terms and conditions therein set forth.

After discussion it was determined that the business and property thus offered was of the reasonable value of the consideration demanded for the same and thereupon by the affirmative vote of all present, the following preambles and resolution were adopted:

Whereas, the firm of Horatio Taylor & Co. has offered to sell, transfer and assign to this company the business of manufacturers of harness and saddlery now owned and conducted by said firm at No. 617 Mercer street, New York city, as more fully appears in the written proposal on file in this office, and

Whereas, the stockholders of this company at a meeting duly held, approved the said proposal and recommended that the board of directors accept the same, and

Whereas, in the judgment of this board of directors said business and property are reasonably worth the amount of the consideration demanded therefor; that the same is necessary for the use and lawful purposes of the company, and that it is deemed to be for the best interests of this company to accept said offer, as set forth in said proposition, now, therefore,

Resolved, that said offer, as set forth in said proposition, be and is hereby approved and accepted, and that, in accordance with the terms thereof, this company shall, as full payment for said property and business, issue and deliver ..... shares of its capital stock, of the total par value of ....., to said firm of Horatio Taylor & Co., or to their nominees or assigns in such proportions as may be designated by them, and shall also assume the indebtedness of said firm, but not exceeding $....., and,

Further Resolved, That the president and treasurer [*or as the case may be*] of this company are hereby authorized and directed, upon delivery of said business and property, as set forth in said proposition, and the execution and delivery of a proper instrument or instruments necessary to transfer and convey the same, to issue and deliver in accordance with these resolutions ..... shares of the capital stock of this company.

[*If the issue of only a portion of the capital stock has been provided for it may be desirable to adopt the following:*]

Upon motion, duly adopted by the affirmative vote of a majority present [*or by unanimous vote*] it was

Resolved, That subscriptions for the remainder of the capital stock be opened at the office of the company after giving such notices as may be deemed expedient, and that at the time of subscribing every subscriber whose subscription is payable in money shall be required to pay to the treasurer at least ten per centum upon the amount subscribed by him in cash.

Upon motion duly adopted, it was

Resolved, that the secretary be and he hereby is authorized and directed to procure proper corporate books, stationery and office furniture.

[*If the corporation is to have inspectors of election, adopt a resolution as follows:*]

Upon motion duly adopted, it was

Resolved, That Messrs. Matthew Miller and Jonas L. Hall be and they are hereby appointed inspectors of election to serve at the first annual meeting of the company, and at any meeting of the stockholders that may be held prior thereto.

[*If any of the directors named in the certificate of incorporation were to act only temporarily, during organization of the company, the following is suggested:*]

James A. Byrne presented his resignation as a director of the company to take effect immediately, which was, upon motion, accepted, and the meeting then, upon motion, filled the vacancy by the election of Silas R. Flower, who, being present, thereupon accepted.

There being no further business before the meeting it was adjourned.

..... , ... ,
Chairman. *Secretary.*

Form No. 215.

Certified Resolution for Bank.

Resolved, That the funds of this company, until further ordered, be deposited in its name with the ..... Bank [*or* ..... *Trust Company*], and that the same be subject to

check made in the corporate name, signed by the president [*or, as the case may be*], and countersigned by the treasurer [*or secretary*], and that a copy of this resolution, certified by the secretary, be transmitted to the said bank [*or Trust Company*].

I, [*insert name*] secretary of the [*insert name*] Company, do hereby certify that I have compared the preceding with the resolution duly adopted at the meeting of the board of directors of said company duly held at No. 617 Mercer street, New York city, on October 15, 1909, at 10 o'clock, A. M., and I do hereby certify the same to be a correct transcript of said resolution and of the whole thereof.

WITNESS my hand and the corporate seal of said company, this 15th day of January, 1909.

[*Corporate seal.*] .....,
Secretary.

Form No. 216.

Treasurer's Bond.

See note at the end of this form.

KNOW ALL MEN BY THESE PRESENTS, that the undersigned, as principal and surety, respectively, are held and firmly bound unto the [*insert corporate name*], its successors and assigns, in the sum of [*insert amount*] dollars, lawful money of the United States, to be paid to said company, its successors and assigns, for which payment, well and truly to be made, we bind ourselves, our executors, administrators and assigns, jointly and severally, firmly by these presents.

In witness whereof, we have hereunto set our hands and seals this ..... of ....., 19...

The condition of the foregoing obligation is such that

Whereas [*insert name of treasurer*], the principal has been duly appointed [*or elected*] and is about to enter upon the duties of the office of treasurer of the company above named,

Now, Therefore, if he shall in all respects fully and faithfully discharge his duties as such treasurer, so long as he shall hold the said office or continue therein during the term for which he is now

or may hereafter be appointed, elected, or hold over; and also, if in case of his death, resignation, disqualification or removal from office, all the books, papers, accounts, vouchers, securities, money and other property of whatever nature in his possession or control belonging to the company shall be forthwith delivered to the company, then this obligation to be void and of no effect, otherwise to be in full force and virtue.

.....,
Principal.

.....,
Surety.

STATE OF NEW YORK, }
County of ....., } *ss.:*

On this ..... day of ....., 19.., before me personally appeared ..... to me known and known to me to be the persons described in and who executed the foregoing undertaking, and severally acknowledged that they executed the same.

[*Signature of Notary.*]

A bond is not required by statute from any of the corporate officers, and need not be given unless required by some provision of the by-laws or by a resolution of the board of directors.

Form No. 217.

Certificate of Payment of One-half Capital Stock of a Business Corporation.

[See the Business Corporations Law, § 5.]

We, the undersigned, being a majority of the directors of the [*insert corporate name*], a corporation formed under the provisions of the Business Corporations Law of the State of New York, do hereby certify:

That the amount of the capital stock of said corporation is [*insert amount*] dollars, and that one-half thereof has been paid in, $..... having been paid in cash, and $..... in property.

IN WITNESS WHEREOF, we have made, signed and acknowledged this certificate in duplicate, and have hereunto set our hands this ..... day of ....., 19..

[*Signatures of majority of directors.*]

STATE OF NEW YORK, }
County of ...., } ss.:

On this ..... day of ....., 19.., before me personally came [*name directors signing certificate*] to me personally known and known to me to be the persons described in and who executed the foregoing certificate, and severally acknowledged to me that they executed the same.

[*Signature of Notary.*]

STATE OF NEW YORK, }
County of ...., } ss.:

[*Insert names of president (or vice-president) and secretary (or treasurer)*], being severally duly sworn, each for himself, deposes and says, that he, the said ..... is the president [*or vice-president*] of the [*insert corporate name*], and that he, the said ....., is the secretary [*or treasurer*] thereof, and that the statements contained in the foregoing certificate are true.

[*Signature of President, or Vice-President.*]
[*Signature of Secretary, or Treasurer.*]

Sworn to before me, this }
.... day of ..., 19. }

[*Signature of Notary.*]

Upon filing and recording the foregoing certificate the fees are as follows: Office of Secretary of State, a recording fee only of fifteen cents per folio. At the county clerk's office, six cents for filing and ten cents per folio for recording.

Form No. 218.

Agreement and Subscription Prior to Incorporation.

We, the undersigned, hereby agree to form a stock corporation under the Business Corporations Law of the State of New York for the purpose of ..... under the name of .....; and for such purpose we mutually agree to pay to the treasurer appointed by said company, the amount set opposite our respective names in the manner following: Fifty per cent. on demand, 25 per cent. on ....., and 25 per cent. thereafter when demanded by said company.

It is further mutually agreed that the capital stock of said company shall be $100,000, divided into 1,000 shares of the par value

of $100 each, of which said amount $50,000 shall be common stock and $50,000 thereof shall be preferred stock entitled to preferences over the common stock as follows: [*for preference clauses see examples, Forms Nos.* 262–277.]

It is further mutually agreed that ..... be and he is hereby authorized for us and in our behalf to cause to be prepared, executed, filed and recorded such certificate of incorporation as may be necessary and to do all things and perform all acts required for the formation of the company hereby agreed to be formed.

This agreement may be executed in several counterparts, each of which so executed shall be deemed to be an original; and such counterparts shall together constitute but one and the same instrument.

Name.	Address.	Number of shares. Preferred.	Common.	Amount.
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....

Any material departure from the contract of subscription and the formation of the corporation relieves the subscribers. Wood's Motor Vehicle Co. v. Brady, 181 N. Y. 145 (1905); Dorris v. Sweeney, 60 N. Y. 463 (1875); Burrows v. Smith, 10 N. Y. 550 (1853).

Form No. 219.

Stock Subscription After Incorporation.

See the Stock Corporation Law, § 53.

We, the undersigned, hereby subscribe hereto our respective names, post-office addresses and the number of shares of stock, at the par value of ..... dollars ($.....) each, which we respectively agree to take in [*insert corporate name*], a stock corporation organized under the Business Corporations Law of the State of New York, with a capital stock of $....., consisting of ..... shares, and we hereby severally agree to pay for such stock ten per cent. thereof herewith and the remainder at such times and in such installments as the board of directors of such company may by resolution require.

Name of subscriber.	Post-office address.	Number of shares subscribed.
.....	.....	.....
.....	.....	.....
.....	.....	.....

Form No. 220.

Minutes of Annual Meeting of Stockholders.

The annual meeting of the stockholders of the [*insert name*] Company, was held at the office of the company, No. 11 Maiden Lane, New York city, on the .... day of ..... 19.., at 10 o'clock, A. M.

The meeting was called to order and presided over by the president [*or vice-president*], Charles E. Smith.

The secretary called the roll of stockholders and reported that out of a total of 2,500 shares, issued and outstanding, there were present in person or by proxy, stockholders holding 1,400 shares, being more than a majority of such stock.

The secretary also reported that the proxies on file with him had been examined and found to be correct.

Notice of the meeting and proof of the publication thereof in the New York Sun, at least once in each week, for two successive weeks, immediately preceding this meeting were presented by the secretary and upon motion, ordered to be filed.

The secretary also presented an affidavit showing that a copy of said notice had been mailed at least ..... days previous to the meeting in accordance with the by-laws.

Upon motion, said affidavit was ordered placed on file.

The secretary read the minutes of the preceding meeting of the stockholders held January 15, 1909, and the same were approved.

The president's annual report was presented to the meeting, and upon motion was approved and ordered placed on file.

The treasurer's annual report was presented and upon motion was approved and ordered placed on file.

The chairman announced that the meeting would proceed to the election of directors for the ensuing year.

Messrs. ....., the inspectors of election, subscribed and verified the oath of office required by statute, and entered upon the discharge of their duties.

[*See form of oath, Form No.* 224.]

The election being by ballot showed that ..... received a plurality of all the votes cast, and the chairman thereupon declared the aforesaid persons to be duly elected directors of the company for the ensuing year.

The meeting then proceeded to elect two inspectors of election

for the ensuing year and ..... having received a plurality of all the votes cast were declared by the chairman to have been duly elected inspectors of election for the ensuing year.

The meeting was then adjourned.

.....,
Secretary.

.....,
Chairman.

Form No. 221.

Form of Notice of Election of Directors.

See the Stock Corporation Law, § 25.

Notice is hereby given that a meeting of the stockholders of [*insert name of company*] will be held at the office of the company [*state location of office*] on the ..... day of ..... 19.., at ..... o'clock, A. M. [*or* P. M.] for the purpose of electing [*insert number*] directors for the ensuing year, and [*insert number*] inspectors of election to serve at the next annual meeting, and for the transaction of such other business as may properly come before said meeting. Polls will remain open [*state length of time*]. Transfer books will be closed from ....., 19.., to ....., 19...

ALBANY, N. Y., ..., 19...

.....,
Secretary.

Form No. 222.

Stockholder's Waiver of Notice of Annual Meeting.

See the General Corporation Law, § 42.

I, the undersigned, a stockholder of the [*insert name*] Company, hereby admit due and timely service of a notice of which the foregoing is a true copy, and I hereby waive any further notice of the annual meeting of stockholders therein mentioned and the lapse of any prescribed period of time, and I do hereby authorize and approve all and any lawful business that may be deemed advisable by the stockholders present at such meeting.

[*Signature.*]

Form No. 223.

Certificate of Inspectors of Election.

See the Stock Corporation Law, § 31.

We, the undersigned, duly elected inspectors of election of [*insert name of corporation*], a stock corporation, do hereby certify as follows:

That a meeting of the stockholders of said corporation was held at ....., on the ..... day of ....., 19.., at .....o'clock, ... M., pursuant to due notice.

That before entering upon the discharge of our duties, we were severally sworn, and the oath so taken by us is hereto annexed.

That the result of the vote taken at such meeting for the election of directors of said corporation for the ensuing year was as follows:

A. B. ....Votes.
C. D. ....Votes.
E. F. ....Votes.

That said A. B., C. D. and E. F. having received a plurality of the votes cast were declared by us duly elected directors of said corporation for the ensuing year.

That the result of the vote taken at such meeting for the election of inspectors of election of said corporation was as follows:

L. M. ....Votes.
N. O. ....Votes.
R. S. ....Votes.

That said L. M., N. O. and R. S. having received a majority [*or plurality, as by-laws provide*] of all the votes cast for inspectors of election were declared by us duly elected as such.

IN WITNESS WHEREOF, we have made and signed this certificate this ..... day of ....., 19...

[*Signatures of inspectors.*]

STATE OF NEW YORK,
County of.....,} *ss.:*

On this ..... day of ....., 19.., before me personally came [*names of inspectors*], to me known and known to me to be the individuals described in and who executed the foregoing certificate and severally acknowledged to me that they executed the same.

[*Signature of Notary.*]

Form No. 224.

Oath of Inspectors to be Annexed to the Foregoing Certificate.

See the Stock Corporation Law, § 31.

STATE OF NEW YORK, }
County of ....., } *ss.:*

We, the undersigned inspectors of election, duly appointed to act at the meeting of the stockholders of the [*insert name of corporation*], to be held at ..... on the ..... day of ....., 19.., being severally duly sworn, do depose and say, and each for himself deposes and says, that he will faithfully execute the duties of inspector at such meeting with strict impartiality, and according to the best of his ability.

.....,
.....,
.....,
Inspectors.

Severally sworn to before me, }
this .... of ..... 19... }
.....
Notary, etc.

The foregoing certificate, with the oath annexed thereto, must be filed in the office of the clerk of the county in which the election was held.

Form No. 225.

Proxy from a Stockholder.

See the General Corporation Law, § 26.

KNOW ALL MEN BY THESE PRESENTS, That I, ..., do hereby constitute and appoint C. D. to be my lawful attorney, substitute and proxy for me, and in my name to vote upon all the stock held by me in [*insert name of corporation*] at the annual meeting of stockholders of such corporation [*or at a special meeting of such corporation, as the case may be,*] to be held on the ..... day of ....., 19.., and at any adjourned meeting thereof, as fully and with the same effect as I might or

could do were I personally present at such meeting; and I hereby revoke any proxy or proxies heretofore given by me to any person or persons whatsoever.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this ..... day of ....., 19...

[*Signature.*] [L. S.]

In presence of .....

All proxies must be filed in the office of the corporation.

Form No. 226.

Proxy With Power of Substitution.

See the General Corporation Law, § 26.

KNOW ALL MEN BY THESE PRESENTS, That I [*or we*], the undersigned, do hereby constitute and appoint Richard F. Greene, Alvin K. Morse and William H. Ensign, with power to be exercised by them, or any one or more of them, the action of a majority of them to be in any event controlling, for me [*or us*] and in my [*or our*] name, place and stead to vote as my [*or our*] proxies at the annual meeting of the stockholders of the Great Hopes Copper Company, to be held on the 25th day of October, 1909, at the office of the company, No. 500 Steuben street, Albany, N. Y., or at any adjournment thereof, at the election of directors to be chosen at said meeting, and on any resolution or proposition that may be submitted to a vote of the stockholders thereat according to the number of votes that I [*or we*] should be entitled to vote if then personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my [*or our*] said proxies or substitutes may do in my [*or our*] place, name and stead.

IN WITNESS WHEREOF, I [*or we*] have hereunto set my [*or our*] hand and seal this 28th day of September, 1909.

Witness:

[*Signatures.*]

Form No. 227.

Proxy to Three or Either of Them.

See the General Corporation Law, § 26.

KNOW ALL MEN BY THESE PRESENTS, That I, ..., do hereby constitute and appoint John D. Rockefeller, Frederic P. Olcott, Henry C. Rouse and Henry W. Poor, or any one of them, with power of substitution my attorney and agent for me and in my name, place and stead, to vote as my proxy at the annual meeting of the stockholders of the Missouri, Kansas and Texas Railway Company, to be held at Parsons, Kansas, on the 17th day of May, 1893, at 12 o'clock, M., or any adjournment thereof, for the election of directors, and upon any matter that may come before the said annual meeting, or any adjournment thereof, according to the number of votes I should be entitled to vote if then personally present at the said meeting.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this ..... day of ....., 1893.

[*Signature.*]

Sealed and delivered in the presence of

[*Signature.*]

Form No. 228.

Form of Proxy from a Member of a Non-Stock Corporation.

See the General Corporation Law, § 26.

KNOW ALL MEN BY THESE PRESENTS, That I, [*insert name*] do hereby constitute and appoint C. D. to be my lawful attorney, substitute and proxy for me, and in my name to vote at the annual meeting [*or at a special meeting, as the case may be,*] of the members of [*insert name of corporation*], to be held on the [*proceed as in form No. 225.*]

See note to form No. 225.

Form No. 229.

Oath of Challenged Voter.

See the General Corporation Law, § 27.

STATE OF NEW YORK, }
County of ...., } *ss.:*

I do solemnly swear that in voting at this election I have not, either directly, indirectly or impliedly, received any promise or any sum of money, or anything of value to influence the giving of my vote or votes at this meeting, or as a consideration therefor.

[*Signature of Voter.*]

Subscribed and sworn to before me, }
this .... day of ...., 19... }

.....,

Inspector of Election.

The oath taken as above must be filed in the office of the corporation.

Form No. 230.

Oath of Challenged Proxy.

See the General Corporation Law, § 27.

STATE OF NEW YORK, }
County of ..... } *ss.:*

I do solemnly swear that I have not, either directly, indirectly or impliedly, given any promise or any sum of money or anything of value to induce the giving of a proxy to me to vote at this election, or received any promise or any sum of money or anything of value to influence the giving of my vote at this meeting, or as a consideration therefor.

[*Signature of Proxy.*]

Subscribed and sworn to before me, }
this .... day of ...., 19... }

.....,

Inspector of Election.

The oath taken as above must be filed in the office of the corporation.

Form No. 231.

Ballot of Stockholder at Election of Directors.

For Directors

of the

..... Company.

1. .....
2. .....
3. .....
4. .....
5. .....

300 shares

John Doe

Form No. 232.

Ballot of Stockholder's Proxy at Election of Directors.

For Directors

of the

..... Company.

1. .....
2. .....
3. .....
4. .....
5. .....

100 shares

John Doe

proxy for John Smith.

Form No. 233.

Directors' Annual Meeting. Minutes.

See the Stock Corporation Law, § 25.

The annual meeting of the board of directors of the [*insert name*] company held at the office of the company, No. 11 Maiden Lane, New York city, on the ..... day of ....., 19.., at 10:30 A. M.

The president [*or vice-president*] of the company, Mr. ....., called the meeting to order and presided.

There were found to be present the following directors:

.....,
.....,
.....,
.....,
constituting a quorum of the board.

The president presented a waiver of notice of the meeting subscribed by all the directors of the company, which was on motion ordered placed on file.

[*See notice, Form No.* 221.]

The meeting then proceeded to the election of officers for the ensuing year and the following were duly elected, to wit:

President, ...
Vice-President, ...
Secretary, ...
Treasurer, ...

The secretary presented the record of the minutes of the meetings of the board of directors and the report of the executive committee for the consideration of the meeting, and upon motion duly adopted the various acts and transactions in behalf of the company by the board of directors and of the executive committee since the last annual meeting [*or since* ..... 19..] were approved, ratified and confirmed.

The meeting was then adjourned.

.....,
Secretary.

....., *Chairman.*

Form No. 234.

Waiver of Notice of Directors' Annual Meeting.

We, the undersigned, constituting all the directors of the [*insert name*] Company, hereby waive all notice whatsoever of the annual meeting of directors, and do agree and consent that the same be held at the office of the company, No. 11 Maiden Lane, New York

city, on the .... day of ....., 19.., at 10:30 o'clock, A. M., for the purpose of electing officers for the ensuing year, for the consideration of the acts and transactions of the board of directors and of the executive committee, and for all and any lawful business that may be deemed advisable by the directors present thereat.

Dated ..... 19...

Form No. 235.

Resolution Authorizing Corporation Note.

Resolved, That the president be and hereby is authorized to make a contract for the purchase of ..... for the use of this corporation, and is hereby authorized in carrying out such purchase to give notes of this corporation to the amount of ..... dollars.

Form No. 236.

Promissory Note of Corporation.

$..... ALBANY, N. Y., ..., 19...

Four months after date, the [*insert name of corporation*] promises to pay to the order of [*name of payee*], ... dollars, at the ..... Bank, Albany, N. Y.

Value received.

THE [*insert corporate name*] COMPANY,
By [*signature*], *President.*

Attest:
[*Signature*], *Secretary.*

Form No. 237.

Resolution of Directors Conferring General Authority to Make Contracts.

Resolved, That the president be and he is hereby authorized and empowered, until otherwise ordered, to enter into, execute and deliver in the name and on behalf of this company, any contract,

agreement, conveyance and any other instrument that may be deemed by him necessary and proper for the business of the company, without further act or resolution of this board, and that the secretary be and he is hereby authorized and directed to attach the corporate seal thereto and to attest the same by his signature.

Form No. 238.

Certification of Foregoing Resolution.

I have compared the foregoing with the resolution duly adopted by the board of directors of the ..... Company, at a meeting regularly called and held at the office of the company, a quorum being present, on ....., 19.., and I hereby certify the foregoing to be a correct copy of said resolution, so adopted, and of the whole thereof, and that the same has not been revoked or rescinded.

.....,
Secretary.

Form No. 239.

Notice of Special Election of Directors.

See the General Corporation Law, § 29.

To the stockholders* of the [*insert corporate name*]:

Notice is hereby given that the election of directors for the [*insert corporate name*] not having been held on the day designated in the by-laws, a meeting of the members of said corporation, for the purpose of electing directors thereof, will be held at the office of said corporation, No..... street, in the [*city or village*] of....., on the ..... day of ....., 19.., at ..... o'clock in the ..... noon.

Dated....., 19...

A. B.,
Secretary.

*Use the word "members" if a non-stock corporation.

Form No. 240.

Notice of Special Election by a Stockholder.

See the General Corporation Law, § 29.

To the stockholders* of the [*insert corporate name*]:

Notice is hereby given that the election of directors for the [*insert corporate name*] not having been held on the day designated in the by-laws, and the directors not having within one month thereafter called a special election [*or the meeting held on (insert date) having resulted in a failure to elect directors*], a meeting of the members of said corporation for the purpose of electing directors thereof will be held at the office of said corporation, No. ..... street, in the..... of ....., on the ..... day of ....., 19.., at ..... o'clock in the .... noon.

Dated ....., 19..

A. B.,
Stockholder of said Corporation.*

Form No. 241.

Sworn Statement of Voter.

See the General Corporation Law, § 31.

STATE OF NEW YORK, }
County of ....., } *ss.:*

A. B., being duly sworn, deposes and says, that he is a member of the [*insert corporate name*]; † that the number of shares of stock owned by him and standing in his name on the books of such corporation is [*state number*], and that the whole number of shares of stock of such corporation outstanding is ..... [*or is unknown to deponent*].

A. B.

Sworn to before me, this .... }
day of ....., 19... }
[*Signature of Notary.*]

The inspectors must file such statement, with a certificate of the result of the election, verified by them, in the office of the clerk of the county in which the election is held. For form of inspector's certificate, see Forms Nos. 223, 224.

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* Use the word "member" if a non-stock corporation.
† Omit all succeeding the † if a non-stock corporation.

Form No. 242.

Petition to Set Aside Election of Directors.

See the General Corporation Law, § 32.

IN THE MATTER OF THE ELECTION OF
DIRECTORS
OF THE
[*Insert corporate name*] COMPANY.

To the Supreme Court of the State of New York:

The petition of [*insert name*], a stockholder in the [*insert name of corporation*], respectfully shows to this court: That the [*insert corporate name*] was on the ..... day of ....., 19.., and still is, a corporation duly organized and existing pursuant to and by virtue of the provisions of [*state the act*] of the State of New York, and the acts amendatory thereof and supplemental thereto, for the purpose of [*state business*] and is now carrying on such business.

That the principal place of business of such corporation is located at [*insert location*].

And the petitioner further shows that on the ..... day of ....., 19.., at the office of such corporation, an election of directors for such corporation was assumed to be held by virtue of its by-laws, and the following persons were assumed to have been elected such directors thereat, to-wit: [*insert names*], and claiming to be directors by virtue of such alleged election said persons organized as a board, and assumed to act as such, and that hereto annexed and marked "Exhibit ...." is a copy of the record of such alleged election.

That at said alleged election other persons, stockholders of such corporation, and qualified to act as directors thereof, to-wit: [*Insert names*], each of whom then was and now is the lawful owner and holder of at least ..... shares of its capital stock, were voted for by duly qualified voters.

That said alleged election and the proceedings, acts and matters touching the same were illegal and invalid for the following reason: [*Set forth the irregularities*].

And the petitioner further shows that at the time of such alleged election and for more than ten days previous thereto, the petitioner was, ever since has been and now is a stockholder in such corporation, being the lawful owner and holder of ..... shares of the capital stock thereof, that he was present and objected to the said illegal proceedings and acts at such election.

That your petitioner is aggrieved by, and complains of, such election and the proceedings, acts and matters touching the same, and alleges that his right to vote was infringed by such illegal proceedings and the value of his stock has been injuriously affected by the acts of said persons assuming to act as directors by virtue of said illegal proceedings.

Wherefore the petitioner prays that such election may be declared by this court to be irregular and of no effect, and be set aside and the offices of all such directors be declared to be vacated, and that all such persons assuming to be directors cease to act as such, and that a new election for the directors of such corporation be ordered by this court, and that inspectors for such election be appointed by the court, and for such further relief as right and justice may require.

A. B.,
Attorney for Petitioner,
Office and post-office address:

.....

STATE OF NEW YORK,
County of ..... } *ss.:*

[*Insert name*], being duly sworn, says that he has read the foregoing petition, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters, he believes it to be true.

[*Signature.*]

Sworn to before me, this ....
day of ....., 19... }

[*Signature of Notary.*]

Form No. 242-a.

Order Setting Aside Election of Directors of Corporation.

See General Corporation Law, § 32.

At a Special Term of the Supreme Court of the State of New York held in and for ..... County, on the ..... day of ....., 19...

Present:

Hon....., *Justice.*

In the Matter of the election of directors of [*insert corporate name*].

..... having presented to this Court his verified petition, praying that an order be made herein setting aside the election of the Directors of the above-named corporation, held on ....., and for other and further relief as in said petition more fully appears, pursuant to § 32 of the General Corporation Law, and said motion having duly come on to be heard, now on reading and filing said petition of ..... verified on the ..... day of ....., 19.., and notice of this motion, dated ....., and [*here recite other papers read in support of and in opposition to the motion*]; and after hearing ..... in support of the motion, and ..... in opposition thereto, it is on motion of ....., attorneys for the petitioner,

ORDERED, that the election for Directors of the [*insert corporate name*] held on .....: be and the same hereby is set aside as irregular, and of no effect, and that the same be and hereby is declared irregular and of no effect, and the offices filled by the said Directors ..... elected at said meeting be and the same hereby are declared vacant, and it is further

ORDERED, that the said ..... [*insert names*] be and they hereby are, and each of them hereby is directed to cease to act as such directors, and they and each of them hereby is enjoined from in any way acting as director, and it is further

ORDERED, that a new election of the directors of the said [*insert corporate name*] be and the same hereby is directed to take place at ..... on ..... and that ..... days' notice of the said election be sent by mail to all members of the said corporation.

Form No. 243.

Certificate of Stock.

See the Stock Corporation Law, § 50.

No..... No. of shares.....
Par value of each $....

The.....Company.

Incorporated under the Laws of the State of New York.

THIS IS TO CERTIFY THAT ..... is the owner of ..... shares of the capital stock of The.....Company, transferable only on the books of the company by the holder thereof, in person or by attorney, on the surrender of this certificate.

[*Corporate seal.*] IN WITNESS WHEREOF, the said company has caused its corporate seal to be affixed hereto and this certificate to be signed by its president or vice-president and secretary or treasurer.

ALBANY, N. Y., ..., 19...

....., President [*or Vice-President*].
....., Secretary [*or Treasurer*].

On the reverse side of the certificate of stock should be printed a blank transfer, as follows:

For value received, I hereby sell, assign and transfer unto ..... shares of the within mentioned stock, and do hereby irrevocably constitute and appoint .....my true and lawful attorney to transfer the same on the books of the company.

Witness my hand and seal, this.... day of ....., 19...
..... [*Seal.*]

Witness:

The provisions of section 51 of the Stock Corporation Law may also be printed on the back of each certificate of stock, if desired.

For form of certificate of preferred stock, see form No. 247.

Form No. 243-a.

Transfer of Certificate of Stock.

FOR VALUE RECEIVED ..... bargain, sell, assign and transfer unto ..... the Capital Stock named in the within Certificate, and ..... do hereby authorize the transfer thereof on the books of the Company.

Dated, ...

[*Signature*].

Form No. 244.

Certificate of Stock.

See the Stock Corporation Law, § 50.

Incorporated Under Laws of New York.

Number ..... Shares .....

POESTENKILL REALTY COMPANY.

Capital Stock, $000,000. Shares, $000 each.

This is to certify, That ..... is the owner of ..... shares of the Capital Stock of the Poestenkill Realty Company, transferable in person or by attorney on the books of the Company upon surrender of this certificate properly endorsed.

[*Corporate Seal*] Witness, the corporate seal of the Company and the signatures of its duly authorized officers affixed this ..... day of ....., 19...

....., Secretary [*or Treasurer*].

....., President [*or Vice-President*].

[*For form of endorsement, see preceding form.*]

Form No. 245.

Certificate of Common Stock.

See Stock Corporation Law, §§ 50 and 61.

No. .... No. Shares ....

(Par Value One Hundred Dollars each.)

The ..... Company.

Incorporated under the Laws of the State of New York.

THIS IS TO CERTIFY that ..... is entitled to ..... fully paid, non-assessable shares of one hundred dollars each in

the common capital stock of The ..... Company, transferable only on the books of the corporation, in person or by attorney, on the surrender of this certificate. The common stock of the corporation is subject in all respects to the prior rights of the holders of preferred stock as provided in the certificate of incorporation.

* This certificate is not valid, nor is its issue complete until after registration thereof by the registrar of the corporation and notation thereof hereon.

IN WITNESS WHEREOF, the corporation has caused this certificate to be signed by its president [*or vice-president*] and its secretary [*or assistant secretary*], at ....., this ..... day of ....., 19...

.....,
President.

....., *Secretary.*

[*Across left-hand end:*]

* Registered this ..... day of ....., 19...

.....,
Registrar.

(Form of Indorsement.)

For value received, ... hereby sell, assign and transfer unto ....., ... shares of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint ..... attorney, to transfer the said stock on the books of the within-named corporation, with full power of substitution in the premises.

Dated, ..., 19...

In presence of

[*Across right-hand end:*]

Notice.— The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular, without alteration or enlargement, or any change whatever.

* Omit this in case stock is not to be registered.

Form No. 246.

Certificate of Common Stock.

See Stock Corporation Law, §§ 50 and 61.

Incorporated under the Laws of the State of .....

The ..... Company.

Authorized capital stock, $20,000,000.

Preferred stock, $9,000,000. Common stock, $11,000,000.

No. .... Par value, $100 each. No. shares, ...

THIS CERTIFIES ..... to be entitled to ..... full-paid shares of the common stock of The ..... Company, transferable only on the books of the company by the holder, in person or by attorney, on surrender of this certificate. The preferred stock, as more fully provided in the certificate of incorporation, is entitled, in preference to the common stock, to cumulative dividends at the rate of ..... per centum yearly, and to payment of its par value and the amount of such cumulative dividends then unpaid in any distribution of assets, but to no other dividend or payment.

* This certificate will not be valid unless countersigned by the transfer agent and registered.

WITNESS the signatures of the ..... president and ..... treasurer of said company, this ..... day of ....., 19...

.....,
President.

.....,
Treasurer.

[*Across left-hand end:*]

* Registered this ..... day of ....., 19...
Trust Company,
Registrar

By .....,
Secretary.

[*Across right-hand end:*]

* Countersigned this ..... day of ....., 19...
.....,
Transfer Agents.

* Omit this in case there is to be no Registrar or Transfer Agent.

(Form of Indorsement.)

For value received, ... hereby sell, assign and transfer unto ..... shares of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint ..... attorney to transfer the said stock on the books of the within-named company, with full power of substitution in the premises.

Dated, ..., 19...

.....

In presence of

.....

[*Following or at right of indorsement:*]

Notice.— The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular, without alteration or enlargement, or any change whatever.

Form No. 247.

Certificate of Preferred Stock.

See Stock Corporation Law, §§ 50 and 61.

(Par Value, One Hundred Dollars each.)

The ..... Company.

(Incorporated under the Laws of the State of New York.)

No. .... No. of shares .....

THIS IS TO CERTIFY that ..... is entitled to ..... fully paid, non-assessable shares of the par value of one hundred dollars each in the preferred capital stock of the ..... Company, transferable only on the books of the corporation in person or by attorney, upon the surrender of this certificate. The holders of preferred stock are entitled out of any and all surplus net profits, whenever ascertained, to cumulative dividends at the rate of and not exceeding six per cent. per annum, in the year beginning on the first day of ....., 1900, and in each and every year thereafter, payable in quarterly installments, in preference and priority to any payment of any dividend on the common stock for such quarter. This certificate is not valid

nor is its issue complete until after registration thereof by the registrar of the corporation and notation thereof hereon.*

IN WITNESS WHEREOF, the corporation has caused this certificate to be signed by its president, or vice-president, and its secretary or assistant secretary, at ....., New York, this ..... day of ....., 19...

.....,
President.

....., *Secretary.*

[*Across left hand end:*]

* Registered this ..... day of ....., 19...

.....,
Registrar.

(Form of Indorsement.)

FOR VALUE RECEIVED, ... hereby sell, assign and transfer unto ....., ... shares of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint ....., attorney, to transfer the said stock on the books of the within-named corporation, with full power of substitution in the premises.

Dated, ..., 19...

In presence of:

[*Across right-hand end:*]

Notice.— The signature of this assignment must correspond with the name as written upon the face of the certificate in every particular, without alteration or enlargement, or any change whatever.

Form No. 248.

Certificate of Partly Paid Stock.

See the Stock Corporation Law, § 60.

No. ..... No. of shares .....

The ..... Company.

(Incorporated under the Laws of the State of New York.)

Authorized capital stock $ ..... Shares, $ ..... each.

THIS CERTIFIES that ..... is the owner of ..... shares of the partly paid capital stock of The .....Company,

* Omit this in case stock is not to be registered.

For various preference clauses, see Forms Nos. 262–273.

transferable only on the books of the company in person or by attorney on surrender of this certificate. Ten per cent. of the par value has been paid in cash on the shares of stock named in this certificate. The above-named holder of this certificate accepts the same subject to liability for the payment upon said shares of all instalments, not noted as paid upon the face or reverse of this certificate, which shall be called by the board of directors, prior to the transfer of this certificate upon the books of the company.

IN WITNESS WHEREOF, the said company has caused its corporate seal to be affixed hereto and this certificate to be signed by its president or vice-president and secretary or treasurer, this ..... day of ....., 19...

{ *Corporate seal.* }

....., *President* [*or, Vice-President*].
....., *Secretary* [*or, Treasurer*].

On the reverse of the certificate should be printed blank instalment receipts and a blank transfer as follows:

2d.	Instalment.....%	Paid.....	.....
3d.	Instalment.....%	Paid.....	.....
4th.	Instalment.....%	Paid.....	.....
5th.	Instalment.....%	Paid.....	.....
6th.	Instalment.....%	Paid.....	.....
7th.	Instalment.....%	Paid.....	.....
8th.	Instalment.....%	Paid.....	.....
9th.	Instalment.....%	Paid.....	.....
10th.	Instalment.....%	Paid.....	.....

FOR VALUE RECEIVED ..... hereby sell, assign and transfer unto ..... shares of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint ....., attorney to transfer the said stock on the books of the within-named company with full power of substitution in the premises.

.....

Dated, ..., 19...
In presence of

.....

Form No. 249.

Temporary Stock Receipt.

Capital, $2,500,000. Shares, ...
Surplus, $2,500,000 Amount, $.....

TEMPORARY RECEIPT.

The [*insert name*] Company.

No. 1000.

THIS CERTIFIES that ..... is entitled to ..... shares of the capital stock of THE ..... COMPANY, of the par value of one hundred dollars per share, for which payment has been made at the rate of one hundred dollars per share, the receipt of which is hereby acknowledged.

This temporary receipt properly indorsed, may be exchanged for engraved certificate of stock on or after ..... 19...

Dated, New York, ... 19...

(Form of Indorsement.)

FOR VALUE RECEIVED, ... have bargained, sold, assigned and transferred and by these presents do bargain, sell, assign and transfer unto .... the capital stock named in the within certificate, and ..... do hereby constitute and appoint .... true and lawful attorney, irrevocable, for ..... and in ..... name and stead, but to ..... use, to sell, assign, transfer and set over, all or any part of the said stock, and for that purpose to make and execute all necessary acts of assignment and transfer, and one or more persons to substitute with like full power.

.....

Dated .....
Signed in the presence of

.....

Form No. 250.

Installment Receipt for Stock Subscription.

No. Shares

....

[*Insert Corporate Name*] Company, Inc.

INSTALLMENT RECEIPT IN ACCORDANCE WITH THE TERMS OF SUBSCRIPTION AGREEMENT, DATED , 19 .

Received of for account of [*insert corporate name*] Company, Inc., the sum of ..... dollars in payment of first installment of ..... per share upon a subscription for ..... shares of the stock of said [*insert corporate name*] Company, Inc., in accordance with the terms of the Subscription Agreement.

The holder hereof will be entitled to certificate for said shares of [*insert corporate name*] Company, Inc., upon payment of the remainder of said subscription according to the terms of said agreement and upon surrender of this receipt.

This receipt is transferable only at the office of the undersigned upon surrender hereof, properly endorsed.

Dated New York, , 19 .

Normanskill Trust Company
by

.....,
Vice-President.

FURTHER PAYMENTS UPON SUBSCRIPTION.

Installments due	Dollars	Paid	Received by
2nd installment, Dec. 15, 19	$75 00	Dec. 12, 19	..... *Vice-President*
3rd installment, Feb. 15, 19	75 00	Feb. 15, 19	..... *Vice-President*
4th installment, April 15, 19	75 00	April 15, 19	..... *Vice-Presidnet*

This receipt may be exchanged for permanent stock certificate on or after [*insert date*], at the office of the Normanskill Trust Company, at Normanskill, N. Y.

[*Insert Corporate name*] Company, Inc.

Form No. 251.

Resolution Declaring Dividend.

Resolved, That there be and hereby is declared from the surplus profits of the company a semi-annual dividend of three per cent. (3%) payable October 25, 1909, to stockholders of record at the close of business on October 11, 1909; and that the treasurer is hereby instructed and authorized to give due notice of such dividend, and to pay the same on the date specified.

Form No. 252.

Resolution Declaring a Dividend.

RESOLVED, that the sum of $ be and the same hereby is appropriated and set aside from the surplus profits of this company for the payment of a quarterly (or semi-annual or annual as the case may be) dividend of per cent. upon its outstanding stock, said dividend to be due and payable on the day of , 19 ;

RESOLVED, FURTHER, that the treasurer of this company be and he is hereby authorized and instructed to notify the stockholders of such dividend and to pay the same when due.

Form No. 253.

Notice of Dividend for Mailing.

Oct. 4th, 1909.

You are hereby notified that at a meeting of the directors of the ..... Company, held this day, a semi-annual dividend of three per cent. was declared, payable at this office, October 25, 1909, to stockholders of record at the close of business on October 11, 1909.

.....,

Secretary.

Form No. 254.

Resolution Declaring Stock Dividend (Pullman Company)

Whereas, The value of the assets of this company exceeds the par value of the capital stock by more than twenty-six million dollars ($26,000,000).

Resolved, That for the purpose of representing in the capitalization of this company existing surplus assets to the extent of twenty-six million dollars ($26,000,000), the capital stock of the company is hereby increased to one hundred million dollars ($100,000,000); and the proper officers of the company are hereby directed to issue additional stock to the amount of twenty-six million dollars ($26,000,000), and

Resolved, That the directors be authorized to distribute said twenty-six million dollars ($26,000,000), capital stock, with a necessary additional amount from the stock held in the treasury of the company, *pro rata,* to stockholders of the company in the ratio of thirty-six (36) shares to each one hundred (100) shares held by stockholders of record at the close of business on the 30th day of November, A. D. 1906.

Form No. 255.

No. 81. Certificate of Interest-Bearing Scrip Dividend. $100.00

BEAVER RIVER MANUFACTURING COMPANY.

THIS CERTIFIES that Warren L. King is entitled to one hundred dollars on account of the profits of the Beaver River Manufacturing Company, of Roscoe, N. Y., which sum the said company will pay to him or his order, indorsed hereon, on the 1st day of February, 1916, at the office of said company, with annual interest thereon at the rate of 7 per cent. per annum, payable on the first day of February in each year, with the privilege, however, to the owner hereof to convert the same into the capital stock of said company at the par value thereof at any time the company may resolve to increase its capital stock.

This certificate is issued pursuant to a resolution of the board of trustees of said company, passed on the 21st day of October,

1909, and is transferable only on the books of the company by the person herein named or his order indorsed hereon.

In Witness Whereof, the said Beaver River Manufacturing Company has caused this certificate to be signed by its president [*or vice-president*], and its corporate seal to be hereunto affixed, and to be attested by its secretary this 28th day of October, 1909.

{ *Corporate seal.* }

BEAVER RIVER MANUFACTURING COMPANY.

By Richard Bingham,
President.

Attest:

Albert L. Hastings,
Secretary.

Form No. 256.

A Famous Scrip Dividend.

In 1868, under the management of Commodore Vanderbilt, the New York Central Railroad Company declared a notable dividend in scrip which was before the courts in the cases of Bailey v. N. Y. Central R. R. Co., 22 Wallace, 604, and Brundage v. Brundage, 60 N. Y. 544.

The following resolution discloses the nature of the scrip:

"THE NEW YORK CENTRAL RAILROAD COMPANY.

"*Whereas,* This company has hitherto expended of its earnings for the purpose of constructing and equipping its road, and in the purchase of real estate and other properties, with a view to the increase of its traffic, moneys equal in amount to 80 per cent. of the capital stock of the company; and

"*Whereas,* The several stockholders of the company are entitled to evidence of such expenditure, and to reimbursement of the same at some convenient future period; now, therefore,

"*Resolved,* That a certificate, signed by the president and treasurer of this company, be issued to the stockholders severally, declaring that such stockholder is entitled to 80 per cent. of the amount of the capital stock held by him, payable ratably with the other certificates issued under this resolution, at the option of the company, out of its future earnings, with dividends thereon, at the same rates and times as dividends shall be paid on shares of the capital stock of the company, and that such certificates may be,

at the option of the company, convertible into stock of the company, whenever the company shall be authorized to increase its capital stock to an amount sufficient for such conversion."

Form No. 257.

The above certificates were in this form:

THE NEW YORK CENTRAL RAILROAD COMPANY.

No. Interest Certificate.

Under a resolution of the board of directors of this company, passed December 19, 1868, of which the above is a copy, the New York Central Railroad Company hereby certifies that A. B., being the holder of ..... shares of the capital stock of said company, is entitled to ..... dollars, payable ratably with the other certificates issued under said resolution at the pleasure of the company out of its future earnings, with dividends thereon, at the same rates and times as dividends shall be paid upon the shares of the capital stock of said company.

This certificate may be transferred on the books of the company on the surrender of this certificate.

In Witness Whereof, the said company has caused this certificate to be signed by its president and treasurer, this 19th day of December, 1868.

.....,
President.

.....,
Treasurer.

At the foot of each certificate there was a form of transfer in blank:

For a valuable consideration I, A. B., do hereby sell, assign, and transfer all interest in the above certificate to C. D., and do hereby irrevocably appoint E. F. attorney, to execute a transfer thereof on the books of the railroad company therein mentioned.

The foregoing may be used by any class of stock corporations, except corporations subject to the Public Service Commissions Law, which does not permit the issuance of scrip dividends by corporations subject thereto.

Form No. 257-a.

Scrip Dividend.

No. 67. $935.29.

E. P. GLEASON MANUFACTURING CO.

This certifies that F. Billingham is entitled to Nine Hundred Thirty-five 29/100 Dollars, Scrip Dividend, representing the undivided earnings on Certificate No. .... of the E. P. Gleason Manufacturing Co. for the year 18 . .

[seal].

This dividend is payable at the pleasure of the Company, and in case of surrender of Certificate of Stock on which it is issued, this Certificate is to be surrendered with it.

F. W. Belmont, Secretary.

E. P. Gleason, President.

The obligation to pay the above scrip dividend being absolute, such payment was to be made within a reasonable time, notwithstanding the provision of the certificate that "This dividend is payable at the pleasure of the Company." Billingham v. Gleason Mfg. Co., 101 A. D. 476 (1905).

Form No. 258.

Form of Demand for Transfer of Stock.

See the Stock Corporation Law, § 32.

To the ..... Company, and its directors, officers and agents:

You will take notice that I am the legal owner of certificate number .... for ..... shares of stock of the said ..... Company, and that said certificate was issued to ....., and has been duly transferred by him to me, said original certificate and transfer being herewith exhibited to you. I hereby offer to surrender to you said certificate on receiving a new certificate for said ..... shares of stock, and do demand that you forthwith transfer said ..... shares to me on the books of said ..... Company, and issue to me a new certificate therefor in my name.

Dated, Albany, N. Y., ..., 19..

[*Signature.*]

Form No. 259.

Stock-Book of Stock Corporation.

See the Stock Corporation Law, § 32.

STOCK-BOOK OF THE [*insert corporate name*], PURSUANT TO THE STOCK CORPORATION LAW OF THE STATE OF NEW YORK.

Names of stockholders.	Places of residence.	Number of shares of stock held.	Time each became owner of shares.	Amount paid thereon.

Section 32, above referred to, requires the names to be "alphabetically arranged," hence the pages of the stock-book should bear the letters of the alphabet in successive order, and each entry should be made upon the page bearing the appropriate letter, thus: "John Anderson" on page "A;" "John Brown" on page "B," etc.

Form No. 260.

Request to Treasurer for a Statement.

See the Stock Corporation Law, § 69.

To the Treasurer of the [*insert corporate name*]:

We, the undersigned, stockholders [*or, I, the undersigned, a stockholder*] of the above named corporation, owning more than five per centum [*or, three per centum, if the amount exceeds $100,000*] of the capital stock of said corporation, do hereby request from you a statement of the affairs of said corporation, under oath, embracing a particular account of all its assets and liabilities, pursuant to section 69 of the Stock Corporation Law of the State of New York.

Dated, ...

Witness:

Yours, etc.,

[*Signature of Stockholder*].

Form No. 260-a.

Notice to Stockholder of Claim for Services.

See the Stock Corporation Law, § 57.

To [*insert name*],

Stockholder of [*insert name*] Company:

You are hereby notified, pursuant to statute, as follows: That the said [*insert corporate name*] Company is indebted to me, the undersigned, in the sum of [*insert amount*] dollars, for services performed by me for said corporation; that such services terminated on the .... day of ....., 191..; that I intend to hold you liable, as such stockholder, for the payment of said indebtedness, with interest thereon.

Dated, this .... day of ....., 191..

Yours, etc.,

[*Attach signature*].

Form No. 261.

Bond of Indemnity in Case of Lost Certificate.

See Stock Corporation Law, § 68.

KNOW ALL MEN BY THESE PRESENTS, That we, [*insert name*] of the city of ....., in the county of ....., and State of New York, and [*insert name of surety*] of ..... are held and firmly bound unto the [*insert corporate name*] Company, a corporation organized and existing under and by virtue of the laws of the State of ....., in the sum of [*insert amount of penalty*] dollars, good and lawful money of the United States, to be paid to the said [*insert corporate name*] Company, its successors or assigns; for which payment well and truly to be made we do bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals:

Dated this ..... day of ....., 19..

Whereas, A certificate for ten (10) shares of the preferred stock of the [*insert corporate name*] Company, in the name of [*insert name*], numbered ..... and dated ....., of the par value of one hundred dollars ($100) a share, to-wit, one thousand ($1,000), indorsed in blank by the said [*insert name*], is claimed by the said [*insert name*] to have been lost and cannot now be produced by him; and

Whereas, At his request and upon the promise of the parties hereto to indemnify and save harmless the said [*insert corporate name*] Company in the premises, and to deliver up the said certificate when found to the said [*insert corporate name*] Company to be canceled, the said [*insert corporate name*] Company is about to issue a new certificate in the place and stead of the one thus claimed to have been lost.

Now, the condition of the above obligation is such, that if the above bounden [*insert name*] and [*insert name of surety*], their heirs, executors and administrators, or any of them, shall well and truly indemnify and save harmless the said [*insert corporate name*] Company, its successors and assigns from and against the said certificate claimed to have been lost, and from any holder thereof, or the claim of any holder thereof, and from any and all damages, costs, charges and expenses, and all actions or suits, whether groundless or otherwise, by reason of said certificate, and also deliver or cause to be delivered up the same when and so soon as the same shall be found, to be canceled, then this obligation is to be void; otherwise to remain in full force.

[*Signature.*] [*Seal.*]
[*Signature.*] [*Seal.*]

STATE OF NEW YORK, }
County of....., } *ss.:*

On this ..... day of ....., 19.., before me the undersigned, personally appeared ..... and ....., to me known and known to me to be the persons described in and who executed the above instrument, and severally duly acknowledged that they executed the same.

Form No. 262.

Example of Stock Preference.

See Stock Corporation Law, § 61.

The Preferred Stock shall entitle the holder thereof to receive out of the surplus or net earnings of each fiscal year a non-cumulative dividend at the rate of but never exceeding six (6) per cent. per annum, payable annually, before any dividend shall be set apart or paid on the Common Stock for such year, and the remainder of the surplus or net earnings applicable to the payment of dividends shall be distributed as dividends among the holders of the Common Stock, as and when the board shall determine,

Corporate Securities — Common and Preferred Stocks. 17 Abt. J. 123.

In case of liquidation or dissolution or distribution of assets of the corporation, the holders of Preferred Stock shall be paid the par amount of such preferred shares before any amount shall be payable to the holders of the Common Stock; and after the payment of the par amount of such preferred shares to the holders thereof, the balance of the assets and funds of the corporation shall be distributed wholly among the holders of the Common Stock.

Form No. 263.

Example of Stock Preference.

See Stock Corporation Law, § 61.

The preferred stock is entitled to preference and priority over the common stock in manner following, to wit: To receive cumulative dividends at the rate of ..... per cent. per annum payable on the ..... day of ....., in each year, before any dividend on the common stock shall be paid, and, upon dissolution, after all of the debts of the corporation shall have been paid, the assets, property and effects shall first be applied to the payment of the said preferred stock at par, with any unpaid accumulations thereon, and before any payment is made to the holders of the common, and the balance to the payment of said common stock. The common stock shall be entitled to all net earnings and profits in excess of the cumulative dividends of ..... per cent. per annum payable on the preferred stock.

Form No. 264.

Example of Stock Preference.

See Stock Corporation Law, § 61.

The preferred stock shall entitle the holder to receive a cumulative dividend in each year at the rate of ..... per cent., payable semi-annually out of the net earnings of the company before any dividend shall be declared or paid on the common stock and, on dissolution, shall be entitled to a preference and a priority of payment over the common stock in any distribution of the property of said corporation.

Form No. 265.

Example of Stock Preference.

See Stock Corporation Law, § 61.

The amount of the capital stock is $....., divided into .....shares of the par value of $..... each, and all shares of this original issue shall be of one uniform kind and subject to the same terms, limitations and provisions.

The corporation may at any time hereafter have both preferred and common stock, provided, however, that in such case the capital shall be increased, and provided further, that the division of the capital stock when increased into two classes, preferred and common, shall have been authorized, by the written consent or by a vote, of stockholders owning and representing at least a majority of the stock of the corporation taken at a meeting of stockholders specially called for that purpose.

In such case and at the same time the stockholders shall determine whether the new issue or the original issue shall be made the preferred stock.

The dividends on the preferred stock shall be limited to ..... per cent. per annum, and such dividends are to be cumulative, so that if for any periods the same cannot be safely paid or may not be paid the right thereto shall accumulate as against the common stock, and all arrears thereof so accumulated must be paid before dividends can be commenced or resumed on the common stock.

Form No. 266.

Example of Stock Preference.

See Stock Corporation Law, § 61.

The preferred stock shall receive in each year out of the earnings of the corporation declared as dividends by the board of directors, non-cumulative dividends up to ..... per centum of the outstanding preferred stock, before any dividends are paid in such year upon the common stock and, in addition, an amount equal to ..... per centum of all earnings declared as dividends in such year upon the common stock.

The common stock shall be entitled to all the earnings of the corporation declared as dividends, except as above provided with respect to dividends upon the preferred stock.

Upon the dissolution of the corporation and distribution of its assets, the preferred stock shall be paid in full at par before any amount shall be paid on account of the common stock, and the common stock shall be entitled to receive all assets remaining after such payment of the preferred stock.

Form No. 267.

Example of Stock Preference.

See Stock Corporation Law, § 61.

The amount of capital stock is to be [*insert amount*] dollars, of which [*state amount*] dollars is to be preferred stock, and [*state amount*] dollars, common stock. The said [*insert amount*] dollars of preferred stock shall be entitled to receive dividends at the rate of ..... per cent. per annum, payable semi-annually on the first days of ..... and ..... in each year, out of the earnings of said company in preference to any dividends upon the common stock, and said dividends shall be cumulative so that any deficiency in the dividends to be paid on said preferred stock in any year shall be made good out of the earnings of subsequent years before any dividends shall be paid upon the common stock. Such preferred stock shall not, however, be entitled to participate in any other or additional earnings or profits, but shall be entitled to be repaid in full upon any distribution of the assets of said corporation in the event of insolvency or dissolution, before any distribution of capital shall be made to the common stock; and the amount of said preferred stock shall not be changed or altered by any reduction in capital of said corporation without the consent in writing of the holders of a majority thereof. The control and management of the said corporation is to be in the hands of the holders of the common stock so long as the business of the company is able to pay from its earnings, or reserve, dividends of ..... per cent. per annum on all the preferred stock, the holders of such preferred shares to have no voting power so long as said dividends on all the preferred shares are so paid. In case, however, said dividends on said preferred shares shall not be earned and paid for a period of ..... years, then and in such case the preferred stock of said corporation shall, upon the expiration of said ..... years, but in no event earlier than [*insert time*], have the same voting power as the common shares, to wit, one vote for each share of stock.

Form No. 268.

Example of First and Second Stock Preferences.

See Stock Corporation Law, § 61.

The amount of the capital stock of such corporation shall be ..... dollars, divided into ..... shares. Said capital stock shall consist of ..... shares of non-cumulative four per cent. First Preferred Stock, of the par value of one hundred dollars each; ..... shares of non-cumulative four per cent. Second Preferred Stock, of the par value of one hundred dollars each, and ..... shares of Common Stock, of the par value of one hundred dollars each.

THE FIRST PREFERRED STOCK shall be entitled to non-cumulative dividends, at the rate of, but not exceeding, ... per cent. per annum, in each and every fiscal year beginning after the ..... day of ....., 18.., in preference and priority to any payment, in or for such fiscal year, of any dividend on other stock; but only from undivided net profits of the company when and as determined by the board of directors, and only if and when the board shall declare dividends therefrom. If, after providing for the payment of full dividends for any fiscal year on the First Preferred Stock, there shall remain any surplus undivided net profits, the board out of such surplus may declare and pay dividends for such year upon the Second Preferred Stock.

THE SECOND PREFERRED STOCK shall be entitled to non-cumulative dividends, at the rate of, but not exceeding ..... per cent. per annum, in each and every fiscal year beginning after the.... day of ....., 18.., in preference and priority to any payment, in or for such fiscal year, of any dividend on the Common Stock; but only from undivided net profits of the company remaining after providing for the payment of the full dividends for such fiscal year on the First Preferred Stock, when and as such undivided net profits shall have been determined by the board of directors, and only if and when the board shall declare dividends therefrom.

THE COMMON STOCK shall be subject to the prior rights of holders of all classes of Preferred Stock at any time outstanding, according to the preferences thereof.

If, from the business of any particular fiscal year, excluding undivided net profits remaining from previous years, after pro-

viding out of the net profits of such particular fiscal year for the payment of the full dividends for such fiscal year on the First and Second Preferred Stock, there shall remain surplus net profits, the board of directors may declare, and out of such surplus net profits of such year may pay, dividends upon any other stock of the company. But no dividends shall in any year be paid upon any such other stock out of net profits of any previous fiscal year in which the full dividends shall not have been paid on the First and Second Preferred Stock.

The new corporation shall have the right to redeem at any time either or both classes of its Preferred Stock at par in cash, if such redemption shall then be allowed by law.

All classes of stock of the new company (except such number of shares as may be disposed of to qualify directors), are to be vested in voting trustees in the manner and for the period of time and subject to the terms and conditions set forth in the plan of readjustment and reorganization hereinafter mentioned.

Form No. 269.

Example of Stock Preference, with Privilege of Increasing Preferred Stock.

See Stock Corporation Law, § 61.

The amount of authorized capital stock of such corporation shall be ..... dollars, divided into ..... shares of the par value of ..... dollars each. Of the shares authorized, ... shares shall be Preferred Stock, all to be now issued, with the privilege to be increased as hereinafter provided, and ..... shares shall be Common Stock.

The terms, conditions, limitations and provisions upon which said preferred stock is issued are these:

(1.) The holders thereof shall be entitled to receive out of the net profits a fixed minimum dividend at the rate of .... per cent. per annum, to be payable at such periods as the directors may determine, before any dividend can be set apart or paid on the common stock for the period theretofore elapsed; and the principal or par value of said preferred stock with accumulated ..... per cent. dividends shall be paid in full in preference to the common stock in the event of any liquidation of the company, whether

through insolvency or the termination of its corporate existence or otherwise. The minimum preferred dividends thereon are to be cumulative, so that if for any period or periods the same cannot be safely paid or may not be paid, the right thereto shall accumulate as against the common stock, and all arrears thereof so accumulated must be paid before dividends can be commenced or resumed on the common stock.

In any calendar year or quarter year after payment of dividends at the rate of ..... per cent. per annum on the preferred stock, the holders of common stock shall be entitled to all profits distributed as dividends up to ..... per cent. per annum on their stock. In any calendar year when dividends aggregating ..... per cent. shall have been paid on the common stock, if it be desired by the directors to pay out any profits in further dividends, the same shall be distributed pro rata between the common and the preferred stocks up to the amount of ..... per cent. additional in the aggregate for such calendar year on each class of stock, but all profits which may be paid by way of dividends in any calendar year in excess of ..... per cent. on the preferred stock shall be distributed wholly upon the common stock.

(2.) The preferred stock is issued to and accepted by stockholders upon the express understanding, made and entered into between said company and the present and all future stockholders thereof, that the preferred stock of said company may hereafter be increased as follows:

(a.) It may be increased from time to time in an amount not exceeding ..... dollars, par value, in the aggregate, making an issue of ..... dollars altogether, of said preferred stock, upon the vote or written consent of a majority of the company's board of directors, and of a majority in interest of the stockholders, together with a compliance with the requirements of the laws of the State of New York made and provided with reference to the increase of capital stock of corporations of this nature.

(b.) After the issue, if such be made, of such additional preferred stock, making ..... dollars in all, there may be issued from time to time additional amounts, not exceeding ..... dollars in amount, making a total issue of preferred stock of..... dollars, but such last mentioned increase of ..... dollars

can only be made upon the written consent or vote of a majority of the board of directors, and the written consent or favorable vote of persons holding a majority of each of the two classes of stock, preferred and common, outstanding at the time, together with a compliance with those requirements of the laws of the State of New York made and provided with reference to the increase of the capital stock of corporations of this nature.

(c.) After the issue of ..... dollars of preferred stock as aforesaid, if so much should be issued, there may be issued additional amounts from time to time, provided an equal amount of common stock shall have been issued at par for cash or its equivalent in property at a cash value, and provided there be obtained in favor of such increase, the written consent or vote of a majority of the directors, and the written consent or favorable vote of persons holding a majority of each of the two classes of stock, preferred and common, outstanding at the time; and said preferred stock shall not be increased beyond said limit of ..... dollars excepting after and upon compliance with all the provisions and conditions in this paragraph (c.) contained, in addition to those requirements of the laws of the State of New York made and provided with reference to the increase of capital stock of corporations of this nature.

(3.) With the new issues of preferred stock as herein provided, or any part thereof, the directors may, in their discretion, lower the minimum rate of preference dividend, and also limit the maximum dividends to be paid thereon provided that no such new preferred stocks shall on that account be disposed of at less than par.

(4.) Any holder or holders of preferred stock may at any time and from time to time upon his or their written request, exchange the preferred stock so held by him or them for common stock, share for share, subject to the provisions of law in such case made and provided, and to the by-laws of the company, whereupon the certificates for the preferred stock so surrendered shall be canceled and the issue of preferred stock as so reduced shall be limited accordingly, and certificates for common stock shall be issued in lieu thereof.

(5.) The company shall have the option of retiring preferred stock in whole or in part at any time and from time to time at a premium of ..... per cent.; in other words, at the price of

..... dollars per share cash, in addition to dividends accumulated and accrued. Such retirement shall be effected either by payment out of the surplus fund, if any, of the company, or from proceeds of common stock that may be issued in lieu of the preferred stock so to be retired, or by an exchange of the common stock so to be issued in place of the preferred stock so to be retired, but in case any preferred stock shall be retired and canceled without the issue of at least an equivalent amount of common stock, steps must be taken for the reduction of the capital stock of the company as provided by law, and in no case shall any such preferred stock be redeemed for cash under circumstances which would produce any impairment of the capital stock of the company.

But such retirement or redemption of stock can only be effected on one month's notice after drawing by lot, and the preferred stockholders affected thereby shall have the option during that time of converting the stock so drawn into common stock by exchange as above provided.

Form No. 270.

Short Statement for Non-cumulative Preferred Stock.

The preferred stock of said company shall be entitled to a dividend of not exceeding five per cent. in any one year, which dividend shall be non-cumulative and payable out of the net earnings before any dividend is paid upon the common stock.

Form No. 271.

Redemption of Preferred Stock.

See Stock Corporation Law, § 61.

The corporation may retire the preferred stock on any day on which a dividend thereon shall be payable at the price per share of one hundred and ten dollars ($110) and accrued dividends, provided it give at least ninety days' notice of such retirement in the manner to be provided in the by-laws.

Form No. 272.

Retirement or Exchange of Preferred Stock.

See Stock Corporation Law, § 61.

The company shall have the option of retiring the preferred stock, in whole or in part, at any time, from time to time, by paying to such holders hereof the sum of one hundred dollars for each share of such preferred stock, together with any accumulated dividends due thereon. Such retirement shall be effected either by payment out of the surplus fund, if any, of the company, or from proceeds of the common stock that may be issued in lieu of the preferred stock so to be retired, or by exchange of the common stock so to be issued in place of the preferred stock so to be retired, but in case any preferred stock shall be retired and canceled without the issue of at least the equivalent amount of common stock, proceedings must be taken for the reduction of the capital stock of the company as provided by law, but no preferred stock shall be redeemed for cash under circumstances which would produce any impairment of the capital stock of the company.

But such retirement or redemption of stock can only be effected on one month's notice after drawing by lot, and the preferred stockholders affected thereby shall have the option during that time of converting the stock so drawn into common stock by exchange as above provided.

Form No. 273.

Convertible Preferred Stock (United Textile Corporation).

See Stock Corporation Law, § 61.

The preferred stock may, at the option of the holder thereof, at any time on or before the 31st day of December, 1910, but not thereafter, be converted into common stock of the corporation, upon presentation of the same by the lawful holder thereof to the treasurer of the corporation, who shall then forthwith issue to said holder an amount of common stock equal to the par value of the preferred stock so tendered for purposes of conversion into common stock. All preferred stock received by the treasurer of the corporation under the aforesaid plan of conversion shall thereafter be held by the corporation as treasury preferred stock and may be reissued thereafter only as non-convertible seven per cent. cumulative preferred stock.

Form No. 274.

Statement Relative to Preferred and Common Shares of Different Par Values.

Third. The amount of the capital stock is to be One hundred thousand dollars ($100,000).

Fourth. The number of shares of which the capital stock shall consist is Ten thousand five hundred (10,500), of which Five hundred (500) shares with a par value of $100 each are to be Preferred Stock, and Ten thousand (10,000) shares with a par value of $5 each are to be Common Stock. The amount of capital with which said corporation will begin business is Five hundred dollars ($500).

Attention is called to the fact that under the arrangement set forth in the above form, if each share of stock is to be entitled to one vote, the holders of the $50,000 of common stock would have a voting power twenty times that of the holders of the same amount of preferred stock, but such a disparity in voting powers is valid and in accord with the provisions of section 23 of the General Corporation Law, as construed in the case of Peo. ex rel. Browne v. Koenig, 133 A. D. 756 (1909).

Respecting the power of a corporation to issue shares differing in par value, see the author's discussion of the subject under section 50 of the Stock Corporation Law.

Form No. 275.

Restricting Voting Rights of Holders of Preferred Stock.

See discussion of this subject under section 23 of the General Corporation Law.

The holders of preferred stock shall have no voice or vote in the management of the corporation nor in any proceedings requiring the affirmative vote or consent of stockholders, except that the limitations and restrictions contained in this paragraph shall not apply to any proceedings that may result in an increase or reduction of the amount of authorized preferred stock, nor in proceedings for voluntary dissolution by stockholders without judicial proceedings. Such right to vote at meetings of stockholders and to give consent in any statutory proceedings requiring consent of stockholders shall be vested in, and exercised exclusively by, the holders of the common stock.

Form No. 276.

Depriving Preferred Stock of Voting Power.

See Peo. ex rel. Browne v. Koenig, 118 N. Y. Supp. 136 (1909); 133 A. D. 756.

Said preferred stock shall not be entitled to vote at any meeting of the stockholders, except as otherwise required by statute, and shall not be entitled to participate in the management of the corporation. Such right to vote at any meeting for the election of directors or at any meeting of stockholders concerning the management of the corporation, except as otherwise provided by statute, shall be exercised exclusively by the holders of the common stock.

Form No. 277.

Restriction of Voting Power.

See Peo. ex rel. Browne v. Koenig, 118 N. Y. Supp. 136 (1909); 133 A. D. 756.

The preferred stockholders shall have no voting power at the annual stockholders' meetings of the company, and no other voting power or rights except in statutory proceedings requiring affirmative action of a majority or more of the total outstanding capital stock.

The above provision is from the certificate of incorporation of S. H. Kress & Company, filed May 17, 1907.

Form No. 278.

Stock in Other Corporations. Voting of.

See Stock Corporation Law, § 52.

Stock in other corporations or associations held by this corporation shall be voted in the name of this corporation by such of its officers as the board of directors shall designate by majority vote of their whole number, or by a proxy thereunto duly authorized by like vote of said board, except as otherwise ordered by vote of the holders of a majority in interest of the capital stock issued and outstanding.

Form No. 279.

Increase (or Reduction) of Number of Directors by Unanimous Consent.

Under the Stock Corporation Law, § 26.

CERTIFICATE OF INCREASE (OR REDUCTION) OF THE NUMBER OF DIRECTORS OF THE ..... COMPANY.

UNANIMOUS CONSENT OF STOCKHOLDERS.

We, the undersigned, being all the stockholders and the holders of record of the entire capital stock, issued and outstanding, of the [*insert corporate name*], company, a corporation duly organized and existing under the laws of the State of New York, do hereby pursuant to the provisions of the Stock Corporation Law, section 26, agree and consent that the number of directors of said corporation shall be increased (or reduced) from ..... to .....

IN WITNESS WHEREOF, we, the above mentioned stockholders and holders of record of the entire issued and outstanding capital stock of said company have made, signed and executed this instrument in duplicate.

Dated this ..... day of ..... 19... [*Signatures.*]

[*Add acknowledgment of stockholders; add also affidavit of custodian of stock book as in form No.* 279-a.]

Form No. 279-a.

Affidavit of Custodian of Stock Book.

STATE OF NEW YORK, }
County of ....., } *ss.:*

[*Insert name*], being duly sworn, deposes and says: That he is the secretary [*or treasurer*] of the [*insert corporate name*], the corporation mentioned in the foregoing instrument; that he is the custodian of the stock book, containing the names of the stockholders of said corporation; that the persons who have attached their signatures to the foregoing instrument, and acknowledged the execution thereof, are all the stockholders of said corporation, and that they are the holders of the entire capital stock of said corporation issued and outstanding.

Sworn to before me this .....
day of ....., 19.. [*Signature.*]

.....,
Notary Public,
..... County, N. Y.

Form No. 280.

Certificate to Increase (or Reduce) Number of Directors.

See Stock Corporation Law, § 26.

CERTIFICATE TO INCREASE (OR REDUCE) THE NUMBER OF DIRECTORS OF [*insert corporate name*] COMPANY.

We, the undersigned, do hereby certify that the following is a correct transcript of the minutes of proceedings of a meeting of stockholders of the [*insert name of corporation*], held pursuant to "the Stock Corporation Law," article 2, section 26, to wit:

....., N. Y., ..., 19...

A special meeting of the stockholders of [*insert name of corporation*], a stock corporation, was held this day at .... o'clock A. M. [*or* P. M.], to determine whether the number of directors shall be increased [or reduced].

Such meeting was held at the office of the company on two weeks' notice in writing to each stockholder of record; such notice having been served personally, or by mail, postage prepaid, directed to each stockholder at his last known post-office address.

Pursuant to such notice the meeting was held at the time and place mentioned, stockholders owning more than a majority of the stock of the corporation being present in person or by proxy.

Such meeting was duly organized by choosing C. D. as president and A. B. as secretary thereof.

The notice of the meeting and proof of the due service thereof were read and filed in the office of the corporation at the time of such meeting.

On motion of E. F., duly seconded, the following resolution was offered for adoption:

"*Resolved,* That the number of directors of [*insert name of company*] be increased [*or reduced*] from ....., the present number, to ....."

Upon a canvass of the votes cast upon said resolution, it was found that stockholders owning ..... shares of the stock of the corporation, being more than a majority of the stock thereof, voted in favor of said resolution, and stockholders owning..... shares of stock of the corporation, voted against its adoption.

[*Or. No stockholder voted against its adoption, as the case may be.*]

Such resolution was thereupon declared duly adopted, and the meeting adjourned.

IN WITNESS WHEREOF, we have made, signed and verified this certificate in duplicate, this ..... day of ....., 19...

C. D., *President.*
A. B., *Secretary.*

STATE OF NEW YORK, }
County of ....., } *ss:*

C. D. and A. B., being severally duly sworn, depose and say, and each for himself deposes and says, that he, the said C. D., was the president, and that he, the said A. B., was the secretary, of the meeting of stockholders of [*insert name of corporation*], held to determine whether the number of directors thereof shall be increased [*or reduced*]; and that the foregoing is a correct transcript of the proceedings of such meeting entered in the minutes of the corporation.

C. D., *President.*
A. B., *Secretary.*

Sworn to before me, this ..... }
day of ....., 19.. }

G. H.,
Notary Public,
County, N. Y.

The fees upon filing and recording the above certificate are as follows: Office of Secretary of State — recording, fifteen cents per folio; county clerk — filing, six cents; recording, ten cents per folio.

Form No. 281.

Notice to Stockholders of Meeting to Change Number of Directors.

See the Stock Corporation Law, § 26.

To the stockholders of the [*insert corporate name*]:

Notice is hereby given that a special meeting of the stockholders of [*insert name of corporation*] will be held at the office of the company at No. .... street, in the city [*or village*] of ....., on the .... day of ....., 19.., at ..... o'clock in the .....noon of that day, to determine whether the number of its directors shall be increased [*or reduced*].

Dated, Albany, N. Y., ..., 19...

A. B.,
Secretary of [*insert name of corporation*].

Form No. 282.

Proof of Service of Notice.

See the Stock Corporation Law, § 26.

STATE OF NEW YORK, }
County of....., } *ss.:*

A. B., who is upwards of eighteen years of age, being duly sworn, deposes and says, that on the ..... day of ....., 19.., he served a notice in writing, of which a true copy is hereto annexed, upon the following persons, stockholders of record of [*insert corporate name*], namely: [*Name persons served*] by delivering to and leaving with each of them personally a copy of said notice. That on the ..... day of ....., 19.., he served the said notice upon the following persons, stockholders of record of said corporation, namely: [*Name persons served*] by mailing to each of them a copy of said notice at the post-office in the city [*or village*] of ....., inclosed in a sealed envelope and directed to each stockholder at his last known post-office address, and prepaying the proper postage on each of said envelopes so mailed.

A. B.

Sworn to before me, this ..... }
day of ....., 19.. }

[*Signature of notary.*]

Form No. 283.

Increased Number of Directors. How Chosen.

An increase in the number of directors shall be deemed to create vacancies in the board, to be filled in the manner provided by the by-laws.

Form No. 284.

Filling of Vacancies in the Board of Directors.

In case of any vacancy in the board of directors through death, resignation, removal, disqualification or other cause, the remaining directors by vote of a majority of the board may elect a successor to hold office for the unexpired portion of the term of the director whose place shall be vacant, until the election of a successor at a meeting of the stockholders.

Form No. 285.

Removal of Officers or Directors.

Any officer elected or appointed by the board of directors, or by the executive committee or by the stockholders, or any member of the executive committee or of any other standing committee, or any director of the corporation may be removed at any time, with or without cause, in such manner as shall be provided in the by-laws of the corporation.

Form No. 286.

Removal of Officers or Directors.

Any officer elected or appointed by the board of directors and any director may be removed at any time by a vote of the majority of the whole board.

Form No. 287.

Classification of Directors.

See Stock Corporation Law, § 25.

As soon as practicable the directors shall divide themselves into three classes, of which the first class shall consist of four directors, each of whom shall hold his office for one year, or until the next annual election; the second class shall consist of four other directors, each of whom shall hold his office for two years, or until the second annual election; and the third class shall consist of five other directors, each of whom shall hold his office for three years, or until the third annual election; and thereafter each and every director chosen at any annual meeting shall hold his office for the term of three years, and until another director is chosen and qualified in his stead.

See example of classification, Form No. 3.

Form No. 288.

Classification of Directors.

See Stock Corporation Law, § 25.

The directors shall be classified with respect to the time for which they shall severally hold office by dividing them into three classes, each consisting of one-third of the whole number of the

board of directors. The directors of the first class shall be elected for a term of one year; the directors of the second class for a term of two years; and the directors of the third class for a term of three years; and at each annual election the successors to the class of directors whose term shall expire in that year shall be elected to hold office for the term of three years, so that the term of office of one class of directors shall expire in each year.

Form No. 289.

Classification of Directors.

See Stock Corporation Law, § 25.

The board of directors of said corporation shall be classified, relative to the period of time for which the directors shall severally serve, into four classes, as follows, to wit: The first class shall be elected for a term of four years; the second class shall be elected for a term of three years; the third class shall be elected for a term of two years; the fourth class shall be elected for a term of one year; and at each annual election after the first, the successors to the class of directors whose term expires in that year shall be elected to hold office for the term of four years, so that the term of office of at least one class shall expire in each year.

Form No. 290.

Directors Dealing With the Corporation.

(From the by-laws of the United States Steel Corporation.)

Sec. 9. CONTRACTS.— Inasmuch as the directors of this company are men of large and diversified business interests, and are likely to be connected with other corporations with which from time to time this company must have business dealings, no contract or other transaction between this company and any other corporation shall be affected by the fact that directors of this company are interested in, or are directors or officers of such other corporation, if, at the meeting of the board, or of the committee of this company making, authorizing or confirming such contract or transaction, there shall be present a quorum of directors not so interested and any director individually may be a party to, or may

be interested in, any contract or transaction of this company, provided that such contract or transaction shall be approved or be ratified by the affirmative vote of at least ten directors not so interested.

The board of directors in its discretion may submit any contract or act for approval or ratification at any annual meeting of the stockholders, or at any meeting of the stockholders called for the purpose of considering any such act or contract, and any contract or act that shall be approved or be ratified by the vote of the holders of a majority of the capital stock of the company which is represented in person or by proxy at such meeting (provided that a lawful quorum of stockholders be there represented in person or by proxy) shall be as valid and as binding upon the corporation and upon all the stockholders as though it had been approved or ratified by every stockholder of the corporation.

Form No. 291.

Executive Committee.

The board of directors may designate from their number an executive committee, which shall for the time being, in the intervals between meetings of the board, and to the extent provided by the by-laws and authorized by law, exercise the powers of the board of directors in the management of the affairs and business of the corporation.

For cases respecting powers of executive committee, see Gen. Corp. Law, § 34, under the heading "Executive Committee, Powers of."

Form No. 292.

Executive Committee (American Diesel Engine Company).

An executive committee may be appointed by or from the board of directors in such manner and subject to such regulations as may be provided in the by-laws, which committee shall have and may exercise all the powers of such board during the intervals between the meetings of said board, subject to such limitations as may be provided in the by-laws or by resolutions of the board. The board of directors shall determine the compensation of the members of the executive committee and of the board.

Form No. 293.

Executive Committee (National Abrasive Manufacturing Company).

The board of directors, by an affirmative vote of a majority of the whole board, may appoint an executive committee of five stockholders, of whom a majority shall constitute a quorum. Whenever the board of directors is not in session such committee shall have and may exercise any and all powers of the board of directors, including the power to cause the seal of the corporation to be affixed to all papers that may require it. The term of office of each member of said committee shall continue until the expiration of his term as director and until his successor shall be elected. Vacancies in this committee may be filled by the concurrent vote of three members of the committee or by like vote of a majority of all of the directors.

Form No. 294.

Executive Committee and Finance Committee.

(From by-laws of the United States Steel Corporation.)

Section 1. The board of directors shall elect from the directors an executive committee and a finance committee; and shall designate for each of those committees a chairman, who shall continue to be chairman of the committee during the pleasure of the board of directors.

The board of directors shall fill vacancies in the executive committee or in the finance committee by election from the directors; and at all times it shall be the duty of the board of directors to keep the membership of each of such committees full, with due regard to the qualifications for such membership indicated in this article of the by-laws.

All action by the executive committee or by the finance committee shall be reported to the board of directors at its meeting next succeeding such action, and shall be subject to revision or alteration by the board of directors; provided that no rights or acts of third parties shall be affected by any such revision or alteration.

The executive committee and the finance committee each shall fix its own rules of proceeding, and shall meet where and as pro-

vided by such rules, or by resolution of the board of directors, but in every case the presence of a majority shall be necessary to constitute a quorum.

In every case the affirmative vote of a majority of all of the members of the committee shall be necessary to its adoption of any resolution.

The chairman and each of the members of the executive committee, shall receive such compensation for their services as from time to time shall be fixed by the finance committee and be approved by the board of directors.

Sec. 2. **The executive committee** shall consist of six members besides the president and the chairman of the finance committee, each of whom, by virtue of his office, shall be a member of the executive committee. So far as practicable each of the six elected members of the executive committee shall be a person having, or having had, personal experience in the conduct of one or the other of the branches of manufacture or mining, or of transportation in which the company, is interested; and so far as practicable, the six elected members shall be taken equally from the three classes of directors. Unless otherwise ordered by the board of directors each elected member of the executive committee shall continue to be a member thereof until the expiration of his term of office as a director.

During the intervals between the meetings of the board of directors, the executive committee shall possess, and may exercise all the powers of the board of directors in the management and direction of the manufacturing, mining and transportation operations of the company, and of all other business and affairs (except the matters hereinafter assigned to the finance committee) in such manner as the executive committee shall deem best for the interests of the company, in all cases in which specific directions shall not have been given by the board of directors.

During the intervals between the meetings of the executive committee the chairman thereof shall possess and may exercise such of the powers vested in the executive committee as from time to time may be conferred upon him by resolution of the board of directors, or of the executive committee.

Sec. 3. **The finance committee** shall consist of four members, besides the president and the chairman of the executive committee, each of whom, by virtue of his office, shall be a member of the

finance committee. So far as practicable each of the four elected members of the finance committee shall be a person of experience in matters of finance; and so far as practicable the four elected members shall be taken equally from the three classes of directors. Unless otherwise ordered by the board of directors, each elected member of the finance committee shall continue to be a member thereof until the expiration of his term of office as a director.

The finance committee shall have special and general charge and control of all financial affairs of the company. The general counsel, the treasurer, the comptroller and the secretary, and their respective offices shall be under the direct control and supervision of the finance committee.

During the intervals between the meetings of the board of directors, the finance committee shall possess, and may exercise, all the powers of the board of directors in the management of the financial affairs of the company, including its purchases of property, and the execution of legal instruments with or without the corporate seal, in such manner as said committee shall deem to be best for the interests of the company, in all cases in which specific directions shall not have been given by the board of directors.

During the intervals between the meetings of the finance committee, and subject to its review, the chairman thereof shall possess and may exercise any of the powers of the committee except as from time to time shall be otherwise provided by resolution of the board of directors or of the finance committee, but not of the executive committee.

Except as otherwise provided by the by-laws, or by resolution of the board of directors, all salaries and compensations paid or payable by the company shall be fixed by the finance committee.

Form No. 295.

Certificate of Increase (or Reduction) of Capital Stock.

See Stock Corporation Law, §§ 62, 63, 64.

We, the undersigned, A. B., chairman, and C. D., secretary, respectively, of a special meeting of the stockholders of [*insert corporate name*], a domestic stock corporation, held for the pur-

pose of increasing [*or reducing*] its capital stock, do hereby certify:

That prior to such meeting a notice, stating the time, place and object thereof, and the amount of the increase [*or reduction*] proposed, signed by the president [*or a vice-president*] and the secretary, was published once a week, for at least two successive weeks, in [*insert name of paper*], a newspaper in the county where the principal business office of such corporation is located.

That the following is a true copy of such notice:

[*Insert here copy of notice as given in Form No.* 296.]

That a copy of such notice was also duly mailed, postage prepaid, to each stockholder of such corporation, at his last known post-office address, at least two weeks before the meeting.

[*Or, that a copy of such notice was personally served at least five days before said meeting upon the following named stockholders:*]

That at the time and place specified in such notice, stockholders appeared in person or by proxy, in numbers representing at least a majority of all the shares of stock of such corporation, and organized said meeting by choosing from their number the undersigned, A. B., as chairman, and C. D., as secretary thereof.

That the notice of the meeting and proof of the proper publishing and mailing [*or service*] thereof was presented.

That, upon motion, a vote was then taken of those present in person or by proxy upon the following resolution:

Resolved, That the capital stock of [*insert name of company*], be increased [*or reduced*] from the present amount thereof, to wit: [*insert amount*] dollars, consisting of [*insert number*] shares of the par value of [*insert par value*] dollars each, to [*insert amount to which stock is increased or reduced*] dollars, to consist of [*insert number*] shares of the par value of [*insert par value*] dollars each.

Resolved, further, That the chairman and secretary of this meeting be, and they are hereby authorized and directed to make, sign, verify and acknowledge the certificates of proceedings required by statute and cause one of such certificates to be filed and recorded in the office of the clerk of ..... county, and a duplicate thereof in the office of the Secretary of State, and to do all acts and things that may be necessary to comply with the pro-

visions of law applicable to and regulating such increase [*or reduction*] of capital stock.

That stockholders owning [*insert number*] shares of stock, being at least a majority of all the stock of the corporation, voted in favor of such resolution; and stockholders owning [*insert number*] shares of stock voted against its adoption. [*Or, "and no stockholder voted against its adoption," if such be the case.*]

That a sufficient number of votes having been cast in favor of such increase [*or reduction*], such resolution was declared duly adopted.

That the amount of capital of said corporation heretofore authorized is [*insert amount*] dollars and the proportion thereof actually issued is [*insert amount*] dollars; and that the amount of the increased [*or reduced*] capital stock is [*insert amount*] dollars.

*[*That the whole amount of the ascertained debts and liabilities of the corporation is* $.....]

IN WITNESS WHEREOF, we have made, signed, verified and acknowledged this certificate in duplicate.

Dated this ..... day of ....., 19..

A. B., *Chairman.*
C. D., *Secretary.*

STATE OF NEW YORK,
County of .....,
} *ss.:*

A. B., chairman, and C. D., secretary, respectively, of the aforesaid meeting, being severally duly sworn, do depose and say, and each for himself deposes and says, that he has read the foregoing certificate subscribed by him, and knows its contents, and that the same is true.

A. B., *Chairman.*
C. D., *Secretary.*

Sworn to before me, this.....
day of ....., 19..

E. F.,
Notary Public,
..... *County, N. Y.*

* This paragraph is to be inserted only in cases of reduction of capital stock.

STATE OF NEW YORK,
County of ....., } ss.:

On this ..... day of ....., 19.., before me personally came A. B. and C. D., to me personally known to be the persons described in and who made, signed and verified the foregoing certificate and severally duly acknowledged to me that they made, signed and verified the same for the uses and purposes therein set forth.

E. F.,
Notary Public,
..... *County, N. Y.*

At the office of the Secretary of State the fee upon the foregoing certificate is fifteen cents for each folio of 100 words contained therein. At the county clerk's office the fees are: Filing, six cents; recording, ten cents per folio. In addition to such fees, in case of an increase of capital stock, there must be forwarded *to the State Treasurer* (not to the Secretary of State) one-twentieth of one per cent. upon the amount of such increase, simultaneously with the transmission of the certificate to the Secretary of State.

Certificates of reduction of capital stock of other corporations than railroads must have indorsed thereon the approval of the State Comptroller, and such certificates should be sent to the Comptroller's office for approval prior to their presentation for filing in the office of the Secretary of State, or of any county clerk. Proper information in the form of an affidavit must be furnished the Comptroller to enable him to indorse upon the certificate the statutory approval. For such purpose a form of affidavit, designed to contain the essential proof and to meet the requirements of the Comptroller's office, has been prepared. See form No. 297.

In the case of *any increase or reduction* of capital stock of a railroad corporation, the certificate of such increase or reduction must have indorsed thereon the approval of the Public Service Commission. No form of proof to be presented to obtain such approval of the Public Service Commission is inserted here, as the requirements of such commission in relation thereto are subject to such alterations and amendments as the exigencies of each application may require.

Form No. 296.

Notice of Meeting to Increase or Reduce Capital Stock.

See Stock Corporation Law, § 63.

NOTICE TO STOCKHOLDERS.

....., N. Y., ..., 19..

A special meeting of the stockholders of [*insert name of company*] will be held on the ..... day of ....., 19.., at ..... o'clock, P. M. [*or* A. M.] at the office of such company, at

No. ..... street, in the city [*or village*] of ....., for the purpose of voting upon a proposition to increase [*or reduce*] its capital stock from [*insert amount of present capital stock*], consisting of [*insert number of shares*] shares of the par value of [*insert par value*] dollars each, to [*insert amount to which stock is proposed to be increased or reduced*] dollars, to consist of [*insert number of shares*] shares of the par value of [*insert par value*] dollars each.

.....,
President [*or Vice-President*].

.....,
Secretary.

Form No. 297.

Proof for the State Comptroller's Information Upon an Application for Approval of a Reduction of Capital Stock.

See Stock Corporation Law, § 64.

STATE OF NEW YORK,
County of ....., } *ss.:*

A. B. and C. D., treasurer and secretary, respectively, of [*insert name of company*], being severally duly sworn, do depose and say, and each for himself deposes and says: That the said A. B. is the treasurer of [*insert name of company*], and the said C. D. is the secretary thereof; that such company is a domestic stock corporation other than a railroad corporation, or a moneyed corporation; that a capital of [*insert amount to which the capital stock is reduced*] dollars is sufficient for the proper purposes of the corporation, and is in excess of its debts and liabilities.

A. B., *Treasurer.*
C. D., *Secretary.*

Sworn to before me, this ....
day of ....., 19... }

E. F.,
Notary Public,
..... *County, N. Y.*

The foregoing affidavit should not be attached to the other papers, as it is to be retained by the Comptroller for filing in his office.

The fee for each certificate of approval furnished by the Comptroller is one dollar, as provided in the Executive Law (L. 1909, ch. 23), § 42.

No form of certificate of approval is appended here, as a printed blank prepared by the Comptroller is used by that official.

Form No. 298.

Stockholder's Waiver of Notice of a Meeting.

See General Corporation Law, § 42.

I, the undersigned, a stockholder of the ..... Company, hereby admit due and timely service of a notice of which the foregoing is a true copy, and I hereby waive any further notice of the meeting therein mentioned and the lapse of any prescribed period of time, and I do hereby authorize and approve the proposed increase of capital stock of said company from $..... to $..... [*or, as the case may be*].

.....

Form No. 299.

Unanimous Consent of Stockholders to Increase or Reduce Capital Stock.

Under Stock Corporation Law, § 63.

We, the undersigned, being stockholders of the [*insert corporate name*] Company, a stock corporation organized and existing under the laws of the State of New York, do hereby consent that the present authorized capital stock of said corporation, to wit: [*Insert amount*] dollars, consisting of ..... shares of the par value of one hundred dollars each, be increased [*or reduced*] to [*insert amount*] dollars, to consist of ..... shares of the par value of ..... dollars each, and we do hereby authorize such increase [*or reduction*] of capital stock; and empower the officers of the corporation to do all acts and things necessary to effectuate such increase [*or reduction*] of capital stock.

And we do hereby certify as follows:

That the amount of capital of said corporation heretofore authorized is [*insert amount*] dollars;

That the proportion thereof actually issued is [*insert amount*] dollars;

That the amount of the increased [*or reduced*] capital stock is [*insert amount*] dollars;

* That the whole amount of the ascertained debts and liabilities of the corporation is $.....

IN WITNESS WHEREOF, we have signed this instrument in duplicate.

Dated, this ..... day of ....., 19..

[*Signatures of Stockholders.*]

* This paragraph is to be inserted only in cases of reduction of capital stock.

STATE OF NEW YORK, }
County of ....., } *ss.:*

On this ..... day of ....., 19.., before me personally came ....., to me known, and known to me to be the individuals described in and who executed the foregoing instrument, and they severally acknowledged to me that they executed the same.

.....,
Notary Public.

STATE OF NEW YORK, }
County of ....., } *ss.:*

[*Insert name*], being duly sworn, deposes and says: That he is the secretary [*or treasurer*] of the [*insert corporate name*] Company, the corporation mentioned in the foregoing instrument; that he is the custodian of the stock book, containing the names of the stockholders of said corporation; that [*insert names of stockholders*], the persons who have signed the foregoing instrument, are all the stockholders of said corporation, and that they are the holders of record of the entire capital stock of said corporation issued and outstanding.

[*Signature.*]

Sworn to before me, this ....
day of ....., 19...
.....,
Notary Public.

Form No. 300.

Certificate Authorizing Classification of Stock.

See Stock Corporation Law, § 61.

We, the undersigned, ..., president, and ....., secretary, respectively, of the [*insert corporate name*] Company, a domestic stock corporation, do hereby make the following certificate of the proceedings of a meeting of the stockholders of said company, held pursuant to section 61 of the Stock Corporation Law of the State of New York, for the purpose of obtaining consent to classify the capital stock into preferred and common as follows, to wit:

A special meeting of the stockholders of the [*insert corporate name*] Company was held at the office of the company [*or as the case may be*] in the city [*village or town*] of ....., county of ....., State of New York, on the ..... day of ....., 19.., at .. o'clock in the ....noon of that day, for the purpose of voting on a proposition to classify into common and preferred stock the authorized increase of capital stock of the company, amounting to $.....

The meeting was called for that purpose upon notice, such as is required for the annual meeting of the corporation, namely: [*Insert manner of calling meeting.*]

The following is a true copy of said notice:

Notice is hereby given that a special meeting of the stockholders of the [*insert corporate name*] Company will be held at ....., in the ..... of ....., on the ..... day of ....., 19.., at .. o'clock, ... M., to act upon a proposition to classify into common and preferred stock the authorized increase of capital stock of said company, amounting to $....., so that $..... thereof shall be common stock, and $..... thereof shall be preferred stock. Said preferred stock to be entitled to preference and priority over the common stock as follows: [*State the same.*]

At the time and place specified in such notice, stockholders of record appeared in person or by proxy owning at least two-thirds of the capital stock of the company and organized by electing from their number A. B., as chairman of the meeting, and C. D., as secretary thereof.

Upon a call of the roll of stockholders of record, the following were found to be present, in person or by proxy, viz.: [*Insert names.*]

Upon motion duly made and carried, the proxies presented were ordered to be placed on file.

Proof that the meeting was called upon notice such as is required for the annual meeting of the corporation was read and ordered placed on file.

Upon motion, a vote was then taken of those present, in person or by proxy, upon the following preamble and resolution, to wit:

Whereas, The stockholders of this corporation have duly authorized an increase of the capital stock from $....., the present amount, to the sum of $....., to consist of ..... shares of the par value of $..... each;

And Whereas, The present capital stock of the corporation consists wholly of one class of stock, and it has been found desirable to classify the new stock into common and preferred;

Now, Therefore, Resolved, That said authorized increase of capital stock, amounting to [*insert amount*] dollars, be classified so that [*insert amount*] dollars thereof, consisting of [*insert number*] shares of the par value of $..... each, shall be common stock, and so that [*insert amount*] dollars thereof, consisting of [*insert number*] shares of the par value of $..... each, shall be preferred stock, and that said preferred stock shall be entitled to preference and priority over the common stock in manner following: [*State same.*]

Resolved, further, That the president or the vice-president, and the secretary or the assistant secretary of this corporation be, and they are hereby authorized and directed to execute and file proper certificates of the proceedings of this meeting in the offices, respectively, of the Secretary of State and the county clerk of the county of ....., and to take all proceedings and do all acts and things that may be necessary to comply with the provisions of section 61 of the Stock Corporation Law of the State of New York, as amended and applicable to and regulating the issuing of preferred and common stock.

A sufficient number of votes, to wit, the votes of stockholders owning ..... shares of stock of the corporation out of a total of ..... shares of stock issued and outstanding, having been cast in favor of the foregoing resolutions, the same were declared duly adopted.

On motion, duly made and carried, the meeting was then adjourned.

IN WITNESS WHEREOF, we have made, signed and sworn to this certificate in duplicate.

Dated, ..., 19...

.....,
President.

.....,
Secretary.

STATE OF NEW YORK, }
County of ....., } *ss.:*

[*Insert name*], and [*insert name*], being duly sworn, do depose and say, and each for himself deposes and says, that said [*insert name*] is the president of the ..... Company, the corporation above mentioned, and said [*insert name*] is the secretary thereof, that he has read the foregoing certificate of the proceedings of the meeting of stockholders of said corporation, and that the same is true.

Sworn to before me, this .... }
.... day of ....., 19... } [*Signatures.*]

.....
Notary Public,
..... *County, N. Y.*

Form No. 301.

Certificate of Change in Par Value of Shares.

See the Stock Corporation Law, § 65.

We, the undersigned, chairman and secretary, respectively, of a special meeting of the stockholders of [*insert corporate name*], a domestic stock corporation, held for the purpose of increasing [*or reducing*] the number of shares into which its capital stock is divided, without increasing [*or reducing*] the amount of capital stock of such corporation, do hereby certify:

That prior to such meeting a notice stating the time, place and object thereof, and the increase [*or reduction*] of the number of shares proposed, signed by a majority of the directors, was published once a week, for at least two successive weeks, in [*insert name of paper*], a newspaper in the county where the principal business office of such corporation is located.

That the following is a true copy of such notice:

Notice to stockholders: A special meeting of the stockholders of the [*insert corporate name*] Company, will be held at the office of the company at No. ..... street, in the city [*or village*] of ....., on the ..... day of ....., 19.., at ..... o'clock, .. M., for the purpose of considering and voting upon a proposition to increase [*or reduce*] the number of shares into

which the capital stock shall be divided, without increasing [*or reducing*] the amount of such capital stock, so that hereafter such capital stock shall be divided into ..... shares of the par value of ..... dollars each.

Dated, Albany, N. Y., ..., 19..

.....,
President [*or Vice-President*].

.....,
Secretary.

That a copy of such notice was also personally served upon or duly mailed, postage prepaid, to each stockholder of such corporation at his last known post-office address, at least three weeks before the meeting.

That at the time and place specified in such notice, stockholders appeared in person or by proxy, in numbers representing at least two-thirds of all the shares of stock of the corporation, and organized by choosing from their number the undersigned A. B., as chairman, and C. D., as secretary thereof.

That the notice of the meeting and proof of the proper publishing and mailing thereof was presented.

That, upon motion, a vote was then taken of those present in person or by proxy upon the following resolution:

Resolved, That the number of shares into which the capital stock of the [*insert corporate name*] Company is divided be increased [*or reduced*] from the present number, to wit:..... shares of the value of ..... dollars each, to the following number, to wit: ..... shares of the par value of ..... dollars each.

That stockholders owning [*insert number*] shares of stock, being at least two-thirds of all the stock of the corporation, voted in favor of such resolution; and stockholders owning [*insert number*] shares of stock voted against its adoption. [*Or, "and no stockholder voted against its adoption," as the case may be.*]

That a sufficient number of votes having been cast in favor of such resolution, the same was declared duly adopted, and the meeting adjourned.

IN WITNESS WHEREOF, we have made, signed, verified and acknowledged this certificate in duplicate.

Dated, this ..... day of ....., 19..

A. B., *Chairman.*
C. D., *Secretary.*

STATE OF NEW YORK, }
County of ....., } ss.:

A. B., chairman, and C. D., secretary, respectively, of the aforesaid meeting, being severally duly sworn, do depose and say, each for himself, that he has read the foregoing certificate subscribed by him, and knows its contents, and that the same is true.

[*Signatures of officers.*]

Sworn to before me, this .... }
day of ....., 19... }

[*Signature of Notary.*]

STATE OF NEW YORK, }
County of ....., } ss.:

On this .... day of ....., 19.., before me personally came A. B. and C. D. to me known and known to me to be the persons described in and who made, signed and verified the foregoing certificate and severally duly acknowledged to me that they made, signed and verified the same.

[*Signature of Notary.*]

Form No. 302.

Change of Principal Office by Unanimous Consent.

See Stock Corporation Law, § 13.

We, the undersigned, being the president and secretary, and a majority of the directors of the [*insert corporate name*] Company, a stock corporation organized under the Business Corporations Law [*or other corporate law*] of the State of New York, do hereby certify, pursuant to the provisions of section 13 of the Stock Corporation Law, as follows, to wit:

First. That the name of said corporation is .....

Second. That its principal office and place of business was originally and is still in the city of ....., county of .....

Third. That it is desired to change its said principal office and place of business to the city of ....., county of ....., and that it is the purpose of said corporation to actually transact and carry on its regular business from day to day at such place.

Fourth. That such change has been authorized by the unanimous consent of the stockholders expressed in writing and duly acknowledged, as more fully appears from such consent, which is hereunto annexed.

[*See Form No.* 303.]

Fifth. That the names of the directors of said corporation, and their respective places of residence are as follows, to wit:

Names.	Residences.
.....	.....
.....	.....
.....	.....

IN WITNESS WHEREOF, we make, sign and verify this certificate in triplicate, this ..... day of ....., 19...

....., *President.*

....., *Secretary.*

A Majority of Directors.

STATE OF NEW YORK,
County of ....., } *ss.:*

[*Insert the names of the president, secretary and directors signing the certificate*], being duly and severally sworn, each for himself, deposes and says that he has read the foregoing certificate and knows the contents thereof; that the same is true to the best of his knowledge, information and belief; that said ..... is the president of [*insert corporate name*], the corporation mentioned and described in said certificate; that said [*insert name*] is the secretary thereof, and that [*insert names*] are a majority of the directors thereof.

[*Signatures of the President, Secretary and Majority of the Directors.*]

Sworn to before me, this ....
day of ....., 19... }

[*Signature of Notary.*]

Form No. 303.

Change of Principal Office. Unanimous Consent of Stockholders.

(To be annexed to Form No. 302.)

We, the undersigned, being all the stockholders and the holders of record of the entire capital stock, issued and outstanding, of the [*insert corporate name*] Company, a stock corporation duly organized and existing under the laws of the State of New York, do

hereby, pursuant to the provisions of the Stock Corporation Law, section 13, agree and consent that the principal office and place of business of said corporation be changed from the city [*town or village*] of ....., county of ....., named in its certificate of incorporation [*or to which it was changed under the provisions of said section*] to the city [*town or village*] of....., county of ....., and State of New York.

IN WITNESS WHEREOF, we, the above mentioned stockholders and holders of record of the entire issued and outstanding capital stock of said company, have made, signed and executed this instrument in duplicate.

Dated, this ..... day of ....., 19..

[*Signatures of stockholders.*]

[*Add acknowledgment of stockholders; add also affidavit of custodian of stock book as in form No.* 279-a.]

Form No. 304.

Change of Principal Office by Vote of Stockholders.

See Stock Corporation Law, § 13.

We, the undersigned, being the president and secretary, and a majority of the directors of [*insert corporate name*] Company, a stock corporation organized under the laws of the State of New York, do hereby certify, pursuant to the provisions of section 13 of the Stock Corporation Law, as follows, to wit:

That a duly called special meeting of the stockholders of said corporation was held at the principal office in the city [*or village*] of ....., on the ..... day of ....., 19.., at which stockholders owning ..... shares of the stock of such corporation were present in person or by proxy.

That at said meeting the following resolution was duly adopted:

"*Resolved,* That the principal office and place of business of this corporation be changed from ..... to ....., and that the president, secretary and directors be authorized, and they hereby are authorized and directed to effect such change pursuant to law."

We further certify:

First. That the name of said corporation is .....

Second. That its principal office and place of business was originally and is still in the city of ....., county of .....

Third. That it is desired to change its said principal office and place of business to the city of ....., county of ....., and that it is the purpose of said corporation to actually transact and carry on its regular business from day to day at such place.

Fourth. That such change has been authorized by a vote of the stockholders of said corporation, at a special meeting of the stockholders called for that purpose, as above set forth.

Fifth. That the names of the directors of said corporation, and their respective places of residence are as follows, to wit:

Names.	Residences.
.....	.....
.....	.....
.....	.....

IN WITNESS WHEREOF, we make, sign and verify this certificate in triplicate, this ..... day of ....., 19...

....., *President.*

....., *Secretary.*

A Majority of Directors.

STATE OF NEW YORK,
County of ....., } *ss.:*

[*Insert the names of the president, secretary and directors signing the certificate*], being duly and severally sworn, each for himself, deposes and says that he has read the foregoing certificate and knows the contents thereof; that the same is true to the best of his knowledge, information and belief; that said ..... is the president of [*insert corporate name*], the corporation mentioned and described in said certificate; that said [*insert name*] is the secretary thereof, and that [*insert names*] are a majority of the directors thereof.

[*Signatures of the President, Secretary and Majority of the Directors.*]

Sworn to before me, this .....
day of ....., 19... }

[*Signature of Notary.*]

Form No. 305.

Certificate of Extension of Corporate Existence.

See the General Corporation Law, § 37.

We, the undersigned [*insert name*], president [*or a vice-president*] and [*insert name*] secretary [*or an assistant secretary*] of the [*name of corporation*], a domestic stock corporation, do hereby certify, under the seal of said corporation, as follows, to wit:

That the consent of the stockholders of said corporation owning at least two-thirds in amount of its capital stock has been given in writing [*or by vote at a special meeting of the stockholders called for that purpose, upon the same notice as that required for the annual meetings of the corporation*] to extend the existence of said corporation for a term of ..... years beyond the time specified in its original certificate of incorporation [*or for a further term of ..... years beyond the time specified in a certificate of extension of corporate existence heretofore filed.*]

That such written consent [*or that a copy of such written consent, if desired*] of said stockholders is hereto annexed.

[*Or, in case of a vote, that a copy of the resolution adopted at said meeting of stockholders is hereto annexed. See form No.* 307.]

IN WITNESS WHEREOF, this certificate under the seal of said corporation has been subscribed by us, this ..... day of ....., 19..

{ *Corporate seal.* } ....., *President* [*or a vice-president*].
{ } ....., *Secretary* [*or an assistant secretary*].

STATE OF NEW YORK, }
County of....., } *ss.:*

On this ..... day of ....., 19.., before me personally came ..... and ....., to me known and known to me to be the individuals described in and who executed the foregoing certificate, and they severally acknowledged to me that they executed the same.

.....,
Notary Public,
..... *County, N. Y.*

The fee at the office of the Secretary of State upon above certificate is fifteen cents for each folio of 100 words contained therein. At the county clerk's office the fee is six cents for filing and ten cents per folio for recording.

Form No. 306.

Form of Consent in Writing.

See Form No. 305.

We, the undersigned, being stockholders of the [*insert corporate name*], a domestic stock corporation, and each owning the number of shares of stock in such corporation set opposite our respective signatures hereto, and together owning at least two-thirds of the capital stock of such corporation, to wit, ... shares of the total of ..... shares into which such capital stock is divided, do hereby certify, pursuant to the General Corporation Law of the State of New York, that we severally consent that the corporate existence of such corporation be extended for the term of ..... years beyond the time specified in its original certificate of incorporation [*or for a further term of ..... years beyond the time specified in a certificate of extension of corporate existence heretofore filed*].

IN WITNESS WHEREOF, we have hereunto set our hands to this consent in duplicate, and the number of shares of stock owned by us, respectively, in such company, this ..... day of ....., 19..

[*Signatures of Stockholders.*]

Form No. 307.

Resolution for Extension of Existence.

See Form No. 305.

Resolved, That we do hereby consent that the corporate existence of the ..... Company be extended for the term of ..... years beyond the time specified in its original certificate of incorporation [*or for a further term of years beyond the time specified in a certificate of extension of corporate existence heretofore filed*].

Form No. 308.

Certificate of Extension of Purposes, Etc.

See the Stock Corporation Law, § 18.

We, the undersigned ....., president and ....., secretary of the [*insert corporate name*], a stock corporation

organized under [*state the law*], desiring to alter its certificate of incorporation so as to include therein other purposes [*powers or provisions*], pursuant to the provisions of the Stock Corporation Law of the State of New York, do hereby make and file this amended certificate for such purpose, and do certify as follows:

That the name of the corporation, whose certificate of incorporation is hereby altered, is [*insert corporate name*].

That the alteration proposed and intended to be effected by the execution and filing of this amended certificate, consists of an extension of purposes [*powers or provisions*], so as to include the following, to wit:

[*State same.*]

That the aforesaid alteration has been duly authorized by a vote of a majority of the directors and also by vote of stockholders representing at least three-fifths of the capital stock of said corporation, at a meeting of the stockholders, called for the purpose, in the manner provided in section 18 of the Stock Corporation Law, as more fully appears in a copy of the proceedings of such meeting, verified by the affidavit of one of the directors present thereat, annexed hereto and filed with this amended certificate.

IN WITNESS WHEREOF, we have made and executed this certificate in duplicate, and have hereunto set our hands this ..... day of ....., 19..

.....,
President.

.....,
Secretary.

STATE OF NEW YORK,
County of..... } *ss.:*

On this ..... day of ....., 19.., before me personally came [*insert names*], to me known and known to me to be the persons described in and who made and signed the foregoing certificate and severally duly acknowledged to me that they had made, signed and executed the same for the uses and purposes therein set forth.

[*Signature of Notary.*]

Form No. 309.

Copy of Proceedings of Meeting, to be Attached to the Foregoing Certificate.

Minutes of a special meeting of the stockholders of the [*insert corporate name*] Company, held at the office of the company at ....., on ....., 19.., at ..... o'clock in the .....noon, for the purpose of considering a proposition to alter its certificate of incorporation so as to include therein other purposes [*powers or provisions*].

The meeting having been called to order, stockholders appeared in person or by proxy, representing [*insert number*] shares of stock, being at least three-fifths of the capital stock of said corporation, and organized by electing ..... and ....., directors of the corporation, as chairman and secretary, respectively, of said meeting.

The chairman [*or secretary*] read the notice of the meeting, which notice stated the time, place and object thereof and the proposed extension of purposes, powers and provisions of the corporation, and also read the proof that such notice was published once a week, for at least two successive weeks, in [*insert name of paper*], a newspaper in the county of ....., the county where the principal business office of the corporation is located, and that a copy of such notice was duly mailed to each stockholder at his last known post-office address at least two weeks before the meeting.

Upon motion, duly seconded, a vote was taken upon the following resolution:

Resolved, That the purposes, powers and provisions of the [*insert corporate name*] Company be extended as follows: [*State same*] and that the president and secretary of this corporation be authorized and instructed to execute and file proper certificates, as provided by law, and to take such other steps as may be necessary to carry out and effectuate the object and purposes of this resolution.

Thereupon, stockholders representing [*insert number*] shares of stock, being at least three-fifths of the capital stock of said corporation, voted in favor of such resolution, and no stockholder voted

against its adoption, and thereupon such resolution was declared duly adopted and the meeting adjourned.

A. B. *Chairman.*
C. D., *Secretary.*

STATE OF NEW YORK, }
County of..... } *ss.:*

C. D., being duly sworn, says that he is one of the directors of the [*insert corporate name*], and was present at a special meeting of the stockholders of said company, held at its office, at ....., on ....., 19.., at ..... o'clock in the forenoon, and that the foregoing is a true copy of the proceedings of such special meeting and of the whole thereof.

C. D.

Sworn to before me, this ..... }
day of ....., 19.. }
[*Signature of Notary.*]

Upon filing and recording the foregoing amended certificate in the office of the Secretary of State the fees are fifteen cents per folio for recording. At the county clerk's office the fees are: Filing, six cents; recording, ten cents per folio.

Form No. 310.

Notice of Meeting.

To the stockholders of [*insert corporate name*]:

Notice is hereby given that a special meeting of the stockholders of said corporation will be held at ....., in the ..... of ....., on the ..... day of ....., 1902, at ..... o'clock, .. M., to act upon a proposition to alter its certificate of incorporation so as to include other purposes, powers or provisions, to wit: [*insert same*], in addition to those now set forth in the certificate of incorporation of said corporation.

Dated, ..., N. Y., ..., 19..

.....,
President.

.....,
Secretary.

Form No. 311.

Affidavit of Mailing.

STATE OF NEW YORK, }
County of..... } *ss.:*

....., being duly sworn, says, that he is the secretary of ..... Company; that on the ..... day of ....., 19.., he deposited in the post-office ....., at the city of ....., a copy of the annexed notice to stockholders of the [*insert corporate name*], contained in a duly post-paid wrapper directed to each stockholder of record of said company at his last-known post-office address.

[*Signature.*]

Sworn to before me, this ..... }
day of ....., 19.. }

[*Signature of Notary.*]

[*Annex here affidavit of publication.*]

Form No. 312.

Example of Regulation and Limitation of Powers.

See the General Corporation Law, § 10.

Provisions for the regulation of the business and the conduct of the affairs of the corporation, including limitations upon its powers and upon the powers of its directors and stockholders, to wit:

(a.) Business shall be closed, books balanced and inventory taken on the ..... day of ....., in each year hereafter, to ascertain the condition thereof; and dividends shall be paid annually on the stock so long as the business shall show a profit.

(b.) No surplus exceeding ..... per cent. of the whole amount of capital stock can be accumulated and kept for any purpose.

(c.) The president of this corporation shall receive no salary [*or as the case may be*].

(d.) For the first year the salaries of the other officers shall be as follows: Secretary, $.....; treasurer, $ .....; superintendent, $.....

(e.) After the first year, the salaries of said officers shall be determined by the board of directors; except that the aggregate amount of annual salaries of officers shall not exceed the sum of $.....

(f.) Any or all the provisions marked respectively (a), (b), (c), (d) and (e) of subdivision .. may be enlarged, changed or modified at any time by the board of directors, with the consent of stockholders representing ..... per cent. of the entire authorized [*or outstanding*] capital stock of said corporation.

Form No. 313.

Other Examples.

The directors shall not make any dividends except from the surplus profits arising from the business of the corporation. The directors may, in any year, set apart from such surplus profits the amount thereof to be determined by them as working capital or as a reserve or surplus fund to meet liabilities or contingencies, before declaring any dividend on the capital stock.

The directors may receive such compensation for the services as may be fixed from time to time by the by-laws of the corporation adopted by a majority in amount of the stockholders. Such compensation may be in the form of a percentage of the surplus profits arising from the business of the corporation over and above and after payment of dividends as hereinbefore set forth upon the preferred stock.

No officer of the corporation shall be entitled to receive any salary except under the authority of a resolution of the board of directors, and such resolution shall be effectual for a term not longer than one year.

The preferred stock shall not be exchangeable for common stock except with the consent of all the outstanding common stock. The preferred stock shall at no time be increased to such an amount as to exceed the amount of the then outstanding common stock. In the event of any increase in the capital stock, the board of directors shall have the right and power to dispose of the new or increased stock, or any part thereof, to such party or parties, at such price not less than par, and upon such terms generally as they may see

fit, provided, however, that any new or increased common stock shall first be offered *pro rata* to the holders of the then outstanding common stock.

Form No. 314.

Certificate of Merger.

See Stock Corporation Law, § 15.

The [*insert corporate name*] Company, pursuant to the provisions of section 15 of the Stock Corporation Law of the State of New York, hereby certifies, under its common seal, as follows:

First. That the [*insert corporate name*] Company is a stock corporation organized and existing under the laws of the State of New York, and that its certificate of incorporation was duly filed and recorded in the office of the Secretary of State of said State on the ..... day of ....., 19.., and also in the office of the clerk of ..... county, in said State, on the ..... day of ....., 19..

Second. That on and prior to ....., 19.., the [*insert corporate name*] Company was also a stock corporation organized and existing under the laws of the State of New York, and that its certificate of incorporation was duly filed and recorded in the office of the Secretary of State of said State on the ..... day of ....., 19.., and in the office of the clerk of ..... county in said State on ....., 19..

Third. That on said ....., 19.., the [*insert corporate name*] Company, lawfully owned all the capital stock of said [*insert corporate name*] Company, and on that day the directors of the said [*insert corporate name*] Company, by a resolution duly adopted, determined to and did merge said [*insert corporate name*] Company, which resolution was in the following words, to wit:

Whereas, The [*insert corporate name*] Company was organized for and now is engaged in business similar [*or incidental*] to that of the [*insert corporate name*] Company; and

Whereas, The said [*insert corporate name*] Company has acquired and now lawfully owns all the stock of said [*insert corporate name*] and desires to merge the said last mentioned cor-

poration, and to be possessed of all the estate, property, rights, privileges and franchises of said corporation; therefore,

Resolved, That the [*insert corporate name*] Company merge, and it hereby does merge said [*insert corporate name*] Company; and further,

Resolved, That the officers of this company be and they hereby are directed to make and execute, under the common seal of this company, and to file in the office of the Secretary of State, a certificate of such ownership, and of the adoption of this resolution of the board of directors of this company, to merge the said [*insert corporate name*] Company.

IN WITNESS WHEREOF, the [*insert corporate name*] Company has caused these presents to be signed in its behalf by its president, and its common or corporate seal to be hereunto affixed and attested by its secretary, on the ..... day of ....., 19..

The [*insert corporate name*] Company,

By .....,

[*Corporate seal.*] *President.*

Attest:

.....,

Secretary.

STATE OF NEW YORK,
County of..... } *ss.:*

On the ..... day of ....., in the year nineteen hundred and ....., before me personally came ....., to me known, who, being duly sworn, did depose and say that he resides in the city of .....; that he is the ..... president of [*insert corporate name*] Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

.....,

Notary Public,

..... *County, N. Y.*

Form No. 315.

Minutes of Meeting of Directors to Act on Merger.

See the Stock Corporation Law, § 15.

A special meeting of the board of directors of the [*insert corporate name*] Inc., was held at the office of said corporation [*or, if elsewhere, so state*], in the ..... of ....., State of New York, on the ..... day of ....., 19..., at ..... o'clock in the ..... noon, pursuant to a waiver of notice of such meeting.

There were present: James L. Livingston, John L. Hedges, Ambrose S. Brice, Jerome J. Wheeler and Josephus Jenkins, being a majority of the directors of the company.

The president, Mr. Livingston, called the meeting to order and was chosen chairman thereof, and Mr. Brice acted as secretary of the meeting.

The secretary presented a written waiver of notice of the meeting, signed by all the directors, and upon motion, it was ordered that the same be filed and that a copy thereof be prefixed to the minutes of this meeting.

The treasurer of the corporation made a report showing to the satisfaction of the directors that this corporation has acquired and now lawfully owns all the stock of the [*insert corporate name*].

Upon discussion and consideration of the matter it was deemed desirable and for the best interests of this corporation that it should merge the said [*insert corporate name*], and thereupon become possessed of all the estate, property, rights, privileges and franchises of said corporation, pursuant to the provisions of section 15 of the Stock Corporation Law of the State of New York.

Thereupon, upon motion duly made and carried, the following preambles and resolutions were adopted, to wit:

Whereas, The [*insert corporate name*] was organized for business similar [*or incidental*] to that of the [*insert corporate name*]; and,

Whereas, The said [*insert corporate name*] has acquired and now lawfully owns all the stock of said [*insert corporate name*], and desires to merge the last mentioned corporation, and to be possessed of all the estate, property, rights, privileges and franchises of said last mentioned corporation; therefore,

Resolved, That the [*insert corporate name*] merge and it hereby does merge said [*insert corporate name*]; and, further,

Resolved, That the officers of this corporation be and they hereby are authorized and directed to make and execute, under the common seal of this company, and to file in the office of the Secretary of State, a certificate of such ownership, and of the adoption of these resolutions by the board of directors of this company to merge the said [*insert corporate name*], pursuant to statute.

There being no further business presented, upon motion, the meeting was adjourned. .....,

Secretary.

Form No. 316.

Sale of Corporate Property; Notice of Application by Dissenting Stockholder for Appointment of Appraisers.

(To be prefixed to the petition in Form No. 317.

See the Stock Corporation Law, §§ 16 and 17.

SUPREME COURT, NEW YORK COUNTY.

IN THE MATTER
OF THE
APPLICATION OF W. BURGESS NESBITT, A STOCKHOLDER OF THE HOWE TRUCK COMPANY, INC., FOR THE APPOINTMENT OF APPRAISERS TO APPRAISE THE VALUE OF HIS STOCK.

Please Take Notice, that on the annexed petition of W. Burgess Nesbitt, verified October 15th, 1915, and the annexed affidavit of Richard S. Raymond, sworn to October 15th, 1915, the undersigned will move this Court at a Special Term, part one thereof, appointed to be held in and for the County of New York at the Court House in the Borough of Manhattan, City, County and State of New York on the 26th day of October, 1915, for an order appointing three persons to appraise the value of the stock of the Howe Truck Company, Inc., owned by the petitioner, and designating the time and place of the proceedings of said commissioners, and directing the manner in which payment for such stock shall be made to the petitioner, and for such other and further relief as to the Court shall seem proper.

Dated, October 15th, 1915.

Yours, etc.,

FRANK WHITE,
Attorney for Petitioner,
32 Liberty Street,
Borough of Manhattan,
City of New York, N. Y.

To: Howe Truck Company, Inc.

Form No. 317.

Petition by Dissenting Stockholder for Appointment of Appraisers upon Sale of Corporate Assets.

See the Stock Corporation Law, §§ 16, 17.

SUPREME COURT, NEW YORK COUNTY.

IN THE MATTER
OF THE
APPLICATION OF W. BURGESS NESBITT, A STOCKHOLDER IN THE HOWE TRUCK COMPANY, INC., FOR THE APPOINTMENT OF THREE PERSONS TO APPRAISE THE VALUE OF HIS STOCK.

To the Supreme Court of the State of New York:

The petition of W. Burgess Nesbitt respectfully shows:

First. That your petitioner resides in the City of New York, County and State of New York, and at all the times hereinafter mentioned was and is now the owner of one hundred (100) shares of the capital stock of the Howe Truck Company, Inc., a domestic stock corporation, duly organized and existing, and having its principal office in the borough of Manhattan, in the City, County and State of New York.

Second. That a meeting of the stockholders of said Howe Truck Company, Inc., aforesaid, was called to be held at the office of the corporation in the City of New York, on October 2d, 1915, and was held at said time and place to consider and vote upon a proposition to sell and convey the property, rights, privileges and franchises of said corporation to the Wolverine Tractor Corporation.

Third. That Messrs. Frank White and Richard S. Raymond of the City of New York attended said meeting as proxies for your petitioner, having been theretofore duly authorized in writing to appear for your petitioner at said meeting and vote upon your petitioner's stock thereat. A copy of said written authority or proxy is hereto annexed, marked "Exhibit A" and made a part hereof. The original thereof was duly presented, accepted as sufficient, and filed at said meeting, as your petitioner is informed and believes.

Fourth. That as appears by the affidavit of Richard S. Raymond, hereto annexed, both said Messrs. White and Raymond attended the meeting aforesaid in your petitioner's behalf and that a vote was taken at said meeting upon the proposition to con-

vey the property, rights, privileges and franchises of said Howe Truck Company, Inc., to the Wolverine Tractor Corporation, aforesaid, and that more than two-thirds of the stock voted in favor of the proposition, but that Mr. White, as proxy for your petitioner, voted against such proposition of sale or conveyance, and after the declaration of the result of the vote protested at said meeting against the proposed sale and then and there demanded payment for your petitioner's stock, at the same time serving upon the corporation a written notice signed by your petitioner objecting to the proposed sale and demanding payment for said stock. A copy of the aforesaid written notice and demand is attached hereto, marked Exhibit "B," and made a part hereof. That sixty days have not elapsed since said meeting was held and that no other application for the relief herein asked for has been made.

WHEREFORE, your petitioner prays that the Court appoint three persons to appraise the value of the stock held by your petitioner in said Howe Truck Company, Inc., and designate the time and place at which said appraisers shall meet, and also direct the manner in which payment for such stock shall be made to your petitioner as provided in section 17 of the Stock Corporation Law of the State of New York, and for such, other, further or different relief as may be just.

Dated, October 15th, 1915.

W. BURGESS NESBITT,
Petitioner.

STATE OF NEW YORK,
County of New York, } ss.:
City of New York,

W. Burgess Nesbitt, being duly sworn, deposes and says, that he is the petitioner named in the foregoing petition; that he has read said petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Sworn to before me this 15th day of October, 1915. } W. BURGESS NESBITT.

THOMAS TILTON,
Notary Public,
New York Co., N. Y.

Form No. 318.

Affidavit of Service of Petition and Notice.

(To be annexed to the petition in the preceding form.)

See Stock Corporation Law, §§ 16 and 17.

SUPREME COURT, NEW YORK COUNTY.

IN THE MATTER
OF THE
APPLICATION OF W. BURGESS NESBITT, A STOCKHOLDER IN THE HOWE TRUCK COMPANY, INC., FOR THE APPOINTMENT OF APPRAISERS TO APPRAISE THE VALUE OF HIS STOCK.

STATE OF NEW YORK,
City and County of New York, } *ss.:*

Richard S. Raymond, being duly sworn, deposes and says, as follows:

Deponent resides in the Borough of Manhattan, City of New York, and is over twenty-one years of age. On October 15, 1915, in the afternoon, at No. 32 Liberty Street, in said Borough of Manhattan, City and State of New York, deponent personally served the annexed petition and notice of motion on the above named Howe Truck Company, Inc., by delivering a copy thereof to Joseph Judkins, personally, and leaving the same with him. Deponent knew the said Joseph Judkins to be the president of the said Howe Truck Company, Inc., and knew the corporation so served to be the Company mentioned and described in the said petition and notice of motion.

Sworn to before me this 15th day of October, 1915. } RICHARD S. RAYMOND.

THOMAS TILTON,
Notary Public,
New York County, N. Y.

Form No. 319.

Proxy of Dissenting Stockholder in Proceedings for Appointment of Appraisers.

EXHIBIT A.

No. of Shares 100.

KNOW ALL MEN BY THESE PRESENTS: that the undersigned stockholder in the Howe Truck Company, Inc., does hereby constitute and appoint Richard S. Raymond and Frank White, of New York City, true and lawful attorneys, agents, and proxies of the undersigned, to vote upon all stock held and owned by the undersigned at a special meeting of the stockholders of said Howe Truck Company, Inc., to be held on the 2d day of October, 1915, and at any and all adjournments thereof according to the number of votes the undersigned would be entitled to vote if personally present, hereby revoking any proxy or proxies heretofore given to vote upon such stock, and ratifying and confirming all that said attorneys, agents, or proxies may do by virtue hereof. Either one of said attorneys, agents, or proxies who shall be present and act at any such meeting or adjournment shall have and may exercise all the powers of all of said attorneys, agents or proxies hereunder.

WITNESS, my hand and seal this first day of October, 1915.

W. BURGESS NESBITT (L. S.).

Witness:

WILLIAM H. SPENCER.

Form No. 320.

Notice by Dissenting Stockholder to be Served at Meeting of Stockholders.

See the Stock Corporation Law, §§ 16 and 17.

EXHIBIT B.

No. of Shares 100.

To the [*insert corporate name*]:

Please Take Notice that the undersigned a stockholder owning [*insert number*] shares of stock in the [*insert corporate name*] hereby objects to the sale of the property, assets and good will of the said [*insert corporate name*] to the [*insert corporate name*] and to the execution or delivery of any contract between the [*insert corporate name*] and said [*insert corporate name*], providing for the transfer of the property, assets and good will of said [*insert corporate name*] to the [*insert corporate name*], in the form approved by the board of directors of said [*insert corporate name*] or in any other form and if such sale or any sale of like character or the transfer of said assets and property is to be made in spite of the objection of the undersigned then the undersigned hereby demands payment for the stock held by him in the said [*insert corporate name*].

Dated, ..., N. Y., January ....., 19..

.....

Form No. 321.

Proof of Dissenting Stockholder's Protest at Meeting to Authorize Sale of Corporate Property.

See the Stock Corporation Law, §§ 16 and 17.

SUPREME COURT, NEW YORK COUNTY.

IN THE MATTER
OF THE
APPLICATION OF W. BURGESS NESBITT, A STOCKHOLDER IN THE HOWE TRUCK COMPANY, INC., FOR THE APPOINTMENT OF THREE PERSONS TO APPRAISE THE VALUE OF HIS STOCK.

STATE OF NEW YORK,
County of ....., } *ss.:*

Richard S. Raymond, being duly sworn, says: I reside in the City of New York and am one of the persons named in the proxy or power of attorney executed by W. Burgess Nesbitt, the peti-

tioner herein, a copy of which is attached to the petition herein. On the 2d day of October, 1915, I attended in person a meeting of the stockholders of the Howe Truck Company, Inc., called to vote upon the proposition to convey all the rights, property, privileges and franchises of said corporation to the Wolverine Tractor Corporation, which meeting was held at the office of said Howe Truck Company, Inc., in the City of New York, and I was present throughout all of said meeting and witnessed all that occurred thereat. When the vote of the stockholders was taken at said meeting upon the proposition to sell and convey the property, rights, privileges and franchises of the corporation as aforesaid, Frank White, Esq., who was present as proxy for said W. Burgess Nesbitt, voted against said proposition on behalf of said W. Burgess Nesbitt. After the result of the vote was declared, said Frank White, on behalf of said W. Burgess Nesbitt, protested at said meeting against the proposed sale and served upon the corporation written objection thereto and a written demand for the payment for said stock owned and held by said W. Burgess Nesbitt. A true copy of the written notice and demand served upon the corporation by said Frank White at said meeting is attached to the petition and marked "Exhibit B."

Sworn to before me this 15th day of October, 1915. } RICHARD S. RAYMOND.

THOMAS TILTON,
Notary Public,
New York Co., N. Y.

Form No. 322.

Certificate of Incorporation by Purchasers of the Property and Franchises of a Stock Corporation.

See Stock Corporation Law, § 9.

We, the undersigned, two-thirds of whom are citizens of the United States and at least one of us being a resident of the State of New York, desiring to become a corporation, pursuant to the provisions of the Stock Corporation Law, and to take and possess the property and franchises of a domestic stock corporation sold

as hereinafter stated, do hereby make, acknowledge and file this certificate for that purpose, and certify, as required by section 9 of said law, as follows:

That the property and franchises of [*insert corporate name*], a domestic stock corporation, organized under chapter ..... of the laws of 19.., of the State of New York, entitled "An act, etc. [*stating title*], were, on the ..... day of ....., 19.., duly sold under and by virtue of a judgment or decree of the Supreme Court of said State of New York, rendered in an action in said court between ....., plaintiffs, and ....., defendants, dated and entered in the clerk's office of the county of ....., on the ..... day of ....., 19..

The following is a brief description of the property thus sold: [*Insert description.*]

That at such sale the undersigned, A. B., C. D., and E. F., became the purchasers of and acquired the property and franchises sold, and have associated with themselves the following persons: [*Insert names of associates, if any.*]

That the name of the new corporation intended to be formed by the filing of this certificate shall be [*insert name of company*].

That the place where its principal office is to be located is [*insert name of village, town or city*].

That the maximum amount of its capital stock shall be [*insert amount of capital stock*], and the number of shares into which the same shall be divided is [*insert number of shares*],* of which [*insert amount*] dollars or [*insert number*] shares shall be common stock, and [*insert amount*] dollars or [*insert number*] shares shall be preferred stock. That the rights pertaining to each class shall be as herein specified, to wit: [*Example given.*]

The preferred stock herein provided for shall be entitled to non-cumulative annual dividends, at the rate of five per cent. per annum, out of the net earnings of all the properties of the new corporation, as and when declared by the board of directors thereof, in preference to any dividend or dividends upon the common stock; and after said preferred stock shall have received five per cent. per annum, as above provided, the common stock shall be entitled to a dividend for the same year, out of the like net earnings as and when declared by said directors, up to five per cent., and any funds applicable to dividends in the same year, in

excess of the dividends as above provided, shall be divided equally, per share, among the holders of the preferred and common stock, as and when declared by said directors.*

That the number of directors who shall manage the affairs of the new corporation shall be [*insert number, not less nor more than the number required by law for the old corporation*], and the names and post-office addresses of the directors for the first year are as follows:

Name.	Post-office Address.
A B.....	.....
C D.....	.....
E F.....	.....
G H.....	.....
I J.....	.....
K L.....	.....
M N.....	.....
N O.....	.....
P Q.....	.....

That the following plan or agreement was entered into at or previous to such sale in anticipation of the formation of a new corporation, and such purchase was made pursuant to it.

[*Here insert such plan or agreement, if any.*]

IN WITNESS WHEREOF, we, the undersigned, the said purchasers and their said associates [*if any*] have made this certificate in duplicate and have hereunto subscribed our names this ..... day of ....., 19..

[*Signatures of purchasers and associates.*]

STATE OF NEW YORK,
County of.....,
} *ss.:*

On the ..... day of ....., in the year one thousand nine hundred and ....., before me personally came [*insert names of purchasers and associates*], to me known and known to me to be the individuals described in, and who executed the fore-

* If the corporation is to have only one class of stock, omit the matter between the * * , and state that all the stock is to be common stock.

going certificate of incorporation, and severally acknowledged that they executed the same for the uses and purposes therein expressed.

.....,
Notary Public,
..... *County, N. Y.*

The number of purchasers and associates executing the above certificate must aggregate not less than the number required by law for the incorporation of the kind of company to be formed by the filing of this certificate.

The fees, upon filing this certificate, are: Office of Secretary of State — filing (except railroads), ten dollars; railroads, twenty-five dollars; recording, fifteen cents per folio. County Clerk's office — filing, six cents; recording, ten cents per folio. In addition to such payments an organization tax of one-twentieth of one per cent. upon the capital stock must be paid to the State Treasurer.

Form No. 323.

Amended Certificate to Correct Informality or Defect.

See General Corporation Law, § 7.

AMENDED CERTIFICATE OF THE ..... COMPANY.

We, the undersigned directors [*or corporators*] of [*insert name of corporation*] for the purpose of correcting an informality in the original certificate of incorporation of said corporation consisting of [*e. g., an omission to state in said certificate the term of corporate existence of such corporation*].

[*Or for the purpose of striking out matter not authorized by law to be stated in the original certificate of incorporation of said corporation, as follows, to wit: State unauthorized matter*].

[*Or for the purpose of correcting a defect in the proof or acknowledgment appended to the original certificate of incorporation of said corporation*], do hereby make and file this amended certificate, pursuant to the General Corporation Law of the State of New York, section 7, and for such purpose, do certify and declare as follows:

[*Here insert the recitals for the supplying or correction of which the amended certificate is made; or omitting the matter unauthorized by law to be stated; or by making the desired correction.*]

IN WITNESS WHEREOF, we have made and filed this amended certificate in duplicate, and have hereunto subscribed our names.

Dated, this ..... day of ....., 19..

[*Signature.*]

STATE OF NEW YORK,
County of ....., } *ss.:*

On this ..... day of ....., 19.., before me personally came [*insert names*], to me known and known to me to be the individuals described in and who executed the foregoing amended certificate, and they severally acknowledged to me that they executed the same.

[*Signature of notary.*]

The fees upon filing this certificate are: Office of Secretary of State, fifteen cents a folio for recording; office of county clerk, filing, six cents, recording, ten cents a folio.

Form No. 324.

Amended Certificate of Subway Realty Company.

We, the undersigned corporators of Subway Realty Company, being all the corporators, directors, and stockholders of said corporation, for the purpose of correcting an informality in the original certificate of incorporation of said corporation and a defect in the proof or acknowledgment of said certificate, to wit, in misdescribing John J. Coakley, one of the undersigned, in the list of directors and subscribers for stock of said corporation and in the certificate of acknowledgment as Joseph J. Coakley, whereas the correct name of such director and subscriber is John J. Coakley, do hereby make and file this amended certificate pursuant to section 7 of the General Corporation Law of the State of New York, and for such purpose, do certify and declare as follows:

CERTIFICATE OF INCORPORATION OF SUBWAY REALTY COMPANY.

We, the undersigned, all being persons of full age, and at least two-thirds being citizens of the United States and at least one-third residents of the State of New York, desiring to form a stock corporation, pursuant to the provisions of the Business Cor-

porations Law of the State of New York, do hereby make, sign, acknowledge and file this certificate for that purpose as follows:

I. The name of the proposed corporation is

SUBWAY REALTY COMPANY.

II. The purposes for which this corporation is to be formed are to purchase, take, hold, sell, convey, lease, mortgage, improve deal in and manage real property in the State of New York, and all estates, easements, liens, licenses, rights, privileges and other interests therein of every kind and nature whatsoever, also chattels real and chattel interests; the construction or acquisition, ownership and management of buildings or structures upon such real property, and of offices and apartments therein; the purchase and sale of personal property and the carrying on of any other lawful trade or business incident to any of the foregoing purposes; the purchasing, acquiring, holding and disposing of the stock, bonds and other evidences of indebtedness of any other corporation, domestic or foreign, and while the holder thereof, the exercise of all the rights and privileges of ownership, including the right to vote thereon and to issue in exchange therefor its own stock, bonds or other obligations.

III. The amount of the capital stock is five hundred thousand dollars ($500,000). The number of shares of the capital stock shall consist of five thousand (5,000) and the par value of each share shall be one hundred dollars ($100).

IV. The principal business office of the corporation is to be located in the borough of Manhattan, city of New York, county of New York.

V. Its duration is perpetual.

VI. The number of its directors is to be five.

VII. The amount of capital with which the corporation will begin business is two hundred and fifty thousand dollars ($250,000).

VIII. The names and post-office addresses of the directors for the first year are as follows:

Names.	Post-office Addresses.
Charles B. Ludlow.....	New Brunswick, N. J.
A. Birtner.....	152 Schermerhorn street, borough of Brooklyn, New York city.
F. I. Burgher.....	21 Brownell street, Stapleton, borough of Richmond, New York city.
William J. Cahill.....	10 Beekman place, borough of Manhattan, New York city.
John J. Coakley.....	302 East 28th street, borough of Manhattan, New York city.

IX. The names and post-office addresses of the subscribers and the statement of the number of shares of stock which each agrees to take in the corporation are as follows:

Names.	Post-office Addresses.	Number of shares.
Charles B. Ludlow.....	New Brunswick, N. J.....	10
A. Birtner.....	152 Schermerhorn street, borough of Brooklyn, New York city.....	10
F. I. Burgher.....	21 Brownell street, Stapleton, borough of Richmond, New York city...	10
William J. Cahill.....	10 Beekman place, borough of Manhattan, New York city	10
John J. Coakley.....	302 East 28th street, borough of Manhattan, New York city.....	10

IN WITNESS WHEREOF, we have made and filed this amended certificate in duplicate, and have hereunto subscribed our names.

Dated, this 29th day of April, 1901.

CHARLES B. LUDLOW.
A. BIRTNER.
F. I. BURGHER.
WILLIAM J. CAHILL.
JOHN J. COAKLEY.

STATE OF NEW YORK,
County of New York, } ss.:

On this 29th day of April, 1901, before me personally came Charles B. Ludlow, A. Birtner, F. I. Burgher, William J. Cahill, and John J. Coakley, each to me known and known to me to be one of the individuals described in and who executed the foregoing amended certificate and who to me severally acknowledged that they executed the same.

A. W. ANDREWS,
Notary Public,
New York County.

Form No. 325.

Amended Supplemental Certificate to Correct Informality or Defect.

See the General Corporation Law, § 7.

AMENDED SUPPLEMENTAL CERTIFICATE OF THE ..... COMPANY.

We, the undersigned directors of [*insert corporate name*] Company, do hereby certify that in the certificate of reduction of capital stock of such corporation from $150,000 to $100,000, filed in the office of the Secretary of State on the ..... day of ....., 19.., and in the office of the clerk of the county of ..... on the ..... day of ....., 19.., an informality exists, as follows, to wit:

[*Set forth the informality.*]

Therefore, we, the undersigned directors of the [*insert corporate name*] Company aforesaid, do hereby make and file this amended certificate for the purpose of correcting such informality or defect, pursuant to the provisions of the General Corporation Law, section 7, and for such purpose do certify and declare as follows:

[*Here set forth the amendment.*]

IN WITNESS WHEREOF, we have made and acknowledged this amended certificate in duplicate, and have hereunto set our hands this ..... day ....., 19...

[*Signatures of directors.*]

STATE OF NEW YORK, }
County of ....., } *ss.:*

On this ..... day of ....., 19.., before me personally came [*insert names of the directors*], to me known and known to me to be the individuals described in and who executed the foregoing amended certificate, and they severally acknowledged to me that they executed the same.

.....,
Notary Public,
.....*County, N. Y.*

(As to fees see note to preceding form.)

Form No. 326.

Petition to Court to Amend Certificate of Incorporation which Fails to State True Objects of Corporation.

See the General Corporation Law, § 7.

SUPREME COURT, ... COUNTY.

IN THE MATTER OF THE PETITION
OF THE
[*insert corporate name*] COMPANY, TO AMEND
ITS CERTIFICATE OF INCORPORATION.

To the Supreme Court of the State of New York:

The petition of the [*insert corporate name*], the above-named petitioner, respectfully shows to this court that it is a corporation, duly incorporated, organized and existing under and by virtue of the laws of the State of New York.

That annexed hereto and marked "Exhibit A" is a copy of the original certificate of incorporation of said corporation, which, as your petitioner is informed and verily believes, was duly filed and recorded in the office of the Secretary of State of the State of New York, on the ..... day of ....., 189.., and a duplicate original [*or a certified copy*] thereof was also on the ..... day of ....., 189.., duly filed and recorded in the office of the clerk of ..... county.

That such certificate of incorporation, so filed as aforesaid, fails to express the true object and purpose of the corporation, so as to truly set forth such object and purpose. That it is and has been ever since the filing of said certificate of incorporation the intention and purpose of the incorporators to, and the true object and purpose of said corporation is, to [*state same*].

That annexed hereto and marked "Exhibit B," is a proposed amended certificate of incorporation duly signed and acknowledged by the directors of said corporation for the first year as named in the original certificate of incorporation. That said proposed amended certificate expresses the true object and purpose of said corporation as hereinbefore set forth, and the petitioner prays for an order of this court amending said original certificate so as to truly set forth such object and purpose, and permit your petitioner to file for record with said Secretary of State and County Clerk of ..... county, said certificate so amended.

The [*insert corporate name*] Company,
By [*signature*] President.

{ Corporate Seal }

STATE OF NEW YORK, }
County of ....., } *ss.:*

[*Name of president*], being duly sworn, says that he is the president of the [*insert corporate name*], the petitioner named in the foregoing petition; that the foregoing petition is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true; that he affixed the corporate seal of said corporation to said petition and signed the same on behalf of said corporation by the authority of its board of directors.

Deponent further says that the reason this verification is not made by petitioner is that it is a domestic corporation; that deponent is the president thereof and makes the same from his personal knowledge and supervision of the affairs and business of said corporation.

[*Signature of president.*]

Sworn to before me, this .... }
day of ....., 19.. }

[*Signature of notary.*]

Form No. 327.

Notice of Application to Court for Correction of Objects.

See the General Corporation Law, § 7.

STATE OF NEW YORK, SUPREME COURT.

IN THE MATTER OF THE PETITION
OF THE
[*insert corporate name*] TO AMEND ITS CERTIFICATE OF INCORPORATION.

Sir:—

Please take notice, that upon the petition, with a copy of which you are herewith served, a motion will be made at the next Special Term of this court, appointed to be held at the ..... in the city [*or village*] of ..... in and for the county of ....., on the ..... day of ....., 19.., at the opening of the court on that day, or as soon thereafter as counsel can be heard, for a rule or order in this proceeding, amending the original certificate of incorporation of the [*insert corporate name*], filed and recorded in the office of the Secretary of State, and also in the office of the clerk of ..... county, on or about the ..... day of ....., 19.., so as to truly set forth the true object and purpose of said corporation as stated in said petition, and permitting the petitioner to file said amended certificate and to have the same recorded in the office of the Secretary of State, and also in the office of said clerk of ..... county, in the manner required by law, or for such other or further order of relief in the premises as shall be just.

Dated, the ..... day of ....., 19...

Yours, etc.,

.....

Attorney for the Petitioner.

Office address: .....

To Hon. .....

Attorney-General.

Form No. 328.

Petition by a Stock Corporation for Change of Name.

See General Corporation Law, §§ 60–65.

SUPREME COURT, STATE OF NEW YORK, COUNTY OF .....

IN THE MATTER OF THE APPLICATION OF THE [*insert name*] COMPANY FOR AUTHORITY TO CHANGE ITS NAME TO THE [*insert name*] COMPANY.

To the Supreme Court of the State of New York:

The petition of the [*insert name*] Company respectfully shows to this court, as follows:

That it is a corporation duly incorporated under a general law [*or by a special law*] of this State, to wit: [*State the law*], and that the objects for which it was formed are: [*Insert objects*].

That its principal business office is situated in the city [*or village*] of ....., in the county of ....., and State of New York.

That the present name of your petitioner is the [*insert name*] Company, and that the name it desires to assume is the [*insert same*] Company.

That the following are the grounds of this application, namely: [*Insert same*].

That this petition for an order for such change of name of said corporation has been duly authorized by a resolution of its board of directors adopted at a meeting of said board held on the ..... day of ....., 19...

That annexed hereto is a certificate of the Secretary of State, that the name which said corporation proposes to assume is not the name of any other domestic corporation or a name which he deems so nearly resembling it, as to be calculated to deceive.

Wherefore, your petitioner prays for an order of the court authorizing it to change its corporate name from the [*insert name*] Company and to assume instead thereof the corporate name, the [*insert proposed name*] Company.

Dated, ..., 19...

The [*insert corporate name*] Company,

By [*signature*] President.

{ Corporate Seal }

STATE OF NEW YORK, }
County of ....., } ss.:

[*Insert name of president*], being duly sworn, says, that he is the president of the [*insert corporate name*] Company, the petitioner above named; that he has read the foregoing petition, by him subscribed, and knows the contents thereof; that the same is true to the knowledge of the deponent; that the seal affixed to said petition is the corporate seal of said company and was affixed thereto by the authority of the board of directors of said company, and that he signed said petition on behalf of said company, by the like authority.

Deponent further says that the reason this verification is not made by petitioner is that it is a domestic corporation; that deponent is the president thereof and makes the same from his personal knowledge and supervision of the affairs and business of said corporation.

[*Signature of president.*]

Sworn to before me, this .. }
day of ..... 19... }

[*Signature of notary.*]

Form No. 329.

Notice of Application for Order to Change Name.

See General Corporation Law, § 62.

Notice is hereby given that the [*insert corporate name*] Company, a domestic corporation, having its principal business office in the city [*or village*] of ....., county of ....., and State of New York, will apply to the Supreme Court of the State of New York, at a Special Term thereof, to be held at ....., in the city [*or village*] of ....., county of ....., on the .....day of ....., 19.., at ..... o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order authorizing said corporation to change its corporate name to the [*insert proposed name*] Company.

Dated, Albany, N. Y., ..., 19...

The [*insert corporate name*] Company.

By [*signature of*] President.

Form No. 330.

Resolution of Directors Authorizing Application for Change of Name.

Resolved, by the board of directors of the [*insert corporate name*] at a meeting duly convened this .... day of ....., 18.., that it is desirable that the corporate name of said company should be changed from that of the [*insert name*] to the name, [*insert proposed name*], for the following reasons, to wit: [*State them*];

Therefore, be it resolved, by said board of directors, that application for an order of the Supreme Court to authorize the said company to assume the name, [*insert name*] be made in the manner required by law, and that the president be and is hereby directed to sign and verify a proper petition for that purpose, and to affix the seal of the corporation thereto.

Form No. 331.

Order Changing Corporate Name.

See General Corporation Law, §§ 60–65.

At a Special Term of the Supreme Court of the State of New York, held at the ..... in the city of ....., on the ..... day of ....., 189...

Present: Hon. E. L. F., Justice.

[*Insert title, as in Form No.* 326.]

Upon reading and filing the petition of the [*insert corporate name*] Company, a domestic stock corporation, duly verified by ....., its president, wherein said petitioner prays for an order authorizing it to assume another corporate name, to wit, the name [*insert new name*] Company, and upon filing the certificate of the Secretary of State annexed thereto, certifying that the name which such corporation proposes to assume is not the name of any other domestic corporation or a name which he deems so nearly resembling it, as to be calculated to deceive, upon filing proof that a copy of the petition herein and of the notice of motion were duly filed with the Secretary of State, and upon filing due proof by affidavits showing that notice of the presentation of said petition has been duly published once in each week for three successive

weeks in the [*insert name of paper*], a newspaper of the county of ....., in which county such corporation has its business office [*or if the corporation be located in the city and county of New York, that such notice has been so published in two daily newspapers published in such county*], and the court being satisfied by said petition, and by the affidavits and certificate presented therewith, that the petition is true, and that there is no reasonable objection to the change of name proposed, and that the petition has been duly authorized, and that notice of the presentation of the petition, as required by law, has been made;

Now, on motion of ....., attorney for the said petitioner, no one opposing, it is

Ordered, That said petition be and the same hereby is granted, and that the petitioner herein, the [*insert corporate name*] Company, be and it hereby is authorized to assume another corporate name, to wit, the name [*insert same*], on and after the ..... day of ....., 19.., and it is further ordered and directed that this order be entered, and the papers on which it is granted be filed, within ten days from the date hereof, in the office of the clerk of ..... county, the county in which the certificate of incorporation of said corporation is filed, and that a certified copy of this order, within ten days after the entry thereof, be filed in the office of the Secretary of State, and further, that a copy of this order be published once a week for four successive weeks in the [*name of newspaper*], a newspaper in the county of ....., beginning within ten days after the entry hereof.

The foregoing order is to be filed and recorded in the office of the county clerk, who is entitled to a filing fee of six cents, a recording fee of ten cents a folio and for a certified copy eight cents a folio. Such certified copy must be filed in the office of the Secretary of State. No fee is payable at the latter office for such filing.

If the proceedings are for the change of name of a railroad corporation the petition must be approved by the Public Service Commission. See G. C. L., § 60; see also provisions as to the designation by said board of a newspaper in which the notice is to be published, G. C. L., § 62. It should also be noted that a certified copy of the order in such cases must be filed in the office of said commission, as well as in the office of the Secretary of State.

Form No. 332.

Annual Report of Stock Corporations, Other than Moneyed or Railroad Corporations.

See Stock Corporation Law, § 34.

ANNUAL REPORT

OF

THE [*insert corporate name*] COMPANY.

Pursuant to the provisions of section 34 of the Stock Corporation Law of the State of New York, I, the undersigned, ..., president [*or a vice-president, or the treasurer, or a secretary*] of the [*insert name of corporation*], a domestic [*or a foreign*] stock corporation, do hereby make a report as of the first day of January, 19.., as follows, to wit:

1. The amount of its capital stock is [*insert amount*] dollars, and the proportion actually issued is [*insert amount*] dollars.

2. The amount of its debts does not exceed the sum of [*insert amount*] dollars.

3. The amount of its assets is at least the sum of [*insert amount*] dollars.

4. The amount of its stock issued for property purchased is [*insert amount*] dollars.

5. The names and addresses of all the directors and officers of the company are as follows:

Directors: [*insert names and addresses.*]

Officers: President, [*insert name and address*].
Secretary, [*insert name and address*].
Treasurer, [*insert name and address*].

(*In case of a foreign corporation insert also the following:*)

*6. The name of the person designated in the manner prescribed by the Code of Civil Procedure, as a person upon whom process against the corporation may be served within the State is ...., whose address is .....

IN WITNESS WHEREOF, I have signed this report this ..... day of ....., 19...

.....,
President.
[*or a vice-president, or the treasurer, or a secretary, as the case may be.*]

* The legislature overlooked the fact that the provisions for designation are now in section 16 of the General Corporation Law.

The recitals contained in paragraphs 5 and 6 of this form constitute new matter required by the amendment of 1905.

Under the practice prevailing prior to the amendment of 1901, it was necessary to file the report during the month of January each year. It was also necessary to make such report in duplicate, one of which was to be filed in the office of the Secretary of State, and the other in the office of the clerk of the county in which the principal business office of the corporation was located. It was also required to be signed by a majority of the directors of the corporation and to be verified by the oath of the president or vice-president and treasurer or secretary.

Under the law as now modified the execution and filing of one report is sufficient, duplicate reports being unnecessary because the report is required, pursuant to the amended law, to be filed only in the office of the Secretary of State. It is to be signed by only one of the executive officers, either the president or a vice-president or the treasurer or a secretary. The report is not required to be sworn to, and need not be made or filed until an officer of the corporation has been requested in writing so to do by a creditor or by a stockholder of the corporation.

No fee is payable at the office of the Secretary of State for filing the report.

In relation to annual reports of railroad companies, see the Public Service Commissions Law.

For statutes governing reports to the Comptroller by all corporations liable to direct State taxation, see Taxation.

Form No. 333.

Voting Trust Agreement.

See General Corporation Law, § 25.

AGREEMENT made the ..... day of ....., 19..., between all the stockholders of the [*insert name of company*] who shall become parties to this agreement by signing the same, hereinafter called the stockholders, parties of the first part, and [*insert names*], hereinafter called the voting trustees, parties of the second part:

WHEREAS, The parties of the first part deem it to their interest to act together, concerning the management of the ..... Company, of which they are respectively stockholders, and to that end to unite the voting power held by them as such stockholders, and to place the same in the hands of the voting trustees, as hereinafter provided;

Now, this Agreement, made in consideration of the premises, of the mutual covenants herein contained, and of one dollar by each of the parties to the others in hand paid, witnesseth as follows:

First. Each party hereto of the first part, holding shares of the capital stock of the ..... Company, to the number set opposite his, her or its name as hereunto subscribed respectively, hereby severally agrees to deposit the same and the certificates therefor, with sufficient transfers thereof in favor of the persons hereinbefore named as voting trustees, with the ..... Trust Company of the City of New York, and to receive in exchange therefor the certificates hereinafter referred to, which deposit shall continue for the period of five years from the date of this agreement, that is to say, until the ..... day of ....., 19..; and upon the making of such deposit all shares represented by the stock certificates so deposited shall be transferred upon the books of said ..... Company, to the names of said voting trustees, who are hereby fully authorized and empowered to cause such transfers to be made, and also to cause any further transfers of said shares to be made which may become necessary through the occurrence of any change of the persons holding the office of voting trustee as hereinafter provided. And during the said period of five years the voting trustees shall possess and be entitled to exercise all rights of every name and nature, including the right to vote, in respect of any and all such shares deposited; it being, however, understood that the holders of the trust certificates of either class to be issued by the voting trustees shall be entitled to receive payments equal to the dividends, if any, collected by said voting trustees upon shares of such class standing in their names.

Second. The voting trustees do hereby promise and agree with the stockholders and with every holder of certificates issued as hereinafter provided, that from time to time, upon request, they will cause to be issued to the several stockholders in respect of all stock deposited by them, certificates to an aggregate amount equal to the amount of all stock so deposited, and which certificates as to the two classes of stock of said company, preferred and common, shall be in substantially the following forms respectively:

The ..... Company.

PREFERRED STOCK TRUST CERTIFICATE.

THIS IS TO CERTIFY, that on the ..... day of ....., 19.., [*insert name of stockholder*] will be entitled to receive a certificate or certificates for ..... full paid shares of one

hundred dollars each in the preferred stock of the ..... Company, and in the meantime to receive payments equal to the dividends, if any, collected by the undersigned voting trustees upon a like number of such shares of preferred capital stock standing in their names; and until the said ..... day of ....., 19.., the voting trustees shall possess and be entitled to exercise all rights of every name and nature, including the right to vote, in respect of any and all such stock; it being expressly stipulated that no voting right passes to the holder hereof by or under this certificate, or by or under any agreement, express or implied.

This certificate is issued pursuant to the terms of an agreement in writing, dated ....., 19.., made and entered into between stockholders of said company and said voting trustees, which agreement is on file with the ..... Trust Company of New York.

This certificate is transferable only on the books which shall be kept for that purpose by said voting trustees, by the registered holder, either in person or by attorney duly authorized, according to rules which shall be established for that purpose by said voting trustees, and on surrender hereof; and until so transferred, said voting trustees may treat the registered holder as owner hereof for all purposes whatsoever, except that delivery of said certificates hereunder shall not be made without the surrender hereof.

This certificate is not valid unless signed by the duly authorized agent of the voting trustees and also countersigned and registered by the ..... Trust Company of New York as registrar.

IN WITNESS WHEREOF, said voting trustees have caused this certificate to be signed by their duly authorized agent, this ..... day of ....., 19...

A. B.,
C. D.,
E. F.,
G. H.,
I. J.,
Voting Trustees.

By their agent hereunder,

.....

Countersigned and registered this ..... day of ....., 19..,
..... Trust Company,
Registrar,

By

.....

..... Company.

COMMON STOCK TRUST CERTIFICATE.

THIS IS TO CERTIFY, that on the 2d day of January, 1901, [*name of stockholder*] will be entitled to receive a certificate or certificates for ..... full-paid shares of one hundred dollars each in the common capital stock of the ..... Company, and in the meantime to receive payments equal to the dividends, if any, collected by the undersigned voting trustees upon a like number of such shares of common capital stock standing in their names; and until the said ..... day of ....., 19.., the voting trustees shall possess and be entitled to exercise all rights of every name and nature, including the right to vote, in respect of any and all such stock; it being expressly stipulated that no voting right passes to the holder hereof by or under this certificate, or by or under any agreement, express or implied.

This certificate is issued pursuant to the terms of an agreement in writing, dated ....., 19.., made and entered into between stockholders of said company and said voting trustees, which agreement is on file with the ..... Trust Company of New York.

This certificate is transferable only on the books which shall be kept for that purpose by said voting trustees, by the registered holder, either in person or by attorney duly authorized, according to rules which shall be established for that purpose by said voting trustees, and on surrender hereof; and until so transferred, said voting trustees may treat the registered holder as owner hereof for all purposes whatsoever, except that delivery of said certificates hereunder shall not be made without the surrender hereof.

This certificate is not valid unless signed by the duly authorized agent of the voting trustees and also countersigned and registered by the ..... Trust Company of New York as registrar.

IN WITNESS WHEREOF, said voting trustees have caused this certificate to be signed by their duly authorized agent, this..... day of ....., 19...

A. B.,
C. D.,
E. F.,
G. H.,
I. J.,
Voting Trustees.

By their agent hereunder,

.....

Countersigned and registered this ..... day of ....., 19...
..... Trust Company,
Registrar,

By

.....

Third. On the second day of ....., 19.., the voting trustees, in exchange for and upon surrender of any of their trust certificates then outstanding, will in accordance with the terms hereof deliver proper certificates of equivalent kind and amount of stock of the ..... Company.

Fourth. From time to time, after this agreement shall have taken effect, the voting trustees may receive any additional full-paid shares of the capital stock of the ..... Company, either preferred or common, upon the terms and conditions of this agreement; and in respect of all such shares so received, will issue and deliver certificates similar to those above mentioned, entitling the holders to all the rights above specified.

Fifth. Any voting trustee may, at any time, resign by delivering to the other voting trustees in writing his resignation, to take effect ten days thereafter; and in every case of death, resignation or vacancy arising through other cause, the vacancy so occurring shall be filled by the appointment of a successor or successors, to be made by the other voting trustees by a written instrument; and the term "Voting Trustees," as herein used, shall apply to the parties of the second part and their successors hereunder.

Sixth. All questions arising between the voting trustees shall, from time to time, be determined by the decision of the greater number of those then acting as voting trustees, either at a meeting, or by writing, with or without meeting, and in like manner they may establish their rules of action. The decision or act of a majority of the voting trustees shall, for the exercise of the voting power, and for all purposes of this agreement, be deemed the decision or act of all the voting trustees.

Seventh. In voting the stock held by them, the voting trustees will exercise their best judgment, from time to time, to select suitable directors, to the end that the affairs of the company shall be properly managed, and in voting on other matters which may come before them at any stockholders' meeting will exercise like judgment; but it is understood that no voting trustee incurs any responsibility by reason of any error of law or of any matter or thing done or omitted under this agreement, except for his own individual malfeasance.

Eighth. This agreement may be simultaneously executed in several counterparts, each of which so executed shall be deemed to be an original; and such counterparts shall together constitute but one of the same instrument.

Ninth. This agreement shall not be binding upon the parties until the same shall have been signed by the stockholders representing a majority of the capital stock of the company.

IN WITNESS WHEREOF, the several parties hereto have hereunto set their hands and seals the day and year first above mentioned, and the voting trustees have hereunto set their hands and seals in token of their acceptance of the trust hereby created.

Form No. 334.

Voting Trust Agreement.

THIS AGREEMENT, made on the ..... day of ....., 1901, between ....., owners and holders of shares of the capital stock of the ..... Company, a corporation organized and existing under the laws of the State of ....., and any other owners and holders of shares of the capital stock of the said company who may hereafter become parties or assent

hereto, each for himself and not for the others, hereinafter called "the stockholders," parties of the first part, and the ..... Trust Company, hereinafter called "the trustee," party of the second part.

Whereas, The ..... Company has but recently come into existence and the success or failure of the business enterprise depends largely upon the management and policy of the said company during the first years of its existence; and,

Whereas, The said parties of the first part believe that it is essential for the success of said company, and for the best interests of all the stockholders thereof, that the said company shall be managed and directed during the first five years of its existence under a definite and fixed policy, and to secure a union of all interests in order to properly develop the rights, privileges, franchises and property owned by the said corporation; and,

Whereas, The said stockholders have this day transferred and delivered to the voting trustee certificates for fully paid shares of one hundred dollars each of the capital stock of the ..... Company, as follows:

..... shares,

..... shares,

which certificates, together with such other similar certificates as may hereafter from time to time be delivered hereunder by the other stockholders of said company, are hereby received and will be received by and are to be held and disposed of by the voting trustees under and pursuant to the terms and conditions hereof.

Now, therefore:

1st. The voting trustee does hereby promise and agree with the aforesaid stockholders individually that the voting trustee will cause to be issued and delivered to each of said stockholders individually, a certificate for the number of shares transferred and delivered to the voting trustee as hereinbefore set forth in substantially the following form:

..... Company.

COMMON STOCK TRUST CERTIFICATES.

THIS IS TO CERTIFY, that as hereinafter provided ..... will be entitled to receive a certificate or certificates for..... .....fully paid shares of the par value of one hundred dol-

lars each, in common stock of the capital stock of the..... Company, on the ..... day of ....., 19.., and in the meantime to receive payments equal to the dividend, if any, collected by the undersigned voting trustee upon a like number of such shares standing in its name, and until after actual delivery of such stock certificates the voting trustee shall possess and shall be entitled to exercise all rights of every name and nature, including the right to vote in respect to any and all such stock, it being expressly stipulated that no voting right passes by or under this certificate or by or under any agreement express or implied.

This certificate is issued under and pursuant to the terms and conditions of a certain agreement dated the ..... day of ....., 1901, by and between certain of the stockholders of the ..... Company and the undersigned voting trustee.

This certificate is transferable only on the books of the undersigned voting trustee, by the registered holder either in person or by attorney duly authorized, according to the rules established for that purpose by the undersigned voting trustee, and on surrender hereof and cancellation or transfer the undersigned voting trustee may treat the registered holder as owner hereof for all purposes whatsoever, except that the delivery of stock certificates hereunder shall not be made without the surrender hereof.

IN WITNESS WHEREOF, the undersigned voting trustee has executed this certificate this ..... day of ....., 190..

Voting Trustee.

2d. That on the ..... day of ....., 19.., the voting trustee in exchange for and upon the surrender of the aforesaid trust certificates then outstanding will, in accordance with the terms thereof, deliver or cause to be delivered proper certificates of equivalent amount of stock of the ..... Company.

3d. The voting trustee shall cause the above-mentioned deposited shares of the capital stock of the ..... Company to be transferred on the books of said company to the name of the voting trustee.

4th. From time to time hereafter the voting trustee will receive such additional fully paid shares of the capital stock of the ..... Company as any and all other stockholders of

said company may tender and deliver to said voting trustee hereunder, and in respect of all such shares so received will issue and deliver certificates similar to those above mentioned, entitling the holders to all rights above specified.

5th. In voting stock held by it, the voting trustee shall exercise its best judgment from time to time to select suitable directors to the end that the business and affairs of the ..... Company shall be properly managed, and in voting on any other matters which may come before it at any stockholders' meeting, will exercise like judgment, but it assumes no responsibility in respect to such management or in respect of any action taken pursuant to its vote so cast, it being understood that the voting trustee incurs no responsibility by reason of any error of judgment or by law in any matter or thing done or omitted under this agreement, except for its own gross negligence or wilful malfeasance.

6th. This agreement shall be open for inspection at the office of the voting trustee in the city of ..... during ordinary business hours to any stockholder of the said ..... Company.

IN WITNESS WHEREOF, the several parties hereto have hereunto set their hands and seals in the city of New York the day and year first above written.

In the presence of:

Form No. 335.

Underwriting Agreement.

THIS AGREEMENT made and entered into this 26th day of February, 1908, by and between ....., ... and ..... of the city of Albany, N. Y. (hereinafter called the "Syndicate Managers"), parties of the first part, and the subscribers hereto, severally, parties of the second part, of whom each is hereinafter called the "Subscribers," and all of whom, together with said parties of the first part constitute the syndicate.

Whereas, The [*insert name*] Company of Albany, N. Y., has purchased the real estate, personal property and business of the [*insert name*] Company; and

Whereas, The business of the [*insert name*] Company has been combined with the business of the [*insert name*] Company, and, further, a new issue of six per cent. first mortgage bonds covering the property of both companies, aggregating in amount the sum of three hundred thousand dollars ($300,000) par value payable in twenty years from date to be known as "First Mortgage Six Per Cent. Gold Bonds of the [*insert name*] Company," have been issued; and

Whereas, To further the business of said company the syndicate desires to provide a sum not to exceed twenty thousand dollars ($20,000) for purchasing a portion of said issue of bonds,

Now, therefore, In consideration of the premises and of the sum of one dollar by each party to each other in hand paid, the receipt whereof is hereby acknowledged, the subscribers hereto agree with one another as follows:

First. The subscribers hereby form a syndicate for the purpose herein expressed, with a maximum obligation of twenty thousand dollars ($20,000), each subscriber, for himself, and not for any other, hereby agrees to purchase and take from the syndicate and the syndicate agrees to deliver the amount of bonds of the [*insert name*] Company, part of the new issue aforesaid, which is set opposite each subscriber's signature to this agreement at par with interest accrued thereon and represented by unmatured coupons unless the whole or any part thereof may be sold as hereinafter provided, and pay therefor the full sum as follows:

Thirty per cent. on July 1, 1909.
Thirty per cent. on September 1, 1909.
Thirty per cent. on November 15, 1909.
Ten per cent. on January 1, 1910.

Nothing contained in this agreement, or otherwise, shall constitute the subscribers partners with or agents for one another or for the Syndicate Managers or render them liable to contribute in any event more than the ratable amount as aforesaid.

Second. The Syndicate Managers shall have the sole direction and management and entire conduct of the transactions and business of the syndicate. The subscribers irrevocably agree that the Syndicate Managers shall have full power and authority for account of the syndicate to borrow by means of note or notes, such sums as may be necessary, not exceeding twenty thousand dollars

($20,000) and to pledge therefor bonds of the new issue aforesaid not in excess of twenty-five thousand dollars ($25,000) par value and also pledge as security therefor this agreement and the several payments to be made by the subscribers. Such loan to bear interest and be payable concurrently with the payments on the purchase price of the bonds as aforesaid.

The Syndicate Managers shall have the full power and authority to extend the time of payment of such loan or any part thereof from time to time or make any renewal or renewals of the whole or any part thereof or any additional or further agreement in relation thereto.

Third. Each subscriber reserves the right at any time prior to maturity of any loan made upon the pledge of this agreement, to pay the full amount or the balance of his subscription with interest, and withdraw and have delivered to him the bonds he shall have subscribed for, or his proportion thereof in case any of said bonds shall have been sold as hereinafter provided, and upon such payment in full he shall be released and discharged from all further liability by reason of or on account of his subscription or by reason of or on account of any pledge of this agreement for any loan or otherwise.

Fourth. The Syndicate Managers, at any time prior to maturity of any loan or extension of any loan made upon this agreement, may sell and dispose of the whole or any part of the bonds hereby subscribed for and not paid for and withdrawn as aforesaid, at public or private sale, and at such price, and on such terms as to credit or otherwise and pay such commission to brokers or others on such sale as they may deem expedient and apply the proceeds first to any and all expenses incurred in and about such sales and second upon any loan that may have been made upon this agreement and adjust and equalize any payments that may have been made on any such loan by any of the subscribers.

Upon paying off any part of said loan the Syndicate Managers shall be entitled to the return of bonds of the par value equalling the amount of such payments; upon the final payment of such loan they shall be entitled to the return of all remaining bonds and until the maturity of such loan, except in case of default in making payments, shall be entitled to have and receive the coupons attached to all of said bonds as they severally mature.

Fifth. The Syndicate Managers shall have full power and authority from time to time to make calls upon the subscribers

upon ten days' notice, for their proportion of any amount due or to become due on account of their subscription or by reason of any pledge of this agreement and the subscribers severally agree to pay such sums in cash as shall be called for as aforesaid, but in the aggregate not exceeding their respective obligations hereunder.

In case of the failure of any subscriber to make such payments as and when called as aforesaid the Syndicate Managers may sell the rights and interest of the defaulting subscriber in and under this agreement and the bonds represented thereby, at public or private sale at any time thereafter, without advertisement or notice, and after deducting all interest and legal or other costs and expenses, the residue shall be applied on any liability or indebtedness of such defaulting subscriber and if there shall be any deficiency, he shall pay and discharge the same; any overplus shall be paid over to such defaulting subscriber. The Syndicate Managers may purchase at any such sale the rights and interest of any defaulting subscriber, for the benefit of the non-defaulting subscribers, and may call for and apportion any assessment to pay for the same.

Sixth. In case said loan or the interest, or any part thereof, shall not be paid when due, the lender shall have the right, upon ten days' notice to the Syndicate Managers, to sell at public auction in the city of Albany, N. Y., from time to time such portion of said bonds remaining undelivered as may be necessary to raise the amount due for principal, interest and legal or other expenses in connection therewith, and if there shall be any deficiency, the subscribers shall be liable therefor; any overplus shall be paid over to the Syndicate Managers.

Seventh. Each subscriber hereby severally guarantees to the lender of any money upon this agreement, the payment of such a proportionate amount of principal and interest as the amount of his subscription shall bear to the amount of such loan, and the subscribers severally agree that their obligations to make such payment shall be enforceable to the full extent thereof, without regard to any defense against the Syndicate Managers, the [*insert corporate name*] Company, or any other corporation or person which the subscriber may have to the obligations of this agreement or otherwise.

No lender by whom any loan may be made as aforesaid shall be responsible for the recitals of this instrument, nor for any informality in or invalidity of said bonds, nor for the acts of any of the subscribers or Syndicate Managers and no subscriber shall be released from his guarantee or subscription because of any such matter.

Eighth. The Syndicate Managers may become subscribers hereto, and as subscribers they and each of them shall be accountable for all obligations made by them, and shall be entitled in all respects to the same rights and benefits as other subscribers. In case of the death, resignation, or incapacity to act of any of the Syndicate Managers, successors shall be appointed in writing by a majority in amount of the remaining subscribers.

The Syndicate Managers shall not be liable for any error of judgment, or for any mistake of law or fact, nor shall they be liable save for their own gross negligence or wilful default, nor liable for any act done or performed in good faith under any of the provisions of this agreement, nor shall any of them be liable for the acts of any of the others.

Ninth. Each subscriber hereby ratifies, assents to and agrees to be bound by any action of the Syndicate Managers assumed to be taken under this agreement, and agrees to perform his undertakings herein as stated in this agreement to the full extent of the amount of his subscription, but in no event or under no circumstances shall he be called upon to pay or be liable for any amount beyond the amount of his subscription except in case of a loan hereupon and then only his proportionate amount of the interest thereupon. The failure of any subscriber to perform any of his undertakings hereunder shall not affect or release any other subscriber.

Tenth. Any notice which the Syndicate Managers, or any lender, may have occasion to give to any subscriber, shall be sufficient for all purposes if given in writing, mailed postpaid to the address of such subscriber set opposite his signature hereto, or if no such address is given, then to his last known address, and in default thereof then to the general delivery at the post-office at Albany, N. Y.

Eleventh. The Syndicate Managers may issue to the subscribers certificates of interest hereunder in such tenor and form as they may deem suitable. Such certificates of interest may be made

transferable in such manner and upon such terms and conditions as the Syndicate Managers may prescribe. Each transferee of any such certificate shall be deemed to have succeeded to all rights under this agreement of his assignor but no assignment or other transfer of any rights hereunder shall release the subscriber from his obligations hereunder and such transferee shall be subject to all the terms, duties, conditions and liabilities of this agreement.

Twelfth. This agreement shall be in all things binding upon and inure to the benefit of the heirs, executors, administrators, successors and assigns of the parties hereto.

IN WITNESS WHEREOF, the Syndicate Managers, parties of the first part, and the subscribers, parties of the second part, have subscribed this agreement on and after the day and year first above written.

.....,
.....,
.....,
Syndicate Managers.

Subscribers.	Address.	Par value bonds subscribed.	Amount to be paid.
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....

Form No. 336.

Consent to Mortgage.

See Stock Corporation Law, § 6.

We, the undersigned stockholders of [*insert name of company*], a stock corporation organized and existing under and by virtue of the laws of the State of New York, having a capital stock of [*insert amount*] dollars, divided into [*insert number*] shares of the par value of [*insert amount*] dollars each, and being stockholders owning at least two-thirds of the stock of said corporation,

DO HEREBY CONSENT that said corporation may make, execute and deliver a mortgage or deed of trust constituting a first lien upon all its property and franchises to [*insert name*], as trustee, said mortgage or deed of trust to be dated on the ..... day of ....., 19.., and to be for the sum of [*insert amount*] dollars, and conditioned as security for the payment of [*insert amount*] in bonds to be issued by said [*insert corporate name*] as follows, to wit: [*Insert number*] bonds of ..... dollars each, numbered from ..... to ....., inclusive, and ..... bonds of ..... dollars each, numbered from ..... to ....., inclusive. Said bonds to be dated the ..... day of ....., 19.., and to become due and payable in ..... years from said date, and to bear interest from the ..... day of ....., 19.., until the maturity thereof, at the rate of ..... per cent. per annum, payable semi-annually on the first day of..... and ..... in each year.

IN WITNESS WHEREOF, we have hereunto set our hands and the number of shares of stock owned by us, respectively, in said corporation.

Dated, this ..... day of ....., 19...

[*Signatures of Stockholders.*]

STATE OF NEW YORK, }
County of ....., } *ss.:*

On this ..... day of ....., 19.., before me personally came A. B., C. D., E. F. and G. H., to me known and known to me to be the persons described in and who made and signed the foregoing certificate and severally duly acknowledged to me that they had made, signed and executed the same for the uses and purposes therein set forth.

.....,
Notary Public,
..... *County, N. Y.*

STATE OF NEW YORK, }
County of ....., } *ss.:*

A. B., being duly sworn, deposes and says that he is the treasurer of the [*insert corporate name of company*], referred to in the foregoing consent; that he is the custodian of the stock book of such corporation; that the persons, who have subscribed the foregoing consent and acknowledged the execution thereof, are the

owners upon the books of such corporation of the number of shares of stock therein set opposite their respective signatures to the foregoing consent, being at least two-thirds in amount of the capital stock of such corporation.

Sworn to before me, this ....
day of ....., 19... }

[*Signature of Notary.*]

The foregoing affidavit of the custodian of the stock book is not a statutory requirement. It was prepared by the author and first appeared in his "Manual of Corporation Laws" (1890), and has since been quite generally copied in other books.

Form No. 337.

Short Form of Consent to Mortgage.

We, the undersigned, stockholders, owning at least two-thirds of the stock of the [*insert corporate name*] do hereby consent to the execution and delivery by said corporation of a mortgage upon all its property and franchises to [*insert name*], as trustee, to secure the payment of the bonds of said corporation to the amount of ..... dollars.

IN WITNESS WHEREOF, etc., as in Form No. 336.

[*Add acknowledgment and affidavit as above stated.*]

Form No. 338.

Certificate of Consent to Mortgage.

THIS IS TO CERTIFY, that the holders of not less than two-thirds of the capital stock of the [*insert corporate name*] Company, a corporation organized and existing under the laws of the State of New York, having its principal place of business in the city of ....., county of ....., and State of New York, have given their consent to the mortgage or deed of trust made and executed by the [*insert corporate name*] Company to the ....., as trustee, bearing date the ..... day of ....., 190., and that such consent was given by such stockholders in writing [*or by a vote at a special meeting of the stockholders called for*

that purpose, upon the same notice as that required for the annual meetings of the corporation], pursuant to the provisions of section 6 of the Stock Corporation Law.

IN WITNESS WHEREOF, the ..... Company has caused this certificate to be subscribed and acknowledged by its president [*or vice-president*] and by its secretary [*or assistant secretary*], and its corporate seal to be hereunto affixed, attested by its secretary, the ..... day of ....., 19...

[*Insert corporate name*] Company,
By [*Signature*],
President [*or vice-president*].

[*Seal.*] [*Signature*],
Attest: *Secretary* [*or assistant secretary*].
[*Signature.*]
Secretary.

STATE OF NEW YORK,
County of ....., } *ss.:*

On this ..... day of ....., in the year one thousand nine hundred and ....., before be personally came ....., and ....., to me known, who being by me duly severally sworn, did depose and say, each for himself, that the said ..... resides in the city of ....., and State of ....., and the said ..... resides in ....., State of .....; that the said ..... is the president of the ..... Company, and the said ..... is the secretary of ..... Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order. .....,

Notary Public.

STATE OF NEW YORK,
County of ....., } *ss.:*

On this ..... day of ....., 19.., before me personally came [*insert names of subscribers to certificate*], to me known and known to me to be the persons described in and who made and signed the foregoing certificate and severally duly acknowledged to me that they had made, signed and executed the same for the uses and purposes therein set forth.

[*Signature of Notary.*]

Form No. 339.

Corporation Mortgage.

This Indenture, made this ..... day of ....., 19.., by and between the [*insert corporate name*], a stock corporation duly organized and existing under and by virtue of the laws of the State of New York, and located and having its principal office in the ..... of ....., county of ....., State of New York, party of the first part, and ....., as trustee, for the purpose hereinafter set forth, party of the second part.

Witnesseth:

Whereas, The said party of the first part desires to raise money for the purpose of discharging and paying certain debts against said corporation, heretofore necessarily incurred in its business, and to borrow money for the transaction of its business and for the exercise of its corporate rights, privileges and franchises, and for other lawful purposes of its incorporation, has, by a resolution of its board of directors [*or trustees*], authorized the making and issuing of its negotiable coupon bonds, each of the denomination of ..... dollars ($.....), numbered consecutively from C 1 upward, and of its registered bonds, each of the denomination of ..... dollars ($.....), or multiples of $....., numbered consecutively from R 1 upward, such coupon and registered bonds to amount in the aggregate to ..... dollars ($.....), and to bear date the .... day of ....., 190., payable ..... years from their date in gold coin of the United States of the present standard of weight and fineness, and bearing interest at the rate of ..... per cent. per annum, payable in like gold coin semi-annually on the first days of ..... and ....., respectively;

And, Whereas, All of said bonds are to be sealed with the corporate seal of said ..... Company, signed by its president or vice-president, and secretary, with the certificate of the trustee hereunder indorsed thereon, and each of said coupon bonds to have interest coupons attached, which said bonds, coupons and certificates are all to be substantially of the following tenor, that is to say:

[*For forms of bonds, coupons and certificates, see forms Nos.* 340–343.]

And, Whereas, The written consent of the stockholders owning at least two-thirds of the stock of said ..... Company has been given to the execution of this mortgage or deed of trust and to the issue and execution of said bonds, and a certificate under the seal of said ..... Company that such consent was so given, subscribed and acknowledged by the president and secretary of said ..... Company has been filed and recorded in the office of the clerk of the county of ....., in which said county said company has its principal place of business [*or the consent of the stockholders owning at least two-thirds of the stock of said ..... Company has been given to the execution of this mortgage or deed of trust and to the issue and execution of said bonds by vote at a special meeting of the stockholders of said company called for that purpose, upon the same notice as that required for the annual meeting of the corporation, and a certificate under the seal of said ..... Company that such consent was so given, subscribed and acknowledged by the president and secretary of said ..... Company has been filed and recorded in the office of the clerk of the county of ....., in which said county said company has its principal place of business.*]

And, Whereas, At a meeting duly called for that purpose, this mortgage or deed of trust was submitted to the board of directors [*or trustees*] of the ..... Company, and it was then and there duly resolved that this mortgage or deed of trust be executed by the president of said ..... Company, in its name and on its behalf, and that the corporate seal of said company be hereunto affixed and attested by the secretary, and that this mortgage or deed of trust be duly delivered on behalf of said company to ..... trustee herein mentioned.

Now, therefore, this indenture witnesseth: That, in order to secure the payment of the principal and interest of the bonds aforesaid at any time outstanding according to their tenor and effect, and the fulfillment of the conditions and covenants hereinafter contained, and irrespective of their time of issue and for and in consideration of the purchase and acceptance of said bonds by the holders thereof, and of the sum of one dollar to it duly paid by the trustee, party of the second part, at or before the ensealing of these presents, the receipt whereof is hereby acknowledged,

the ..... Company, party of the first part, has granted, bargained, sold, aliened, remised, conveyed and confirmed, assigned, transferred and set over, and by these presents does grant, bargain, sell, alien, remise, convey and confirm, assign, transfer and set over, unto the said trustee, the party of the second part, and to his successor or successors, forever, all and singular the following described properties: [*Insert description.*]

Together with all and singular the tenements, hereditaments and appurtenances belonging to the property hereby conveyed, or in anywise thereto appertaining, and the reversions, remainders, tolls, incomes, rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the party of the first part of, in and to the same, and any and every part thereof with the appurtenances; *and also all and every other estate, right, title and interest, property and appurtenances which the said party of the first part may hereafter acquire.*

To have and to hold the said above-described premises, property, rights, franchises and appurtenances, unto the said party of the second part, and his lawful successor or successors, forever.

But in trust, nevertheless, for the benefit, security and protection of the persons and corporations, firms and partnerships who may be or become holders of the aforesaid bonds and interest coupons, or any or either of them, and for enforcing the payment thereof, when payable, according to the true intent and meaning of the stipulations of this mortgage or deed of trust, and of said bonds and said interest coupons, and without preference, priority or distinction as to lien or otherwise of any of said bonds over any of the others, by reason of priority in the time of the issue or negotiation thereof, or otherwise; provided, however, and these presents are upon the express condition, that if the party of the first part, its successors or assigns, shall well and truly pay, or cause to be paid, unto the holders of the bonds to be issued hereunder, the principal and interest to become due thereon to said holders at the times and in the manner stipulated in said bonds and in said interest coupons according to the true intent and meaning thereof, and shall well and truly keep, observe and perform all and singular the covenants, promises and conditions in the said bonds hereby secured and in this indenture expressed to be kept, observed and performed by or on the part of the said party of the first part, then

these presents and the estate and right thereby granted shall cease, determine and be void, otherwise to remain in full force. And it is hereby expressly covenanted and agreed, by and between the parties hereto, and the ..... Company, for itself, its successors and assigns, doth hereby covenant and agree, and the trustee covenanting for himself, his successor or successors in the trust hereby created, with and on behalf of the respective persons, corporations, firms and partnerships who shall hold any of said bonds or coupons, that the further trusts, uses, purposes, conditions and covenants upon which the said property and franchises hereby mortgaged and conveyed are to be held by the trustee and subject to which the said bonds secured hereby are to be issued and to be held by each and every holder thereof, are as follows, that is to say:

First. This mortgage or deed of trust is to be a continuing lien to secure the full and final payment of the principal and interest of all bonds which may from time to time be issued and negotiated under the same, but so that the total aggregate amount of said bonds so issued and negotiated shall not exceed $....., and to be issued upon the terms and of the denominations, and to mature and become payable in the manner and at the place and time or times hereinbefore stated, with interest payable as so stated.

Second. The coupon bonds and registered bonds intended to be secured hereby shall, from time to time, be executed by the ..... Company and delivered to the trustee, to be certified and delivered by him, and only such of said bonds as shall be so certified by the trustee, by signing the certificate indorsed thereon, shall be secured by this mortgage or deed of trust or be entitled to any lien or benefit thereunder; and such certificate of the trustee shall be conclusive evidence that the bonds so certified have been duly issued hereunder and are entitled to the benefit of the trust hereby created.

Third. The ..... Company covenants and agrees that it will fully and entirely pay off and satisfy the whole of said bonds to be issued hereunder, principal and interest, according to the terms thereof, without delay and without deduction from either said principal or interest for any taxes, assessments and governmental or other charges now or hereafter imposed upon the said bonds or any interest thereon, either by the United States, or by

any State, county or municipal authority, which the ..... Company may be required to deduct therefrom.

Fourth. Until default shall be made in the payment of the principal or interest of any of the bonds hereby secured, or any part thereof, as and when the same shall become due and payable, or in the performance or observance of any condition, covenant, agreement or requirement of said bonds or of this mortgage or deed of trust, the trustee shall permit and suffer the ..... Company, its successors and assigns to possess, operate and enjoy the real and personal property hereby mortgaged, with the appurtenances thereunto belonging, in any manner not inconsistent with these presents, and to receive and use the tolls, incomes, rents, issues and profits thereof.

Fifth. When and as the interest coupons annexed or to be annexed to the bonds secured hereby mature and are paid by the ..... Company or by any person or corporation for it or on its behalf, they shall be canceled. All coupons maturing before the delivery of bonds by the party of the second part shall be cut off and canceled by the party of the second part before the delivery of such bonds.

Sixth. The ..... Company covenants and agrees that it shall and will, from time to time, pay and discharge, before the same shall fall into arrears, all taxes, water rates, assessments and governmental charges, lawfully imposed upon the franchises and lands, and other hereby mortgaged premises, or upon any part thereof, the lien of which might or could be held to be superior to the lien hereof, and will pay and discharge all claims of every kind and nature which may hereafter become a lien upon the hereby mortgaged premises, or any part thereof, prior to the lien hereof, so that the priority of this mortgage may be duly preserved, and will keep said mortgaged premises in good order and repair and shall not, and will not, create or suffer to be created any mechanics', laborers' or other lien or charge whatsoever upon the mortgaged premises or any part thereof, which might or could be prior to the lien of these presents, or do or suffer any matter or thing whereby the lien of these presents might or could be impaired, until the bonds hereby secured, with all interest accrued thereon shall be fully paid and satisfied.

Seventh. The ..... Company further covenants and agrees that it shall and will at all times, until said bonds, hereby secured,

with all interest accrued thereon, shall be fully paid and satisfied, keep such parts of the said mortgaged premises or property as are liable to be destroyed or injured by fire, insured against loss by fire in some solvent fire insurance company or companies authorized to transact business in the State of New York, and approved by the trustee, to an amount equal to the insurable value of said property, payable in case of loss to the trustee; and all moneys collected from such insurance shall be held by the trustee for the further security of the bondholders hereunder until the ..... Company shall, after the fire, have applied an equal sum of money to the reconstruction or repair of the part of the premises destroyed or injured, or to the erection of other permanent improvements upon such mortgaged premises; whereupon from such insurance moneys held by the trustee there shall be paid to the said ..... Company, from time to time, an amount equal to the amount so applied by it, after the fire, to such reconstruction, repair or erection.

Eighth. The said ..... Company shall and will, from time to time during the continuance of this trust and mortgage, make, execute and deliver all such further instruments and conveyances as may be necessary to vest in said trustee, and his successor or successors, the within described and all subsequently acquired property and rights of property to facilitate the execution of said trust.

Ninth. It is further covenanted and agreed that the personal property hereinbefore described and hereby conveyed, or intended so to be, shall be real estate for all the purposes of this instrument, and shall be held and taken to be fixtures and appurtenances of the mortgaged premises, and as a part thereof, and are to be used and sold therewith and not separate therefrom, except as herein expressly provided.

Tenth. The said ..... Company shall be permitted to alter, remove, sell or dispose of any buildings, fixtures, machinery or other appliances upon the mortgaged premises which cannot be advantageously used in the judicious operation and management of the business of said company, provided that no such sale shall be made if it exceeds the sum of $....., unless the written assent of the trustee shall have first been obtained, and provided always that the said ..... Company shall, and it hereby agrees that in such case it will, replace any buildings, fixtures, machinery or other appliances removed, sold, or otherwise disposed of, by acquiring, subject to this mortgage, other real estate, or placing upon the

mortgaged property, subject to this mortgage, other buildings, fixtures, machinery or other appliances equal in value to the value of the property so removed, sold, or otherwise disposed of, or by paying to the trustee the appraised value of such property, and any sum so received by the trustee shall, upon request of said ..... Company, be invested in bonds secured by this mortgage, or in bonds, mortgages or securities authorized by law for the investment of funds of savings banks in the State of New York, which bonds, mortgages or securities shall be held for the further security of the bonds secured by this mortgage; but until default in the payment of the principal or interest of the bonds secured hereby, or some part thereof, the interest and income of said bonds, mortgages or securities shall be paid to the ..... Company.

Eleventh. In case default shall be made in the payment of any interest on any of said bonds secured hereby, as and when such interest shall become due and secured, such default shall continue for ..... months, or in case default shall be made in the payment of the principal of any of said bonds when the same shall mature or otherwise become payable, then, and in every such case, the trustee may, and upon the request of the holders of ..... in interest of the bonds hereby secured and then outstanding, by an instrument or concurrent instruments in writing, signed by them or by their attorneys in fact duly authorized for that purpose, shall, with or without entry, sell all the premises, estate, property, rights and franchises hereby conveyed, or so intended to be, at public auction at ...., or other suitable place in the city of ....., after giving notice of such sale as required by law, and also notice by publication in at least two newspapers published in ....., at least once a week for ..... consecutive weeks next preceding such sale, and from time to time to adjourn such sale or sales in his discretion, and without further notice to hold such adjourned sale or sales, and upon any sale or sales hereunder to make and deliver to the purchaser and purchasers of the premises, estate, property, rights and franchises so sold a good and sufficient deed or deeds for the same, which sale shall be a perpetual bar, both in law and in equity, against the said ..... Company and all persons and corporations lawfully claiming, or to claim by, through or under it, and, upon the making of any such sale, the principal of all the bonds hereby secured and then outstanding shall forthwith become due and payable, anything in said bonds to the contrary

notwithstanding, and upon the making of any such sale, the said trustee shall apply the proceeds thereof as follows, to wit:

1. To the payment of the costs and expenses of such sale or sales, including a reasonable compensation to such trustee, his agents, attorneys and counsel, and all expenses, liabilities and advances made and incurred by such trustee in managing and maintaining the property hereby conveyed, or intended to be, and all taxes and assessments superior to the lien of these presents.

2. To the payment of the whole amount of principal and interest which shall then be owing or unpaid upon the bonds secured hereby, without any preference or priority whatever, whether the said principal by the tenor of said bonds, be then due or yet to become due; and in case of the insufficiency of such proceeds to pay in full the whole amount of such principal and interest owing and unpaid upon the said bonds, then to the payment of such principal and interest *pro rata,* without preference or priority, but ratably, to the aggregate amount of such principal and accrued and unpaid interest.

3. To pay over the surplus, if any, to whomsoever may be lawfully entitled to receive the same.

Twelfth. It is further declared and agreed that the receipt of the trustee, who shall make the sale, hereinbefore authorized, shall be a sufficient discharge to the purchaser or purchasers at such sale for his or their purchase money; and such purchaser or purchasers, his or their heirs or assigns, or personal repesentatives, shall not, after paying such purchase money and receiving such receipt of the trustee therefor, be obliged to see to the application of such purchase money upon or for the trusts or purposes of these presents, or be in anywise answerable for any loss, misapplication or non-application of such purchase money by the trustee.

Thirteenth. In case default shall be made in the payment of the principal or interest of any of said bonds when the same shall become due and payable, or in the observance or performance of any covenant or condition in said bonds or herein contained on the part of the party of the first part, and such default shall continue for ..... months, it shall be the duty of, and it is hereby made obligatory upon the trustee, upon the request in writing of the holders of ..... in interest of said bonds hereby secured and then outstanding, and upon proper indemnification, to proceed forthwith to enforce the rights of the said trustee and of the bond-

holders hereunder by sale or entry, or both, according to such requisition, or by judicial proceedings for such purpose, as he, being advised by counsel learned in the law, shall deem most expedient in the interests of the holders of the bonds secured hereby.

Fourteenth. The several remedies granted hereunder shall be cumulative and not exclusive one of the other, and shall be in addition to all other remedies to enforce the lien of these presents.

Fifteenth. In case of any default on its part, as aforesaid, the party of the first part shall not, and will not, apply for or avail itself of any appraisement, valuation, stay, extension or redemption laws, now existing, or which may hereafter be passed, in order to prevent or hinder the enforcement or foreclosure of this mortgage or the absolute sale of the premises hereby granted free from any right of redemption, or the final and absolute putting into possession thereof immediately after such sale the purchaser or purchasers thereof, but hereby waives the benefit of all such laws.

Sixteenth. Upon the filing of a bill in equity or other commencement of judicial proceedings to enforce the rights of the trustee or of the bondholders under these presents, the said trustee shall be entitled, as a matter of right, to the appointment of a receiver or receivers of the property hereby mortgaged, and of the earnings, income, rents, issues and profits thereof, pending such proceedings.

Seventeenth. Upon payment, when due, of all the principal and interest of all the bonds which shall have been issued hereunder, the trustee shall, upon the written request of the ..... Company, forthwith enter satisfaction of this mortgage upon the records, and shall do, make, execute and deliver such deeds, acts, instruments or assurances as may be necessary to vest all the mortgaged premises and property in the said ..... Company, its successors and assigns, free and discharged from the lien of these presents.

Eighteenth. It is covenanted and agreed that the trustee shall not be answerable for anything except gross negligence or willful misconduct in the discharge of his duties. And it is further covenanted and agreed that the trustee may resign and discharge himself of the trust hereby created by notice in writing to the ..... Company to be given at least ..... months before such resignation shall take effect. And whenever notice of such resignation is so given or a vacancy in the office of trustee hereunder shall occur, a new trustee shall be appointed as follows:

The ..... Company covenants and agrees that it will pay to the trustee hereunder his reasonable fees and expenses in the execution of the trusts hereby created.

Lastly. The trustee, party of the second part, hereby accepts the trust hereby created and covenants faithfully to execute the same.

IN WITNESS WHEREOF, the party of the first part has caused these presents to be signed by its president, and its corporate seal to be hereunto affixed and attested by its secretary, and the party of the second part, in token of his acceptance of the trust and obligations hereby imposed upon him, has signed and sealed the same, the day and year first herein written.

THE.....COMPANY.

{ Corporate Seal } By ....., *President.*

[*Signature of Trustee.*] [L. S.]

Attest:

....., *Secretary.*

STATE OF NEW YORK, }
County of ....., } *ss.:*

On the ..... day of ....., in the year ....., before me personally came ....., to me known, who, being by me duly sworn, did depose and say that he resides in .....; that he is the [*president or other officer*] of the [*name of corporation*], the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

.....,
Notary Public,
..... *County, N. Y.*

If such corporation have no seal, that fact must be stated in place of the statements required respecting the seal.

[*Add acknowledgment of trustee.*]

Form No. 340.

Form of Coupon Bond.

UNITED STATES OF AMERICA,
State of New York.

The [*insert corporate name*] Company.

First Mortgage Gold Coupon Bond.

No.... $.....

KNOW ALL MEN BY THESE PRESENTS, that the ..... Company is indebted, and for value received promises to pay to the bearer hereof, or to the registered holder of this bond, if the same be registered, the sum of ..... dollars ($....) in gold coin of the United States of the present standard of weight and fineness, on the ..... day of ....., 19.., at the office of said company, in the city of ....., with interest at the rate of ..... per cent. per annum, payable semi-annually at said office, in like gold coin, on the first days of ..... and ..... in each year, upon surrender of the annexed coupons therefor as they severally mature.

* Both the principal and interest of this bond are payable without deduction for any United States, State, municipal or other tax or taxes which said ..... Company may be required to pay or deduct therefrom under or by reason of any present or future law, the said company hereby agreeing to pay such tax or taxes.

This bond is one of a series of coupon and registered bonds of the ..... Company, bearing interest at the rate of ..... per cent. per annum, issued or to be issued in pursuance of and subject to the terms of the mortgage or deed of trust hereinafter referred to, but so that the aggregate amount of said bonds, both coupon and registered, shall not exceed the total sum of $..... All of said bonds are equally secured by a mortgage or deed of trust, dated ....., 19.., executed by said ..... Company to ..... of the city of ....., as trustee, conveying the property and franchises of the ..... Company mentioned in said mortgage or deed of trust, to which reference is hereby made for a description of the property and franchises mortgaged, and the nature and extent of the security, and the rights of the holders of said bonds under the same, and the

terms and conditions upon which said bonds are issued and secured.* This bond may be registered, in the name of the owner, on the books of the company, such registration to be indorsed hereon, and thereafter no transfer shall be valid unless made on the books of the company by the registered owner and similarly indorsed hereon, but said bond may again be made payable to bearer by like transfer, and thereafter pass by delivery until again registered. Notwithstanding such registration the coupons hereon shall remain and be negotiable by delivery and payable to bearer on presentation.

This bond shall not become obligatory for any purpose until it shall have been authenticated by the certificate, hereon indorsed, of the trustee under said mortgage or deed of trust.

IN WITNESS WHEREOF, the ..... Company has caused these presents to be signed by its president or vice-president, and its corporate seal to be hereunto affixed, and to be attested by its secretary, and coupons for said interest, with the engraved signature of its treasurer to be attached hereto, this ..... day of ....., 19...

THE ..... COMPANY,

{ Corporate Seal } By ....., *President.*

Attest:

....., *Secretary.*

Form No. 341.

Form of Interest Coupons, of Which the First is to be Payable..... ..... 1, 19....

On the first day of ....., 19.., the ..... Company will pay the bearer, at its office in the city of ....., $..... in gold coin, free from all taxes, being six months' interest then due on its First Mortgage Coupon Bond, No. .....

.....,

Treasurer.

Form No. 342.

Form of Trustee's Certificate.

This bond is one of the series of bonds described in the within mentioned mortgage or deed of trust executed by the ..... Company to the undersigned and duly recorded, and the holder hereof is entitled to the benefit of the trust thereby created.

....., *Trustee.*

Form No. 343.

Form of Registered Bond.

UNITED STATES OF AMERICA,

State of New York.

The [*insert corporate name*] Company.

First Mortgage Gold Registered Bond.

No.... $.....

KNOW ALL MEN BY THESE PRESENTS, that the ..... Company is indebted, and for value received, promises to pay to ..... or assigns the sum of ..... dollars ($.....) in gold coin of the United States of the present standard of weight and fineness, on the ..... day of ....., 19.., at the office of said company in the city of ....., with interest at the rate of ..... per cent. per annum, payable semi-annually at said office in like gold coin on the first days of ..... and ..... in each year. [*Follow form of coupon bonds between the* * *.] This bond is transferable by the holder hereof only in person or by attorney, duly authorized, upon the books of the company at its office in the city of ..... This bond shall not become obligatory for any purpose until it shall have been authenticated by the certificate thereon indorsed of the trustee under said mortgage or deed of trust.

IN WITNESS WHEREOF, the ..... Company has caused these presents to be signed by its president or vice-president and its corporate seal to be hereunto affixed, and to be attested by its secretary, this ..... day of ....., 19...

THE ..... COMPANY,

{Corporate Seal} By ....., *President.*

Attest:

....., *Secretary.*

Form No. 344.

Statement of Mortgage Indebtedness.

Under Tax Law, Section 259.

THE ALBANY DOCK AND TERMINAL COMPANY.

The Albany Dock and Terminal Company, having its principal office at Albany, Albany county, New York, hereby certifies as follows:

That on the 10th day of January, 1905, it executed and delivered to the Albany Trust Company, of Albany, New York, a mortgage or deed of trust to secure an issue of bonds aggregating the sum of one million dollars ($1,000,000), which said mortgage or deed of trust was thereafter on January 11, 1905, duly recorded in the office of the clerk of Albany county in Liber of Mortgages No. 956, at page 193.

That there has been issued under said mortgage or deed of trust bonds for the following amounts, viz.:

January 11, 1905	$300,000
March 15, 1905	100,000
July 10, 1906	50,000
July 9, 1907	25,000
Total amount issued	$475,000

That the total amount of principal indebtedness that has been advanced (or has been secured thereby) prior to the 1st day of July preceding the filing of this statement, is the sum of four hundred and seventy-five thousand dollars ($475,000).

That the amount of bonds unissued in the hands of the trustee on this date is five hundred and twenty-five thousand dollars ($525,000).

IN WITNESS WHEREOF, the said corporation has caused this statement to be executed in duplicate by its secretary [*treasurer, or other proper officer*], this 14th day of July, 1909.

ALBANY DOCK AND TERMINAL COMPANY,
By ....., *Secretary.*
[*or Treasurer or other proper officer.*]

STATE OF NEW YORK, }
County of Albany, } *ss.:*

Hendrik Van Rensselaer, being duly sworn, says that he is the secretary [*or treasurer or other proper officer*] of the Albany Dock and Terminal Company; that he has read the foregoing statement and knows the contents thereof, and that the same is true to his own knowledge.

HENDRIK VAN RENSSELAER.

Sworn to before me, this 14th
day of July, 1909.

JOHN LIVINGSTON,
Notary Public,
Albany Co., N. Y.

Form No. 345.

Counsel's Opinion as to Legality of Bond Issue.

(Letters similar to the following are frequently published by corporations when advertising bond issues.)

IN RE FIRST MORTGAGE FIVE PER CENT. GOLD BONDS OF THE GOLD RIDGE RAILWAY COMPANY.

DEAR SIRS.— We have examined the proceedings for the incorporation of the Gold Ridge Railway Company and the issue of its First Mortgage Five Per Cent. Gold Bonds and the execution of the mortgage to secure the same.

We are of opinion that the Gold Ridge Railway Company has been legally organized and had legal power to issue said bonds and to execute the First Mortgage, dated November 1, 1909, to secure the same; that such bonds have been legally issued and are valid obligations of the said railway company; and that the said First Mortgage is in proper form to entitle the holders of said bonds to the protection and security provided in said mortgage.

We are, dear sirs,

Yours faithfully,

(Signed) SEWARD, GUNTHER & MORAWELL.

Form No. 346.

Guarantee of Corporate Bonds.

See Stock Corporation Law, § 8.

FOR VALUE RECEIVED, The ..... Company hereby guarantees the payment by the ..... Company, of the principal of the within bond at the maturity thereof, and of all interest thereon, according to the tenor of the coupons belonging thereto, as they severally become due, and also the payment of all amounts payable under the sinking fund provisions in the indenture of trust to the ..... Trust Company, by which the within bond is secured, as the same becomes due, and for the purposes aforesaid the said ..... Company hereby covenants and agrees with the ..... Company and the holder of this bond, and with the ..... Trust Company, to pay to the said ..... Trust Company, in the city of ....., semi-annually, on or before the first day of January and July in each year, an amount in cash sufficient to pay the interest on all the bonds issued under the indenture of trust herein referred to at any time outstanding, and also all amounts that may from time to time become due and payable under the provisions of the said sinking fund created by and contained in the said indenture.

IN WITNESS WHEREOF, the said ..... Company has caused its corporate name to be signed hereto by its president or vice-president, and its corporate seal to be hereunto affixed by its secretary, this ..... day of ....., 19...

[*Corporate seal.*] ..... Company.

By ....., *President.*

Attest:

.....,

Secretary.

Form No. 347.

Guarantee of Corporate Bonds..

See Stock Corporation Law, § 8.

The Evansville and Terre Haute Railroad Company, for a valuable consideration, the receipt whereof is hereby acknowl-

edged, hereby guarantees the payment of the principal and interest mentioned in the within bond, according to the tenor and effect thereof.

IN WITNESS WHEREOF, the [*continue as in preceding form.*]

(See Dougan v. Evansville & T. H. R. R. Co., 15 App. Div. 488.)

Form No. 348.

Guarantee of Corporate Bonds.

See Stock Corporation Law, § 8.

For a valuable consideration, the receipt whereof is hereby acknowledged, the Evansville and Terre Haute Railroad Company hereby guarantees to the holder of the within bond, the punctual payment of the principal and interest thereof, when and as the same shall become due and payable.

IN WITNESS WHEREOF, the [*continue as in form No.* 282.]

(See case above cited.)

Form No. 349.

Form of Proxy from a Bondholder.

See the General Corporation Law, § 26.

KNOW ALL MEN BY THESE PRESENTS, That I [*insert name*], do hereby constitute and appoint C. D. to be my lawful attorney, substitute and proxy for me, and in my name to vote upon all the bonds held by me in [*insert name of company*], at a meeting of the bondholders of such corporation, to be held on [*proceed as in form No.* 225.]

See note to preceding form.

Form No. 350.

Corporation Mortgage to an Individual.

This Indenture, made this ..... day of ....., 19.., by and between the [*insert corporate name*], a stock corporation duly organized and existing under and by virtue of the laws of the

State of New York, and located and having its principal office in the ..... of ....., county of ....., State of New York, party of the first part, and ....., of the ..... of ....., county of ....., State of ....., party of the second part, the said party of the first part being hereinafter known and designated as the mortgagor, and the said party of the second part being hereinafter known and designated as the mortgagee.

Whereas, The said ..... is justly indebted to the mortgagee in the sum of ..... dollars, lawful money of the United States of America, secured to be paid by ..... certain bond or obligation, bearing even date herewith, conditioned for the payment of the said amount of indebtedness, as aforesaid, to the mortgagee, ... or assigns, on ..... the ..... day of ....., which will be in the year one thousand nine hundred and ....., and interest thereon, ... to be computed from the ..... day of ....., 19.., at and after the rate of ..... per centum per annum, and to be paid semi-annually on the ..... days of ..... and ..... in every year until the said principal sum shall be wholly paid.

It being thereby expressly agreed, that the whole ..... of the said principal sum shall become due after default in the payment of interest, taxes or assessments, as hereinafter provided, anything herein contained to the contrary notwithstanding.

Whereas, The execution of this mortgage has been duly and sufficiently consented to and authorized by the holders of not less than two-thirds of the capital stock of said mortgagor,

Now this indenture witnesseth, That the mortgagor, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, and also for and in consideration of the sum of one dollar, to the mortgagor in hand paid by the mortgagee, the receipt whereof is hereby acknowledged, does hereby grant and release unto the mortgagee, and to ..... and assigns forever, all [*insert description*].

Together with the appurtenances and all the estate and rights of the mortgagor in and to said premises:

To have and to hold the above-granted premises unto the said mortgagee, ... and assigns forever.

Provided always that if the said mortgagor, its successor, legal representatives or assigns shall pay unto the said mortgagee, his ..... or assigns, the said sum of money mentioned in the condition of the said bond or obligation, and the interest thereon, at the time and in the manner mentioned in the said condition, then these presents and the estate hereby granted shall cease, determine and be void.

And the said mortgagor covenants with the mortgagee as follows:

First. That the mortgagor will pay the indebtedness as hereinbefore provided, and, if default be made in the payment of any part thereof, the mortgagee shall have power to sell the premises herein described according to law.

Second. That the mortgagor will keep the buildings on the said premises insured against loss by fire for the benefit of the mortgagee. And should the mortgagee, by reason of any such insurance against loss by fire, as aforesaid, receive any sum or sums of money for any damage by fire to the said building or buildings, such amount may be retained and applied by said mortgagee toward payment of the amount hereby secured, or the same may be paid over either wholly or in part to the said mortgagor, its successor, legal representative, or assigns, to enable said mortgagor to repair said buildings or to erect new buildings in their place, or for any other purpose or object satisfactory to the said mortgagee, without affecting the lien of this mortgage for the full amount secured thereby before such damage by fire, or such payment over, took place.

Third. And it is hereby expressly agreed that the whole of said principal sum or so much thereof as shall remain unpaid, shall become due at the option of the said mortgagee after default in the payment of any instalment of principal or of interest for thirty days, after default in the payment of any tax or assessment for ninety days, or in case of the actual or threatened demolition or removal of any building erected upon said premises, anything herein contained to the contrary notwithstanding.

Fourth. That the mortgagor will execute any further necessary assurance of the title to said premises and will forever warrant said title.

Fifth. That if default shall be made in the payment of any instalment or the whole of the principal sum mentioned in the

condition of the bond, or of the interest which shall accrue thereon, or of any part of either, at the respective times therein specified for the payment thereof, the mortgagee shall have the right forthwith, after any such default, to enter upon and take possession of the said mortgaged premises, and to let the said premises, and receive the rents, issues and profits thereof, and to apply the same, after payment of all necessary charges and expenses, on account of the amount hereby secured, and said rents and profits are in the event of any such default hereby assigned to the mortgagee.

Sixth. And the mortgagee shall also be at liberty immediately after any such default, upon proceedings being commenced for the foreclosure of this mortgage, to apply for the appointment of a receiver of the rents and profits of the said premises without notice, and the mortgagee shall be entitled to the appointment of such a receiver as a matter of right, without consideration of the value of the mortgaged premises as security for the amounts due the mortgagee, or the solvency of any person or persons liable for the payment of such amounts.

Seventh. And the mortgagor does further covenant and agree, that in default of the payment of any taxes, charges and assessments which may be imposed by law upon the said mortgaged premises, or any part thereof, it shall and may be lawful for the said mortgagee, without notice to or demand from the mortgagor, to pay the amount of any such tax, charge or assessment, with any expenses attending the same, and any amount so paid the mortgagor covenants and agrees to repay to the mortgagee, with interest thereon, without notice or demand, and the same shall be a lien on the said premises, and be secured by the said bond and by these presents; and the whole amount hereby secured, if not then due, shall thereupon, if the mortgagee so elect, become due and payable forthwith, anything herein contained to the contrary notwithstanding.

IN WITNESS WHEREOF, the mortgagor has caused these presents to be signed by its president, and its corporate seal to be hereunto affixed and attested by its secretary, the day and year first above written.

[*Corporate seal.*] THE ..... COMPANY.

By ....., *President.*

Attest:

....., *Secretary.*

STATE OF NEW YORK, }
County of....., } ss.:

On the ..... day of ....., in the year ....., before me personally came ....., to me known, who, being by me duly sworn, did depose and say that he resides in .....; that he is the [*president or other officer*] of the [*name of corporation*], the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

.....
Notary Public,
..... *County, N. Y.*

Form No. 351.

Corporation Bond to an Individual.

KNOW ALL MEN BY THESE PRESENTS, that the [*insert corporate name*] Company, a corporation organized and existing under the laws of the State of New York, is held and firmly bound unto [*insert name*] in the penal sum of [*insert double the amount of the debt*] dollars, lawful money of the United States of America, to be paid to the said [*insert name*] ..... or assigns: For which payment, well and truly to be made, said obligor binds itself and its successors firmly by these presents. Sealed with the corporate seal, and dated the ..... day of ..... one thousand nine hundred and .....

The condition of the above obligation is such, that if the above bounden [*insert corporate name*] Company or its successors, shall well and truly pay, or cause to be paid, unto the above-named [*insert name*] ..... or assigns, the just and full sum of ..... dollars on the ..... day of ....., 19.., and the interest thereon, to be computed from the ..... day of ....., 19.., at and after the rate of ..... per centum per annum, and to be paid semi-annually on the .....

days of ..... and ..... in every year until the said principal sum shall be wholly paid, then the above obligation to be void, otherwise to remain in full force and virtue.

And it is hereby expressly agreed, that should any default be made in the payment of any instalment of principal or of the said interest, or of any part thereof, on any day whereon the same is made payable, as above expressed, or should any tax or assessment be hereafter imposed upon the premises described in the mortgage accompanying this bond and become due or payable, and should the said interest remain unpaid and in arrear for the space of thirty days, or said tax or assessment remain unpaid and in arrear for ninety days, then and from henceforth, that is to say, after the lapse or expiration of either one of the said periods, as the case may be, the aforesaid principal sum with all arrearages of interest thereon, shall, at the option of the said obligee, ... or assigns, become and be due and payable immediately thereafter, although the period above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

It is also agreed, that all the other terms, covenants, conditions, provisions, stipulations and agreements made by the said obligor in the mortgage collateral hereto are hereby made part of this instrument, to the same extent and with the same effect as if the same were fully set forth herein.

IN WITNESS WHEREOF, the ..... Company has caused these presents to be signed by its president [*or vice-president*] and its corporate seal to be hereunto affixed, and to be attested by its secretary, this ..... day of ....., 19...

[*Corporate seal.*] THE ..... COMPANY.

By ....., *President.*

Attest:

....., *Secretary,*

STATE OF NEW YORK, }
County of....., } *ss.:*

On the ..... day of ..... in the year ....., before me personally came ..... to me known, who, being by me duly sworn, did depose and say that he resides in .....; that he is the [*president or other officer*] of the [*name of corporation*], the corporation described in and which executed the above

instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

.....

Notary Public,

..... *County, N. Y.*

Form No. 352.

Certificate of Indebtedness.

The ..... Company, a stock corporation duly organized and existing under and by virtue of the laws of the State of New York, having its office and place of business at the city of ..... in the county of ....., and State of New York, hereby certifies that it is indebted unto ..... in the sum of ..... dollars, for moneys loaned and advanced unto it, which amount it hereby promises, covenants and agrees to pay at its office, in the said city of ....., five years from date hereof, on presentation and surrender of this certificate, with the right, privilege and option, however, on the part of said company to pay the whole or any part of the sum hereby agreed to be paid, at any time prior to the expiration of said term of five years, without notice, and upon such payment in full to demand delivery and cancellation hereof.

THIS CERTIFICATE is transferable only on the books of the company by the holder thereof, in person or by attorney, on the surrender of this certificate.

IN WITNESS WHEREOF, the ..... Company has caused these presents to be executed for it and in its name, by its president and treasurer, pursuant to a resolution of the board of directors of said company, duly adopted.

(*Corporate seal.*) ..... Company,

By ....., *President.*

And by ....., *Treasurer.*

STATE OF NEW YORK, }
County of....., } *ss.:*

On the ..... day of ..... in the year ....., before me personally came ....., to me known, who, being duly sworn, did depose and say that he resides in .....; that he is the [*president or other officer*] of the [*name of corporation*], the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

[*Signature and office of officer taking acknowledgment.*]

If such corporation have no seal, that fact must be stated in place of the statements required respecting the seal. (L. 1909, ch. 52, § 309.)

Form No. 353.

Testimonium Clause, Including Corporate Signature.

See also Forms Nos. 354–360.

IN WITNESS WHEREOF, the said ..... Company has caused its corporate name to be signed hereto by its president and its corporate seal to be hereunto affixed attested by its secretary, this ..... day of ....., 19...

The ..... Company,

{ *Corporate* } By .....,
{ *Seal.* } *President.*

Attest:

.....,
Secretary.

Form No. 354.

Testimonium Clause, Including Corporate Signature.

See also Forms Nos. 353–360.

IN WITNESS WHEREOF, the said ..... Company has caused this instrument to be executed in its corporate name by

its president, and its corporate seal to be hereunto affixed, attested by its secretary, this ..... day of ....., 19...

The ..... Company,

{ *Corporate Seal.* } By .....,
President.

Attest:

.....,
Secretary.

Form No. 355.

Testimonium Clause, Including Corporate Signature.

See also Forms Nos. 353–360.

IN WITNESS WHEREOF, the said parties hereto have caused these presents to be executed by their duly authorized officers, and their respective corporate seals, duly attested, to be affixed, the ..... day of ....., 19

OQUAGA LAKE COMPANY,

{ *Corporate Seal.* } By THEODORE FLINT,
President.

Attest:
ELI E. EADS, *Secretary.*

THE GULF POWER COMPANY,

{ *Corporate Seal.* } By ANDREW A. AMES,
President.

Attest:
EBEN L. ARTS, *Secretary.*

Form No. 356.

Testimonium Clause, Including Corporate Signature.

See also Forms Nos. 353–360.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be signed by their respective presidents or vice-presi-

dents and their respective corporate seals, duly attested, to be hereto affixed, as of the day and year first above written.

The .....,

{ *Corporate Seal.* } By .....,
President.

Attest:

.....,
Secretary.

The .....,

{ *Corporate Seal.* } By .....,
President.

Attest:

.....,
Secretary.

Form No. 357.

Testimonium Clause, Including Corporate Signature.

See also Forms Nos. 353–360.

IN WITNESS WHEREOF, the said [*insert corporate name*] has caused these presents to be signed in its corporate name by its president (or vice-president) and its corporate seal, duly attested, to be affixed, and the said [*insert corporate name*] has also caused these presents to be signed in its corporate name by its president (or vice-president) and its corporate seal, duly attested, to be affixed, the day and year first above written.

ANDES LUMBER COMPANY,

{ *Corporate Seal.* } By [*signature*],
President.

Attest:

.....,
Secretary.

McCLURE MACHINE COMPANY,
By [*signature*],
President.

If the instrument is to be executed in several counterparts add either of the following:

This instrument is one of twelve counterparts this day executed and delivered as provided in Article ..... hereof.

Ten original instruments, all alike and all constituting the same mortgage, being so executed, for convenience in recording.

Form No. 358.

Testimonium Clause, Including Corporate Signature.

See also Forms Nos. 353–360.

IN WITNESS WHEREOF, the parties hereto of the first and second parts (or the parties of the first, second and third parts) have caused these presents to be executed in their respective corporate names by their respective presidents or vice-presidents and their respective corporate seals, duly attested, to be hereto affixed the day and year first above written.

The [*insert corporate name*],

{ *Corporate Seal.* } By [*signature*],
President.

Attest:

. . . . . .,
Secretary.

The [*insert corporate name*],

{ *Corporate Seal.* } By [*signature*],
President.

Attest:

. . . . . .,
Secretary.

Form No. 359.

Testimonium Clause, Including Corporate Signature.

See also Forms Nos. 353–360.

IN WITNESS WHEREOF, the said American Car and Foundry Company, the said Columbia Trust Company and said Erie Railroad Company, have caused this instrument to be executed by their duly authorized officers and their corporate seals to be hereto affixed, the day and year first above written.

AMERICAN CAR AND FOUNDRY COMPANY,

[*Seal.*] By . . . . . .,
President.

Attest:

. . . . . .,
Secretary.

COLUMBIA TRUST COMPANY,

[*Seal.*] By .....,
Vice-President.

Attest:

.....,
Secretary.

ERIE RAILROAD COMPANY,

[*Seal.*] By .....,
President.

Attest:

.....,
Secretary.

Form No. 360.

Testimonium Clause, Including Corporate Signature.

See also Forms Nos. 353–359.

IN WITNESS WHEREOF, the Illinois Steel Company, the party of the first part, has caused this indenture to be signed in its name and behalf by its president, or one of its vice-presidents, and its corporate seal to be hereunto affixed, and the same to be attested by the signature of its secretary, or an assistant secretary, and The New York Trust Company, party hereto of the second part, has caused this indenture to be signed in its name and behalf by its president, or one of its vice-presidents, and its corporate seal to be hereunto affixed and the same to be attested by the signature of its secretary, or an assistant secretary; all upon the day and year first above written.

ILLINOIS STEEL COMPANY,

{ *Corporate Seal.* } By E. J. BUFFINGTON,
President.

Attest:

T. J. HYMAN,
Secretary.

THE NEW YORK TRUST COMPANY,

{ *Corporate Seal.* } By F. J. HORNE,
Vice-President.

Attest:

H. W. MORSE,
Secretary.

Form No. 361.

Receiver's Certificates. Petition for Authority to Issue.

SUPREME COURT, ... COUNTY.

IN THE MATTER

OF THE

VOLUNTARY DISSOLUTION OF ..... RAILROAD COMPANY, A DOMESTIC CORPORATION.

To the Supreme Court of the State of New York:

The petition of ....., temporary receiver of the ..... Railroad Company, respectfully shows to this court as follows:

1. Your petitioner was appointed temporary receiver of the ..... Railroad Company in the above-entitled proceeding by order made and entered in the office of the clerk of the county of ..... on ....., and thereafter duly qualified and gave the bond required by the said order duly approved by a justice of this court, and on ..... took possession of the property, rights and effects of the said Railroad Company and since said time has continued in possession thereof, and in accordance with the said order of appointment is conducting the business of the said Railroad Company in accordance with the usual methods, and the terms and requirements of its various franchises.

2. The assets of said ..... Railroad Company consist of many franchises granted by the city of ....., covering in all about ..... miles of track, and the car barns and substations situated at ..... and the various overhead structures used in the business of carrying passengers by electric power through the various streets of the city of ....., and also various machinery, tools, implements and supplies used in connection with said business and ..... cars. [*Add any other assets of the company.*]

3. Since his appointment your petitioner has given the affairs of the said Railroad Company exclusively his time and attention

and has made himself familiar with its requirements to properly conduct the business of said company in order that its assets may be preserved and its obligations to the public properly carried out.

4. Upon taking possession of said property your petitioner found that much of the roadbed was in poor condition; that many switches and turnouts were worn out; that many of the rails were too light for the heavy cars and large traffic run upon them; that this condition existed upon the following streets in the said city of .....:

5. Your petitioner has endeavored from time to time with the funds coming into his hands to make repairs and improvements to said tracks and keep them in proper condition for operation, but with the funds coming into his hands he has not been able to place the same in proper condition as upon large portions of the streets heretofore mentioned the rails are of too light weight and in many places the same have sunk so that the motors under the cars scrape the pavement.

6. Your petitioner verily believes that the said tracks, switches and turnouts require a general renewal, relaying, overhauling and repairing and that it is improper, uncomfortable and unsafe to the public to conduct the business of said railroad longer over the said tracks, switches and turnouts.

7. Your petitioner has consulted with experienced railroad experts, more particularly with ....., who for some years has been superintendent of said Railroad Company, and with ....., chief engineer of the said Railroad Company, who has been in charge of the construction and engineering works of the said company for the past ..... years, and is advised by them that the said tracks, etc., should be relaid, renewed and reconstructed at once and that it will require at least the expenditure of ..... dollars to make the said roadbed of the said company safe and proper for the conveyance of the public, and that any undue delay in the completion of the said work may result in damage and irretrievable loss. The affidavits of said ..... and ....., sworn to herein, respectively, on ..... and ....., are submitted herewith.

8. The said property of the company is subject to a mortgage given to the ..... Trust Company as trustee, dated..... ....., and recorded in ..... county, to secure an issue of

..... dollars of bonds due ....., which bonds are still outstanding and unpaid, and the said ..... Trust Company is still the trustee under the said mortgage and is acting as such.

Said property is also subject, as appears from the records in the office of the clerk of the ..... county, to the following judgments:

Name.	Judgment creditor.	Amount.	Date of judgment.
.....	.....	.....	.....
.....	.....	.....	.....

9. Your petitioner is informed and believes that there are no other creditors of the Railroad Company having a lien upon its assets who have not been made parties to this proceeding and that all other creditors are not secured.

10. Your petitioner verily believes that the expenditure of said sum of ..... in improving the said trackage, etc., will materially lessen the operating and repairing expenses in the management of the said railroad.

11. Your petitioner verily believes and so advises this court that ..... dollars of receiver's certificates are necessary to be issued by him for the purposes aforesaid.

WHEREFORE, your petitioner asks the instructions of the court in the premises; and your petitioner further asks that this court may in its wisdom and in pursuance of the authority vested in it, make an order authorizing and empowering him as temporary receiver of the ..... Railroad Company to issue receiver's certificates of the said railroad in the sum of ..... dollars, or so much thereof as may be necessary for the purpose of relaying, renewing and repairing the tracks, roadbed and underlying structure of said roadbed, and to purchase and lay new turnouts, switches and special work therefor on ..... streets, and at such other points and places on the line of said railroad as he may be advised is necessary and proper; and that said certificates shall be made payable not to exceed two years from the date thereof and shall bear interest at not to exceed six per cent. per annum, payable semi-annually, and shall be of such denomination as your petitioner may deem proper.

.....,

Temporary Receiver of the ..... Railroad Company.

(*Verification.*)

Form No. 362.

Order Authorizing Receiver's Certificates.

At a Special Term of the Supreme Court of the State of New York, held at the Court House in the County of ....., on the ..... day of.....

PRESENT:

Hon. .....

Justice.

IN THE MATTER OF THE VOLUNTARY DISSOLUTION OF ..... RAILROAD COMPANY, A DOMESTIC CORPORATION.

On reading and filing the petition of ..... as temporary receiver of the ..... Railroad Company, verified, and the affidavits of ..... and ....., sworn to, respectively, on ..... and ....., from which it appears that to properly operate the said Railroad Company in the interests of the bondholders, stockholders and creditors of the same and to properly and safely accommodate the public, it is necessary that the tracks upon ..... streets in the city of ..... should be reconstructed as in said petition set forth, and that it will be necessary to issue receiver's certificates in the sum of ..... dollars for such purpose, and on due proof of the service of a copy of said petition and of this proposed order and on due notice of this motion more than eight days since upon the Honorable ....., Attorney-General of the State of New York, and upon ..... [*here insert all parties who were entitled to and received notice*], and after hearing....., counsel for the said receiver, in support of said motion, and ..... in opposition thereto, and no one else appearing,

Now, on motion of ....., counsel for the said receiver, it is

ORDERED, that the said ....., as temporary receiver of the ..... Railroad Company, be and he hereby is authorized and empowered to issue as such receiver of the ..... Railroad Company receiver's certificates in the sum of ..... dollars, or so much thereof as may be necessary, which said certificates shall bear interest at not to exceed six per cent. per annum, payable semi-annually, and shall be of such denomination as said receiver shall determine, and shall be payable not to exceed two years from the date thereof, at the discretion of the said receiver, with the privilege to pay and redeem the same at any time after date at par and accrued interest, and which said certificates shall be a first lien upon the real estate, rights, franchises, privileges and assets of the said Railroad Company and any and all funds in the hands of said temporary receiver, or in the hands of his successor, a permanent receiver should one be appointed, prior to the lien of a certain mortgage executed by the said ..... Railroad Company to the ..... Trust Company, dated ....., and recorded ....., securing an issue of ..... dollars of bonds, and also prior to the lien of the following judgments:

and also prior to any and all other claims against the said real estate, rights, franchises, property, privileges and assets of the said Railroad Company, including such priority of lien upon the moneys realized from the said certificates until the same shall have been expended and the repairs and improvements made therewith, in accordance with this order, and then and thereafter to continue as a prior lien upon such repairs and improvements.

FURTHER ORDERED, that the said moneys when received from the sale of the said certificates shall be expended by said receiver substantially in accordance with the estimate of the engineer for said work annexed to the affidavit of ....., sworn to on ....., approximately, as follows:

[*Here insert amount to be expended upon the various streets.*]

FURTHER ORDERED, that the said receiver shall forthwith upon the obtaining of the moneys hereunder proceed to repair, relay and renew the tracks and roadbed of the said Railroad Company with the funds so obtained.

Form No. 363.

Receiver's Certificate.

No..... $.....

..... RAILROAD COMPANY.

Receiver's Certificate of Indebtedness.

THIS IS TO CERTIFY that the undersigned ..... as receiver of the property of the ..... Railroad Company, and not individually, is indebted for value received, to the bearer in the sum of ..... dollars ($.....), payable in gold coin of the United States of America of the present standard of weight and fineness at the office of the said receiver in the city of New York, on the ..... day of ....., 19.., or sooner as hereinafter provided, with interest from the date thereof in like gold coin at the rate of six per centum per annum, payable semi-annually at the office of said receiver on the first days of ..... and ..... in each year.

This certificate is part of an issue of certificates of like tenor and date not exceeding in the aggregate ..... dollars ($.....), and numbered consecutively from one upwards, authorized by an order of the Supreme Court of the State of New York in and for the county of New York in an action wherein ..... is plaintiff and .....is defendant by an order made and entered in said action on the ..... day of ....., 19.., and declared in and by said order to constitute a first lien upon the railroads and property of the said ..... Railroad Company in the hands of said receiver, prior and paramount to the lien of a certain mortgage or deed of trust [*describing the same*] and all other claims and liens of every nature and description whatsoever upon the railroad and property of said company.

This certificate may be paid and redeemed at any time after date at par and accrued interest.

This certificate and all rights and liens thereunder shall be transferable by delivery.

This certificate is issued by the receiver and accepted by the holder on the understanding and condition that it is not to create or constitute any liability on the part of the receiver personally or of any party to the action in which the receiver was appointed.

IN WITNESS WHEREOF, the said undersigned receiver has, pursuant to the order of court heretofore recited, hereunto set his hand this ..... day of ....., 19..

.....
As Receiver of the Property of the

..... *Railroad Company.*

[*Indorsement as follows:*]

..... RAILROAD COMPANY.

Receiver's certificate for $....., dated, ..., 190.., pursuant to an order of the Supreme Court of the State of New York, made and entered ....., 190...

Form No. 364.

Certificate for Reincorporation of an Existing Business Corporation.

See Business Corporations Law, § 4.

We, the undersigned, A. B., chairman, and C. D., secretary, respectively, of a special meeting of the stockholders of [*insert corporate name*], a corporation heretofore organized, held for the purpose of voting upon a proposition to reincorporate pursuant to the Business Corporations Law, do hereby certify:

That such corporation was organized for [*here insert the objects as set forth in its certificate of incorporation*].

That the directors of the corporation called a meeting of the stockholders thereof by publishing a notice, stating the time, place and object of the meeting, signed by at least a majority of them, in the [*insert name of paper*], a newspaper published in the city [*or village*] of ....., in the county of ....., being the county in which the principal business office of such corporation is situated, for at least three successive weeks, and by serving upon each stockholder at least three weeks before such meeting a copy of such notice, either personally or by depositing it in the post-office, postage prepaid, addressed to such stockholder at his last known post-office address.

That a copy of said notice is hereto annexed, marked "Exhibit A," and is hereby made a part of this certificate.

That at the time and place specified in such notice stockholders appeared in person or by proxy representing more than a majority of all the stock of the corporation.

That the meeting was then organized by such stockholders by choosing the undersigned A. B., one of the directors, as chairman, and the undersigned C. D., a stockholder, as secretary.

That a vote was then taken of those present in person or by proxy upon the proposition to reincorporate under the Business Corporations Law.

That the following resolution was offered:

"*Resolved.* That [*insert corporate name*] be reincorporated under the provisions of the Business Corporations Law of the State of New York, and that the officers of this meeting be empowered and directed to execute proper certificates of such reincorporation and file the same, in the manner prescribed by law."

That votes representing a majority of all the stock of said corporation were thereupon cast in favor of such resolution, to wit: Votes representing ..... shares of stock.

That such resolution was thereupon declared duly adopted.

That we further certify as follows, to wit:

[*Here insert the recitals as contained in Form No.* 1.]

IN WITNESS WHEREOF, we, the undersigned, the chairman and secretary, respectively, of said meeting of stockholders, hereby execute this certificate in duplicate, and hereby certify that the foregoing is a true and correct certificate of proceedings of said meeting.

Dated, this ..... day of ....., 19...

....., *Chairman.*

....., *Secretary.*

STATE OF NEW YORK, }
County of ....., } *ss.:*

....., chairman, and ....., secretary, being severally duly sworn, do depose and say, and each for himself

deposes and says, that he has read the foregoing certificate of proceedings of the meeting of stockholders of the [*insert name of corporation*], subscribed by him, and knows the contents thereof, and that such certificate is in all respects correct and true.

....., *Chairman.*
....., *Secretary.*

Severally sworn to before me, this ... day of ...., 19.. }

[*Signature of Notary.*]

STATE OF NEW YORK, County of ....., } *ss.:*

On this ..... day of ....., 19.., before me personally came [*insert names of chairman and secretary*], to me known and known to me to be the persons described in and who executed the foregoing certificate, and severally acknowledged to me that they executed the same.

[*Signature of Notary.*]

Form No. 365.

"Exhibit A," Referred to in the Foregoing Certificate.

NOTICE TO STOCKHOLDERS.

A meeting of the stockholders of the [*insert corporate name*] to vote upon a proposition to reincorporate such company under the provisions of the Business Corporations Law, will be held on the ..... day of ....., 19.., at .... o'clock in the ....noon, at the office of said company at No. ..... street, in the city [*or village*] of ....., in the county of .....

Dated, ..., 19..

[*Insert names of directors signing notice.*]

The payments to be made at the office of the Secretary of State upon the preceding certificate are ten dollars for filing and fifteen cents per folio for each 100 words contained therein for recording. A filing fee of six cents and recording fees of ten cents per folio are payable at the office of the county clerk.

Form No. 366.

Stockholder's Waiver of Notice of Special Meeting.

See the General Corporation Law, § 42.

We, the undersigned, being all the stockholders of the ..... Company, together owning the entire capital stock of said company, to wit, [*insert number*] shares, do hereby authorize the directors of said company to hold a special meeting of the stockholders of said company on the ..... day of ....., 19.., at ..... o'clock in the .....noon, at the office of said company, No. ..... street, in the ..... of ....., for the purpose of voting upon a proposition to [*state purpose*], and we do and each of the subscribers hereby does expressly waive the giving of notice of such meeting required by law, and waive any and all other statutory prerequisites to such meeting.

IN WITNESS WHEREOF, we have hereunto set our hands and the number of shares of stock in said company severally owned by us.

Dated, ..., 19...

Form No. 367.

Reference to Waiver of Notice to be Inserted in Certificate of Proceedings.

See the General Corporation Law, § 42.

That the directors of said corporation have called a meeting of the stockholders thereof at this time, without giving the notice to said stockholders and without the lapse of time prescribed by law, the said action of said directors having been authorized and approved, and said statutory requirements having been waived in writing by every stockholder of said corporation, pursuant to section 42 of the General Corporation Law; said waiver having been produced at said meeting and the following being a true copy thereof [*or state, "and a true copy thereof is hereto annexed"*]:

Form No. 368.

Certificate of Incorporation of a Full Liability Business Corporation.

See the Business Corporations Law, § 6.

We, the undersigned, all being persons of full age, at least two-thirds of whom are citizens of the United States, and one of us a resident of the State of New York, desiring to form a full liability corporation, pursuant to the provisions of the Business Corporations Law of the State of New York, do hereby make, sign, acknowledge and file this certificate for that purpose, as follows:

First. The name of the proposed corporation is to be [*insert corporate name*] Company.

[*Here insert remaining recitals of form No.* 1.]

As to fees payable upon filing and recording the certificates of incorporation, see notes to Form No. 1.

Form No. 369.

Supplemental Certificate by a Business Corporation to Become a Full Liability Corporation.

See the Business Corporations Law, § 6.

We, the undersigned, the president and treasurer, respectively, of the [*insert name of corporation*], a corporation formed under the Business Corporations Law of the State of New York, do hereby certify, pursuant to the provisions of said law, in order that said corporation may become a full liability corporation, as follows:

That hereafter said corporation intends to be a full liability corporation.

That, pursuant to said law, we have annexed hereto a copy of a resolution, adopted by a two-thirds vote of the board of directors of said corporation, and the written consent of all the stockholders of said corporation, authorizing and consenting to the change of said corporation to a full liability corporation, marked, respectively, "Exhibit A" and "Exhibit B."

IN WITNESS WHEREOF, we have made, executed and acknowledged this certificate in duplicate, and have hereunto set our hands this ..... day of ....., 19...

....., *President.*

....., *Treasurer.*

STATE OF NEW YORK, }
County of....., } *ss.:*

On this ..... day of ....., 19.., before me personally came [*names of president and treasurer*], to me known and known to me to be the persons described in and who executed the foregoing certificate and severally acknowledged to me that they executed the same for the uses and purposes therein mentioned.

[*Signature of Notary.*]

EXHIBIT A.

"*Resolved,* That this board does hereby authorize and consent to the change of the [*insert corporate name*] to a full liability corporation."

I hereby certify and declare the foregoing to be a true and correct copy of a resolution duly adopted by a two-thirds vote of the board of directors of the [*insert corporate name*] at a meeting of said board, held at ....., on the ..... day of ....., 19...

.....
, *Secretary.*

EXHIBIT B.

We, the undersigned, stockholders of the [*insert corporate name*], do hereby, severally, give our written consent, authorizing and consenting to the change of said corporation to a full liability corporation.

IN WITNESS WHEREOF, we have hereunto set our hands to this consent in duplicate, and the number of shares of stock owned by each of us in said corporation.

Dated, the ..... day of ....., 19...

A. B., ... shares.
C. D., ... shares.
E. F., ... shares.

STATE OF NEW YORK, }
County of ....., } *ss.:*

On this ..... day of ....., 19.., before me personally came [*insert names*], to me known and known to me to be the persons described in and who executed the foregoing consent and severally acknowledged to me that they executed the same.

[*Signature of Notary.*]

STATE OF NEW YORK, }
County of ....., } *ss.:*

A. B., being duly sworn, deposes and says, that he is the treasurer [*or secretary*] of the [*insert corporate name*], the corporation referred to in the foregoing consent, and that he is the custodian of the stock book of said corporation; that the persons who have subscribed the foregoing consent are all the stockholders of said corporation, and owners of the entire capital stock thereof.

A. B.

Sworn to before me, this ..... }
day of ....., 19... }

[*Signature of Notary.*]

Upon filing and recording the above certificates the fees payable are as noted under form No. 217.

Form No. 370.

Agreement for the Consolidation of Business Corporations.

See Business Corporations Law, §§ 7–11.

THIS AGREEMENT, made the ..... day of ....., 19.., between the ..... [*insert corporate name*] Company, party of the first part, and the ..... [*insert corporate name*] Company, party of the second part, under the corporate seals of said companies,

WITNESSETH: That [*insert corporate name*] Company, said party of the first part, is a corporation organized under the laws of the State of New York, for the purpose of carrying on the business of [*state objects for which the corporation was formed*].

That [*insert corporate name*] Company, said party of the second part, is a corporation organized under the laws of the State of New York for the purpose of carrying on the business of [*state objects for which the corporation was formed*].

That, in consideration of the mutual covenants and agreements herein contained, the said parties hereto do hereby merge and consolidate such corporations into a single corporation under and in pursuance of the laws of the State of New York, in such case made and provided, and by these presents,

THEY DO HEREBY COVENANT AND AGREE upon and prescribe the terms and conditions of such consolidation and the mode of carrying the same into effect, which said terms and conditions and mode of carrying the same into effect they mutually covenant and agree to observe, as follows, to wit:

First. That the name of the corporation hereby formed by said consolidation shall be [*insert corporate name*] Company.

Second. That the number of directors who shall manage its affairs shall be [*state definite number, not less than three nor more than thirteen*].

Third. That the names and post-office addresses of the directors of such new corporation for the first year are as follows, to wit:

Names of directors.	Post-office addresses.
.....	.....
.....	.....
.....	.....

Fourth. That the term of existence of such new corporation shall be [*insert term, not exceeding fifty years*].

Fifth. That the names of the town [*or towns*], county [*or counties*], in which the operations of such new corporation are to be carried on are [*insert names*].

Sixth. That the name of the town [*or city*] and county in this State in which its principal place of business is to be situated is the town [*or city*] of ..... in the county of .....

Seventh. That the amount of the capital stock of such new corporation is to be [*insert amount, which must not be larger than*

the fair aggregate value of the property, franchises and rights of the constituent corporations].

Eighth. That the number of shares into which such capital stock is to be divided is [*insert number*].

Ninth. That the manner of distributing such capital stock among the holders thereof shall be as follows: [*Example given: The capital stock of each of the corporations, parties hereto, shall be convertible into the capital stock of said new corporation hereby formed, share for share, and upon presentation and surrender of any outstanding certificates of stock in either of said constituent corporations, parties hereto, certificates for like amounts of stock in said new corporation shall be issued to the holders thereof.*]

Tenth. [*If the constituent corporations, or either of them, shall have been organized for the purpose of carrying on any part of its business in any place out of this State, and such new corporation shall propose to carry on any part of its business out of this State, the agreement shall so state, with such other particulars as may be deemed necessary.*]

IN TESTIMONY WHEREOF, the said parties of the first and second parts have executed this agreement in duplicate, and have hereunto set their respective signatures, and have caused to be hereto affixed the corporate seals of their respective corporations, of which they are respectively the directors, the day and year first aforesaid.

{Corporate seal}

. . . . . ,
. . . . . ,
. . . . . ,
. . . . . ,
. . . . . ,
Directors of the . . . . . *Company.*
Attest: . . . . . , *President*. . .
. . . . . , *Secretary.*

{Corporate seal}

. . . . . ,
. . . . . ,
. . . . . ,
. . . . . ,
. . . . . ,
Directors of the . . . . . *Company.*
Attest: . . . . . , *President.*
. . . . . , *Secretary.*

STATE OF NEW YORK,
County of ....., *ss.:*

On the ..... day of ....., in the year ....., before me personally came ....., to me known, who, being by me duly sworn, did depose and say that he resides in .....; that he is the [*president or other officer*] of the [*name of corporation*], the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

[*Signature and office of officer taking acknowledgment.*]

If such corporation have no seal, that fact must be stated in place of the statements required respecting the seal.

[*Prepare in the same form as above, proof of execution by the secretary of the other constituent corporation, and annex the same.*]

STATE OF NEW YORK,
County of ....., } *ss.:*

On this ..... day of ....., 19.., before me personally came [*insert names of the directors of first constituent company*], directors of [*insert name of company*], to me known and known to me to be the persons who severally executed the foregoing agreement, and severally acknowledged to me that they executed the same for the uses and purposes therein expressed.

[*Signature of Notary.*]

[*Prepare, in the same form as above, acknowledgment by directors of the other constituent corporation, and annex the same.*]

SWORN COPY OF PROCEEDINGS OF MEETING.

A special meeting of the stockholders of [*insert corporate name*] Company, for the purpose of submitting to said stockholders the annexed agreement, dated ....., 19.., for the consolidation of [*insert corporate name*] Company with [*insert corporate name*] Company, under the name of [*insert name of new corporation*] Company, was held at the office of said first-named corporation

[*or as the case may be*] in the city [*village or town*] of ....., county of ....., on the ..... day of ....., 19.., at ..... o'clock in the ..... noon of that day.

Said meeting was called upon notice of at least two weeks, specifying the time, place and object thereof, and addressed to each stockholder at his last known post-office address, and deposited in the post-office, postage prepaid, and published for at least two successive weeks in [*insert name of paper*], one of the newspapers of ..... county, in which county said corporation, the [*insert corporate name*] Company has its place of business, and also in [*insert name of paper*], one of the newspapers of ..... county, in which county said corporation, the [*insert name of other corporation*] Company has its place of business.

Pursuant to such notice the stockholders of the [*insert corporate name*] Company met at ..... in the city [*village or town*] of ....., county of ....., on the ..... day of ....., 19.., at ..... o'clock in the ..... noon.

There were present at such meeting in person or by proxy stockholders owning ..... shares of the stock, being at least two-thirds of the stock of said corporation.

The meeting was organized by the election of ..... as chairman, and ....., as secretary thereof.

Proof by affidavit of the due service of the notice of the meeting and publication thereof was read and is hereto annexed.

The annexed agreement was thereupon submitted to said stockholders for their approval and, after being considered, a vote was taken by ballot upon the question of approving or rejecting the same, pursuant to statute.

The said ballots were duly cast in person or by proxy, and upon a canvass of such ballots it was found that the votes of stockholders owning ..... shares of stock were cast in favor of the approval of said agreement for consolidation, and votes of stockholders owning ..... shares of stock were cast against the approval of said agreement [*or no votes were cast against the approval of said agreement as the case may be*].

The whole number of shares of the capital stock of said corporation is ....., and the votes of stockholders which were so cast in person or by proxy in favor of the approval of said agreement of consolidation constitute at least two-thirds of the stock of said corporation.

Thereupon said agreement of consolidation was declared duly approved and adopted and the meeting adjourned.

IN WITNESS WHEREOF, I have made, signed and sworn to the foregoing copy of proceedings in duplicate this ..... day of ....., 19...

....., *Secretary.*

STATE OF NEW YORK, }
County of ....., } *ss.:*

[*Insert name*], being duly sworn, deposes and says that he was elected to act, and did act, as secretary of a special meeting of the stockholders of the [*insert corporate name*], held for the purpose of considering the annexed agreement of consolidation, dated ....., 19..; that the foregoing is a copy of the proceedings of said meeting, and is, in all respects, a correct copy of such proceedings, and of all the proceedings of said meeting, and that notice of said meeting was given, as aforesaid, pursuant to statute.

[*Signature of Secretary.*]

Sworn to before me, this ..... }
day of ....., 19... }

[*Signature of Notary.*]

[*Prepare in the same form as above, the certificate of the secretary of the other constituent corporation, and annex the same.*]

[*Attach also proof of publication and service of notice*].

Upon filing and recording the consolidation papers in the office of the Secretary of State fees are payable as follows: Filing, ten dollars; recording, six cents a folio. The fees in the office of the county clerk are: Filing, six cents; recording, ten cents a folio. In addition to such fees an organization tax of one-twentieth of one per cent. must be paid to the State Treasurer upon the amount of capital stock of the new corporation, in excess of the aggregate capitalization of the constituent corporations. See statutes and decisions relative to fees, organization tax, and transmission of same, *ante.*

Form No. 371.

Certificate of Incorporation of a Ferry Company.

See Transportation Corporations Law, art. 2, § 2, *ante.*

We, the undersigned, all being persons of full age, and at least two-thirds being citizens of the United States, and at least one of

us a resident of the State of New York, desiring to become a corporation for conducting and managing a ferry, pursuant to the provisions of article two of the Transportation Corporations Law of the State of New York, do hereby certify as follows, to wit:

First. The name of the corporation is to be [*insert corporate name*] Company.

Second. The places from and to which the ferry established [*or to be established*] shall run are: From ..... to .....

Third. The term for which the corporation is to exist is [*insert number of years not exceeding fifty*] years.

Fourth. The amount of its capital stock is to be [*insert amount*] dollars, and the number of shares thereof is to be [*insert number of shares*] of the par value of ..... dollars each.

Fifth. The number of directors of such corporation is to be [*insert number, which, however, must be fixed between the limit of three and fifteen*].

Sixth. The names of the directors for the first year are [*insert names of the directors*].

IN WITNESS WHEREOF, we, the undersigned, have executed and acknowledged this certificate in duplicate, this ..... day of ....., 19...

A. B.
C. D.
E. F.

STATE OF NEW YORK, }
County of ....., } *ss.:*

On this ..... day of ....., 19.., before me personally came A. B., C. D. and E. F., to me known and known to me to be the persons described in and who made and signed the foregoing certificate, and severally duly acknowledged to me that they had made, signed and executed the same for the uses and purposes therein set forth.

[*Signature of Notary.*]

The fees in the office of the Secretary of State are: Filing, ten dollars; recording, fifteen cents a folio for each 100 words. The fees in the county clerk's office are: Filing, six cents; recording, ten cents a folio. In addition to such payments, an organization tax of one-twentieth of one per cent upon the capital stock must be paid to the State Treasurer. For text of the statutes regulating such payments and information relative to remittances, see *ante*.

Form No. 372.

Affidavit of Payment of One-half the Capital Stock of Ferry Company.

See the Transportation Corporations Law, art. 2, § 3, *ante*.

STATE OF NEW YORK,
County of ....., } *ss.:*

A. B., C. D. and E. F., being severally duly sworn, depose and say, and each for himself deposes and says, that he is a director of [*insert corporate name*] Company, and that said A. B., C. D. and E. F. constitute a majority of the directors thereof; that such company is a ferry corporation organized under the laws of the State of New York; that at least one-half the capital stock of such company has been actually paid in.

A. B.,
C. D.,
E. F.,
Directors.

Severally sworn to before me,
this ... day of ...., 19..

[*Signature of Notary.*]

FEES.—In the office of the Secretary of State a recording fee of fifteen cents a folio; in the county clerk's office, six cents for filing and ten cents a folio for recording.

Form No. 373.

Application for Ferry License by a Corporation Owning the Land.

See the Highway Law, § 270, *ante*.

To the County Court of the county of ..... [*or, the City Court of the city of* ....., *in the county of* .....]:

The petition of [*insert name of corporation*] respectfully shows, that the petitioner is a domestic corporation, duly incorporated under the provisions of the Transportation Corporations Law of the State of New York, for the purpose of conducting and managing a ferry from [*describe the place*] to [*describe the place*] the county of ....., and is the owner of the land situated on the bank of the ..... river through which that part of the

highway adjoining to the proposed ferry runs; and that a ferry ought to be established for the convenience and accommodation of the public, across the said ..... river at the place aforesaid.

Wherefore your petitioner prays that this court will grant it, the said corporation, a license to establish and keep said ferry, pursuant to the provisions of the statutes in such case made and provided.

Dated, this ..... day of ....., 19...

{Corporate seal} The [*insert corporate name*] Company,

By [*signature*], President.

STATE OF NEW YORK, }
County of ....., } *ss.:*

A. B., of ....., being duly sworn, deposes and says, that he is the president of the [*insert corporate name*] Company, the petitioner named in the foregoing petition; that he has read the foregoing petition, by him subscribed, and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true; and, further, that he signed said petition as president of said company by the authority of its board of directors and affixed the corporate seal of said company thereto by the like authority.

[*Signature of Notary.*]

Form No. 374.

Application for Ferry License by a Corporation Not Owning the Land.

See the Highway Law, § 270, *ante.*

To the County Court of the County of ..... [*or the City Court of the city of* ....., *in the county of* .....]:

The petition of [*insert name of corporation*] respectfully shows, that the petitioner is a domestic corporation, duly incorporated under the provisions of the Transportation Corporations Law of the State of New York, for the purpose of conducting and managing a ferry from [*describe the place*], in the county of ..... to [*describe the place*], in the county of ....., and that C. D. is the owner of the land situated on the bank of the

..... river through which that part of the highway adjoining to the proposed ferry runs; and that a ferry ought to be established for the convenience and accommodation of the public, across the said ..... river at the place aforesaid.

That the said C. D., the owner of the land through which the said part of said highway runs, as aforesaid, is not a suitable person to keep said ferry, for the following reasons:
[or, has neglected to apply for a license to keep such ferry, after being served with eight days' written notice from the petitioner of the time and place at which the said petitioner would apply for such license (or, has heretofore obtained a license to keep said ferry, but has neglected to comply with the conditions of the said license, or to maintain said ferry)].

That due service of notice of the time and place of this application has been made upon said C. D., as more fully appears from a copy of said notice and the affidavit of service thereof, which are hereto annexed.

Wherefore your petitioner prays that this court will grant it, the said corporation, a license to establish and keep said ferry, pursuant to the provisions of the statutes in such case made and provided.

Dated, this ..... day of ....., 19...

{Corporate seal} The [*insert corporate name*] Company,
By [*signature*], President.

[*Add verification by petitioner as in the preceding Form No. 373, and annex notice and proof of service, Forms Nos. 375, 376.*]

Form No. 375.

Notice to Owner of Lands of Application for a Ferry License.

See the Highway Law, § 270, *ante*.

To .....:

Take notice that the undersigned will make application to the County Court of the county of ..... [*or, to the City Court of the city of ....., in the county of .....*], at a term thereof to be held at the court-house, in the city [*or village*] of ....., on the ..... day of ....., 19.., at the

opening of the court [*or, at* ..... *o'clock* ..M.] on that day, or as soon thereafter as a hearing can be had, for a license to keep a ferry across the ..... river, from the termination of the highway running through your lands to [*give particular description of location of the ferry*].

Dated, this ..... day of ....., 19..

The [*insert name*] Company.

By ....., President.

Form No. 376.

Proof of Service of Notice.

See the Highway Law, § 270, *ante*.

STATE OF NEW YORK, }
County of ....., } *ss.:*

G. W., being duly sworn, says, that he is more than 18 years of age; that on the ..... day of ....., 19.., at the village of ....., in the county of ....., he personally served on ..... the notice hereto annexed, by delivering to and leaving with him a true copy thereof.

G. W.

Sworn to before me, this .... }
day of ....., 19... }

[*Signature of Notary.*]

Form No. 377.

License to Keep a Ferry.

See the Highway Law, § 270, *ante*.

At a term of the County Court of ..... county, held at the city [*or village*] of ....., in said county, on the ..... day of ....., 19...

Present: Hon. ....., County Judge.

An application having been made by the [*insert corporate name*] Company, a domestic ferry corporation, for a license to keep a ferry across the [*name stream*] at [*describe the place*], and the

provisions of the statutes in such case made and provided having been complied with, it is hereby ordered and determined that this license be granted to said [*insert corporate name*] Company to keep a ferry at the said place, in said town, for the term of five years from this date, and the said ..... Company is allowed to collect and receive ferriage for the transportation of travelers, property and effects, over and across the said ferry, at and after the following rates, and for no greater sum or sums for such transportation, viz.: [*state the rates*].

Form No. 378.

Clerk's Certificate to be Annexed to a Copy of License for Licensee.

See the Highway Law, § 270, *ante*.

STATE OF NEW YORK, }
County of ....., } *ss.:*

I, ..., clerk of ..... Court, do hereby certify, that I have compared the annexed copy of a license with the original license, entered in the book of minutes of said court by me this day, and that the same is a correct copy thereof and of the whole of said original.

IN WITNESS WHEREOF, I have hereunto affixed my name, and my official seal, this ..... day of ....., 19...

[L. S.] ....., *Clerk.*

Form No. 379.

Undertaking Upon Application for License to Keep a Ferry.

See the Highway Law, § 271, *ante*.

STATE OF NEW YORK }
County of ....., } *ss.:*

WHEREAS, The [*insert corporate name*] Company, a domestic corporation, duly incorporated under the provisions of the Transportation Corporations Law of the State of New York, for the purpose of conducting and managing a ferry has made [*or, is about to*

make] application to the County Court of the county of ..... [*or, to the City Court of the city of ....., in the county of .....*] for a license to keep a ferry across the [*name stream*] from the termination of the highway running through the lands of ..... to [*describe location of ferry*];

Now, therefore, we the said [*insert corporate name*] Company and ..... as its surety [*or sureties, as the case may be*], do hereby jointly and severally undertake, in the sum of ..... dollars, to and with the people of the State of New York, that the said [*insert corporate name*] Company shall attend such ferry with sufficient and safe boats and other implements, and so many men to work the same as shall be necessary during the several hours in each day, and at such rates as the court shall direct.

Dated, this ..... day of ....., 19...

The ..... Company,
By ....., *President.*

{Corporate seal}

[*Also signatures of sureties.*]

....., *Secretary.*

STATE OF NEW YORK, }
County of ....., } *ss.:*

On the ..... day of ..... in the year ....., before me personally came ..... to me known, who, being by me duly sworn, did depose and say that he resides in .....; that he is the [*president or other officer*] of the [*name of corporation*], the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

[*Signature of Notary.*]

STATE OF NEW YORK, }
County of ....., } *ss.:*

On this ..... day of ....., 19.., before me personally appeared ..... to me known and known to me to be the persons described in and who executed the foregoing undertaking, and severally acknowledged that they executed the same.

[*Signature of Notary.*]

Form No. 380.

Affidavit of Justification.

STATE OF NEW YORK, }
County of ..... } *ss.:*

L. M. and ....., being severally duly sworn, each for himself, deposes and says, that he is one of the sureties named in the foregoing undertaking; that he is a resident of and a householder, or freeholder, within the State of New York, and is worth the sum of ..... dollars [*twice the amount named in the undertaking*] over and above all debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under execution.

[*Signatures of sureties.*]

Sworn to before me, this }
.... day of ....., 19.. }

[*Signature of Notary.*]

Form No. 381.

Approval.

I hereby approve of the foregoing undertaking, and of the sufficiency of sureties therein named.

Dated, this ..... day of ....., 19...

.....

County Judge.

Form No. 382.

Certificate of Incorporation of a Navigation Corporation.

See the Transportation Corporations Law, art. 3, § 10, *ante.*

We, the undersigned, all being persons of full age, and at least two-thirds being citizens of the United States and one of us a resident of the State of New York, for the purpose of becoming a navigation corporation for the objects hereinafter specified, pursuant to the provisions of article 3 of the Transportation Corporations Law of the State of New York, do hereby certify as follows, to wit:

First. The name of the corporation is to be [*insert corporate name*] Company.

Second. The specific objects for which it is formed are the following, namely: For the purpose of building for its own use, equipping, furnishing, fitting, purchasing, chartering, navigating or owning steam, sail or other boats, ships, vessels or other property, to be used in business, trade, commerce or navigation, and for the carriage, transportation or storing of lading, freight, mails, property or passengers.

Third. The waters to be navigated are [*insert names of waters to be navigated. Example given: The waters, bays and inlets of the Hudson river and tributaries thereof*].*

Fourth. The amount of its capital stock is to be [*insert amount at not less than* $5,000 *nor more than* $4,000,000, *which are the limits fixed by statute*].

Fifth. The term of its existence is to be [*insert number of years not exceeding fifty*].

Sixth. The number of shares of which the capital stock shall consist is to be [*insert number of shares*].

Seventh. The corporation is to have [*insert number, but not less than five nor more than thirteen*] directors.

Eighth. The names of the directors for the first year are [*insert the names*].

Ninth. The principal office is to be situated in the city [*or town*] of ....., in the county of .....

Tenth. The number of shares of stock which each subscriber of this certificate agrees to take in such corporation is as follows:†

Names.	Number of shares subscribed.
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....

IN WITNESS WHEREOF, we have made, signed and acknowledged this certificate in duplicate this ..... day of ....., 19...

[*Signatures of Incorporators.*]

* In case of ocean steamers, the ports between which the vessels are to be navigated must also be stated.

† The aggregate of such subscriptions must equal ten per cent. of the capital and at least ten per cent. of such subscriptions must be paid in cash.

STATE OF NEW YORK, }
County of ....., } ss.:

On this ..... day of ....., 19.., before me personally came [*state names of incorporators*], to me known and known to me to be the persons described in and who made and signed the foregoing certificate and severally duly acknowledged to me that they had made, signed and executed the same for the uses and purposes therein set forth.

[*Signature of Notary.*]

STATE OF NEW YORK, }
County of ....., } ss.:

[*Insert names of at least three directors*], being severally duly sworn, depose and say, and each for himself deposes and says, that he is one of the directors named in the foregoing certificate; that at least ten per cent. of the amount of capital stock named therein has been in good faith subscribed and at least ten per cent. of such subscriptions has been paid in cash.

[*Signatures of at least three directors.*]

Severally sworn to before me, }
this .... day of .... 19... }

[*Signature of Notary.*]

The above certificate of incorporation must be executed by at least seven persons.

As to payments to be made upon filing and recording the certificates of incorporation, see the notes under Form No. 371.

Form No. 383.

Certificate by a Navigation Corporation of Full Payment of Capital Stock.

See the Transportation Corporations Law, art. 3, § 12, *ante.*

We, the undersigned, the president and a majority of the directors of [*insert corporate name*] Company, a navigation corporation, do hereby certify, pursuant to the provisions of article 3 of the Transportation Corporations Law, as follows, to wit:

That the amount of the capital stock of such corporation is [*insert amount*] dollars.

That the whole amount of such capital stock has been paid in.

IN WITNESS WHEREOF, we have made and signed this certificate in duplicate, this ..... day of ....., 19...

[*Signature of president.*]
[*Signatures of majority of directors.*]

STATE OF NEW YORK,
County of .....,
} *ss.:*

A. B., C. D. and E. F., being severally duly sworn, do depose and say, and each for himself deposes and says, that said A. B. is the president of [*insert name of corporation*], and that said A. B., C. D. and E. F. are directors of such company, and a majority thereof; that he has read the foregoing certificate and knows the contents thereof, and that the same is true.

[*Signatures of President and majority of directors.*]

Severally sworn to before me, this
..... day of ....., 19...

[*Signature of Notary.*]

STATE OF NEW YORK,
County of .....,
} *ss.:*

On this ..... day of ....., 19.., before me personally appeared A. B., C. D. and E. F., to me known and known to me to be the persons described in, and who made, signed and verified the foregoing certificate, and they severally acknowledged to me that they made, signed, executed and verified the same for the uses and purposes therein expressed.

[*Signature of Notary.*]

The fees payable upon filing and recording the above certificate are: At the office of the Secretary of State, a recording fee of fifteen cents per folio. At the county clerk's office, six cents for filing and ten cents per folio for recording.

Form No. 384.

Certificate of Incorporation of a Stage Coach Corporation.

See Transportation Corporations Law, art. 4, § 20, *ante*.

We, the undersigned, all being persons of full age, and at least two-thirds being citizens of the United States, and one of us a resident of the State of New York, desiring to become a corporation for the purpose of establishing, maintaining and operating a stage or omnibus route or routes [*or for the purpose of maintaining and operating a stage route or routes already established, as the case may be*], for public use in the conveyance of persons and property elsewhere than in the city of New York, pursuant to the provisions of article 4 of the Transportation Corporations Law of the State of New York, do hereby certify:

First. The name of the corporation is to be [*insert name*] Company.

Second. Such corporation is to continue for a term of [*insert term*] years.

Third. The route or routes upon which it is intended to run, as near as practicable, are [*state route*].

Fourth. The number of directors is to be [*insert number, not less than three nor more than five*].

Fifth. The names of such directors for the first year are [*insert names*].

Sixth. The amount of its capital stock is to be [*insert amount*] dollars, divided into [*insert number*] shares.

Seventh. The place of residence of each subscriber hereto and the number of shares of stock he agrees to take in such corporation are as follows:

Names.	Place of residence.	No. of shares subscribed.
A. B.....	.....	..... shares.
C. D.....	.....	..... shares.
E. F.....	.....	..... shares.
G. H.....	.....	..... shares.
I. J.....	.....	..... shares.

IN WITNESS WHEREOF, we have made, signed and acknowledged this certificate in duplicate this ..... day of ....., 19...

[*Signatures of incorporators, not less than five in number.*]

STATE OF NEW YORK,
County of ....., } ss.:

On this ..... day of ....., 19.., before me personally came [*insert names*], to me known and known to me to be the persons described in and who made and signed the foregoing certificate, and severally and duly acknowledged to me that they had made, signed and executed the same for the uses and purposes therein set forth.

[*Signature of Notary.*]

Relative to the payments to be made upon filing and recording the above certificate, see the notes under Form No. 371.

Form No. 385.

Certificate of Alteration or Extension of Route of Stage Coach Corporation.

See Transportation Corporations Law, § 21, *ante.*

We, the undersigned, the directors of the [*insert corporate name*] Company, a stage coach corporation, organized under the provisions of article 4 of the Transportation Corporations Law of the State of New York, do, for the purpose of altering [*or extending*] the route [*or routes*] of said corporation as designated in the certificate of incorporation thereof, hereby certify as follows, to wit:

That by a vote of two-thirds of the directors of said corporation, at a meeting of said directors held at ....., on the ..... day of ....., 19.., the route [*or routes*] designated in the certificate of incorporation of said [*insert corporate name*] Company was [*or were*] altered [*or extended*] as follows, to wit: [*state alteration or extension*].

IN WITNESS WHEREOF, we have made, signed and acknowledged this certificate in duplicate this ..... day of ....., 19...

[*Signatures of directors.*]

STATE OF NEW YORK,
County of ....., } ss.:

On this ..... day of ....., 19.., before me personally came [*insert name*], to me known and known to me to be

the persons described in and who made and signed the foregoing certificate, and severally and duly acknowledged to me that they had made, signed and executed the same for the uses and purposes therein set forth.

[*Signature of Notary.*]

The fees upon filing and recording the above certificate are the same as those mentioned under Form No. 383.

Form No. 386.

Certificate of Incorporation of a Tramway Corporation.

See Transportation Corporations Law, art. 5, § 30, *ante*.

We, the undersigned, all being persons of full age, and at least two-thirds being citizens of the United States and one of us a resident of the State of New York, desiring to become a corporation for constructing, maintaining and operating an elevated tramway, constructed of poles, piers, wires, rods, ropes, bars or chains, for the transportation of freight in suspended buckets, cars or other receptacles, for hire, pursuant to the provisions of article 5 of the Transportation Corporations Law, do hereby certify:

First. The name of the corporation is to be [*insert name*] Company.

Second. The number of years such corporation is to continue is to be [*insert period*] years.

Third. The places from and to which such tramway is to be constructed, maintained and operated, are as follows: From ..... to .....

Fourth. The length of such tramway, as near as may be, is to be [*state length*].

Fifth. The name of each county through or in which it is intended to be made is [*state each county*].

Sixth. The amount of its capital stock is to be [*insert amount*] dollars.

Seventh. The number of shares into which such capital stock is to be divided is to be [*insert number*].

Eighth. The number of directors thereof is to be [*state number, but not less than three*].

Ninth. The names and places of residence of the directors for the first year are as follows:

Names.	Places of residence.
.....	.....
.....	.....
.....	.....

Tenth. The place of residence of each subscriber hereto, and the number of shares he agrees to take in such corporation, are as follows:

Name.	Place of residence.	Number of shares subscribed.
1.	.....	..... shares.
2.	.....	..... shares.
3.	.....	..... shares.
4.	.....	..... shares.
5.	.....	..... shares.
6.	.....	..... shares.
7.	.....	..... shares.
8.	.....	..... shares.
9.	.....	..... shares.
10.	.....	..... shares.
11.	.....	..... shares.
12.	.....	..... shares.
13.	.....	..... shares.

IN WITNESS WHEREOF, we have made, signed and acknowledged this certificate in duplicate this ..... day of ....., 19..

[*Signatures of incorporators, at least thirteen in number.*]

STATE OF NEW YORK, }
County of ..... } *ss.:*

On this ..... day of ....., 19.., before me personally came [*insert names of the persons subscribing certificate*], to me known and known to me to be the persons described in and who made and signed the foregoing certificate, and severally duly acknowledged to me that they had made, signed and executed the same for the uses and purposes therein set forth.

[*Signature of Notary.*]

Relative to the payments to be made upon filing and recording the above certificate, see the notes under Form No. 371.

Form No. 387.

Certificate of Incorporation of a Pipe Line Company.

See Transportation Corporations Law, art. 6, § 40, *ante*.

We, the undersigned, all being persons of full age, and at least two-thirds being citizens of the United States, and one of us a resident of the State of New York, desiring to become a corporation for the purpose of constructing and operating for public use, except in the city of New York, lines of pipe for conveying or transporting therein petroleum, gas, liquids or any products or property [*or for maintaining and operating any line of pipe already constructed and owned by any corporation, person or persons, for the public use*], pursuant to the provisions of article 6 of the Transportation Corporations Law, do hereby certify:

First. The name of the corporation is to be [*insert name of company*].

Second. Such corporation is to continue for a term of [*insert term*] years.

Third. The places from and to which such pipe line is to be constructed [*or maintained and operated*] are the following, viz.: [*insert names of places*].

Fourth. The length of said pipe line, as near as may be, is to be [*state length.*]

Fifth. The name of each county through or into which it is to be constructed is as follows [*insert names of counties*].

Sixth. The amount of the capital stock of such corporation is to be ..... dollars. [*The capital stock must not be less than fifteen hundred dollars for every mile of pipe constructed or proposed to be constructed.*]

Seventh. The number of shares of which such capital stock shall consist is to be ..... shares.

Eighth. The number of directors of such corporation is to be [*here insert the specific number of directors, not less than seven*].

Ninth. The names and places of residence of such directors who are to serve for the first year, are as follows, viz.:

Names.	Places of residence.
1.	.....
2.	.....
3.	.....
4.	.....
5.	.....
6.	.....
7.	.....

Tenth. The place of residence of each subscriber and the number of shares he agrees to take in such corporation, which in the aggregate equal ten hundred and fifty dollars for every mile of pipe constructed or proposed to be constructed, and twenty-five per cent of which has been paid in cash, are as follows:

	Names.	Places of residence.	Number of shares subscribed.
1.	.....	.....	..... shares.
2.	.....	.....	..... shares.
3.	.....	.....	..... shares.
4.	.....	.....	..... shares.
5.	.....	.....	..... shares.
6.	.....	.....	..... shares.
7.	.....	.....	..... shares.
8.	.....	.....	..... shares.
9.	.....	.....	..... shares.
10.	.....	.....	..... shares.
11.	.....	.....	..... shares.
12.	.....	.....	..... shares.

IN WITNESS WHEREOF, We have made, signed and acknowledged this certificate in duplicate this ..... day of .... 19...

[*Signatures of incorporators.*]

STATE OF NEW YORK,
County of ....., } *ss.:*

On this ..... day of ....., 19.., before me personally came [*insert names of the subscribers to certificate*] to me known and known to me to be the persons described in and who made and signed the foregoing certificate, and severally duly acknowledged to me that they had made, signed and executed the same for the uses and purposes therein set forth.

[*Signature of Notary.*]

STATE OF NEW YORK,
County of ....., } *ss.:*

[*Insert the names of at least three of the directors named in the certificate*], being severally duly sworn, depose and say, and each for himself deposes and says, that he is a director named in the foregoing certificate of incorporation; that at least ten hundred and fifty dollars of stock for every mile of line proposed to be con-

structed, or maintained and operated, has been in good faith subscribed and twenty-five per cent paid in money thereon; that it is intended in good faith to construct [*or to maintain*] and operate the line of pipe mentioned in such certificate, and that such corporation was not projected or formed with the intent or for the purpose of injuring any person or corporation, nor for the purpose of selling or conveying its franchise to any person or corporation, nor for any fraudulent purpose.

[*Signature of directors making affidavit.*]

Severally sworn to before me this
day of ..... 19..

[*Signature of Notary.*]

Lines of pipe cannot be constructed or operated in the city of New York under the provisions of this act.

At least twelve persons must sign and acknowledge above certificate.

For amount of fees and organization tax, payable upon filing and recording the certificates of incorporation, see the notes under Form No. 371.

Form No. 388.

Notice to Owners and Occupants of Lands of Filing Map and Survey of Pipe Line.

See Transportation Corporations Law, § 41, *ante*.

To A. B., C. D., E. F. and ....., owners and occupants of lands through which the route of pipe line located and mapped by the [*insert corporate name*] Company, passes:

Take notice, that a map and survey of the route adopted and located by said [*insert corporate name*] Company for the laying of a pipe line has been filed in the offices of the clerks of the counties of ....., on the ..... day of ....., 19.., and that such route passes over or across the lands owned or occupied by the persons, respectively, to whom this notice is directed, and that the route thereof is indicated thereon by a line of stakes consecutively numbered and equally distant, and not more than twenty rods from each other.

Dated, ..., 19...

Yours, etc.,

The [*name of corporation*].

By ....., Secretary.

Form No. 389.

Notice of Application for Appointment of Commissioners to Relocate Pipe Line by Occupant or Owner of Lands.

See Transportation Corporations Law, § 41, *ante.*

To the [*insert name*] Company, and to A. B.:

Take notice, that on the ..... day of ....., 19.., at a Special Term of the Supreme Court, to be held at ..... in the village [*or city*] of ....., in the county of ....., at the opening of said court on that day, or as soon thereafter as counsel can be heard, an application will be made, pursuant to law, for the appointment of commissioners to relocate the line of route, adopted and located by said corporation for the laying of its pipe line, where the same passes through the land owned [*or occupied*] by C. D., as said line is designated on a map and survey of said route, filed by said corporation in the office of the clerk of ..... county, on the ..... day of ....., 19.., and for such other or further relief as may be proper; that A. B., one of the persons to whom this notice is addressed, is an owner [*or occupant*] of lands to be affected by the alteration to be proposed in said application; that said application will be made upon said map and survey, and notice of filing thereof served upon said C. D. on the ..... day of ....., 19.., and also upon the petition of said C. D., a copy of which is hereto annexed and served upon you.

Dated, ... 19...

Yours, etc.,

Y. Z.,

Attorney for C. D.

Office address, ...

[*Attach petition as in form No.* 390.]

Form No. 390.

Petition by Owner or Occupant of Land upon an Application for the Appointment of Commissioners to Relocate Pipe Line.

See Transportation Corporations Law, § 41, *ante.*

To .....:

The petition of C. D. respectfully shows, that the [*insert corporate name*] Company, a domestic pipe line corporation, has

made a map and survey of the route adopted and located by it for the laying of a pipe line in the county of ....., which map and survey have been certified by the president and engineer of said corporation and filed in the office of the clerk of said county, on the ..... day of ....., 19..; that on the ..... day of ....., 19.., said corporation gave written notice to your petitioner of the filing of such map and survey, and stating that said route passes over or across lands owned [*or occupied*] by your petitioner; that your petitioner is the owner [*or occupant*] of the lands designated on said map and survey, through which the route of said pipe line is designated to pass, the title to which lands has not been acquired by purchase by said corporation.

That your petitioner feels aggrieved by the proposed location of said route, and that his objections to said route are as follows: [*insert same*], and that the route to which it is proposed by him to alter the same is as follows: [*insert description*].

Wherefore your petitioner prays, that the court will, pursuant to section 41 of the Transportation Corporations Law of the State of New York, appoint three disinterested persons commissioners to examine the route located and the proposed alteration thereof, and direct the mode of proceeding, and that the court will make such order as it shall deem proper in relation to such alteration, and determine the location of such line, and grant such other or further relief as may be proper and agreeable to law.

Dated, ..., 19...

C. D.

STATE OF NEW YORK,
County of .....,
} *ss.:*

C. D., being duly sworn, deposes and says, that he is the petitioner named in the foregoing petition, that he has read the foregoing petition, by him subscribed, and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

C. D.

Sworn to before me, this
day of ....., 19...

[*Signature of Notary.*]

Form No. 391.

Order Appointing Commissioners to Examine Proposed Alteration of Pipe Line.

See Transportation Corporations Law, § 41, *ante*.

At a Special Term of the Supreme Court, held at ....., in the city [*or village*] of ....., on the ..... day of ....., 19...

Present: Hon. E. L. F., Justice.

IN THE MATTER

OF THE

APPLICATION OF C. D. FOR AN ALTERATION OF THE PIPE LINE ROUTE OF THE [*insert corporate name*] COMPANY.

On reading and filing the petition of C. D., dated ....., 19.., praying for the appointment of commissioners, pursuant to section 41 of the Transportation Corporations Law of the State of New York, to examine the route of pipe line located by the [*insert name*] Company and the proposed alteration thereof, together with notice of this application thereon at this time and place, with proof of due service on the said [*insert name*] Company and upon A. B. and ..... owners or occupants of lands to be affected by the alteration proposed by said petitioner, and on motion of G. H., counsel for said petitioner, and after hearing L. M., of counsel for the [*insert name*] Company, and P. Q., of counsel for A. B., it is hereby

Ordered, That T. R., N. L. and J. R., of ....., three disinterested persons, be and they are hereby appointed as commissioners to examine the route located for said pipe line by said [*insert name*] Company, and the proposed alteration thereof, and that said commissioners shall [*here direct the mode of proceeding**], and that said commissioners do report to the court the facts relating thereto and their opinion as to the proposed alteration, and what, if any, alteration should be made in such line.

* See the Transportation Corporations Law, § 41, *ante*.

Form No. 392.

Report of Commissioners Appointed to Examine Proposed Alteration of Pipe Line.

See Transportation Corporations Law, § 41, *ante*.

IN THE MATTER

OF THE

APPLICATION OF C. D. FOR AN ALTERATION OF THE PIPE LINE ROUTE OF THE [*insert corporate name*] COMPANY.

To the Supreme Court of the State of New York:

We, the undersigned, commissioners appointed in the above-entitled proceeding, by an order of said court, made at a special term thereof, at the ..... of ....., on the ..... day of ....., 19.., do hereby respectfully report as follows:

That [*report facts relating to examination of the route located and the proposed alteration thereof*].

That our opinion as to the proposed alteration is as follows, to wit:

And we do hereby further report that in our opinion the following alterations should be made in the route of said pipe line, namely: [*state alterations*].

All of which is respectfully submitted.

Dated, ..., 19...

[*Signatures of commissioners.*]

Form No. 393.

Order of Court upon Report of Commissioners Appointed to Examine an Alteration of Pipe Line Route.

See Transportation Corporations Law, § 41, *ante*.

At a Special Term of the Supreme Court, held at ..... in the city [*or village*] of ....., on the ..... day of ....., 19...

Present: Hon. D. C. H., *Justice*.

IN THE MATTER

OF THE

APPLICATION OF C. D. FOR AN ALTERATION OF THE PIPE LINE ROUTE OF THE [*insert corporate name*] COMPANY.

On reading and filing the report, dated ..... 19.., of ..... commissioners appointed in the above-entitled proceeding to report as to the alteration of the route of the pipe line of the [*insert corporate name*] Company, with notice of motion to confirm said report, and for the order of the court thereupon, with affidavit of due service of said notice upon ..... and ....., and upon motion of G. H., of counsel for C. D., and after hearing L. M., of counsel for the [*insert corporate name*] Company, and P. Q., of counsel for A. B., in opposition thereto, it is hereby

Ordered, That said report be and the same is hereby in all respects confirmed, and that the location of the route of said pipe line be and the same hereby is altered and determined as follows, to wit: [*Insert location*], and that the costs, fees and charges of the commissioners, above mentioned, are hereby fixed and adjusted at [*insert amount*], and that the costs and charges of the proceedings in this matter are hereby fixed and adjusted at [*insert amount*] dollars, and it is hereby directed that the amount of said costs, fees and charges of said commissioners and the amount of the costs and charges of this proceeding be paid by the said [*insert name*] Company, [*or by said A. B. as the case may be*] to said commissioners and to said C. D., respectively.

Form No. 394.

Petition of Pipe Line Corporation for Permission to Construct Its Line Across, Along or Upon a Highway, or Across or Upon a Bridge, or Into and Through the Streets of an Incorporated Village or City.

See Transportation Corporations Law, § 45.

To the Appellate Division of the Supreme Court of the .....
Judicial Department:

The petition of the [*insert name*] Company respectfully shows: That said company is a corporation, duly incorporated under article 6 of the Transportation Corporations Law of the State of New York for constructing and operating for public use lines of pipe for conveying or transporting therein petroleum [*or gas, or as the case may be*].

That it is necessary that the pipe line of your petitioner shall be constructed across [*along or upon*] the public highway known as the ....., located in the town of ....., in the county of ..... [*or across or upon the bridge known as the ....., located in the, etc., or into or through the village of ....., beginning at ..... and running, etc.*], as appears by the map of the route of said pipe line, filed ....., 19.., in the office of the clerk of ..... county, pursuant to said article 6 of the Transportation Corporations Law.

That your petitioner has applied to the commissioners of highways of the said town of ..... [*or has applied to the board of trustees of said village of ....., or to the common council of said city of .....*] for their consent to the construction of said pipe line across [*along or upon*] said highway [*or across or upon such bridge, or through said streets, in case of villages or cities*], upon such terms as might be agreed upon with said commissioners [*or said board of trustees, or as the case may be*]; but that such consent of said commissioners [*or board of trustees, etc.,*] cannot be obtained by your petitioner.

Your petitioner, therefore, prays that this court will grant an order, pursuant to said law, permitting the said corporation, your petitioner, to construct its line of pipe across, etc.

Dated, ..., 19...

THE [*insert corporate name*] COMPANY.

{Corporate seal} By [*signature*], *President.*

Attest:

....., *Secretary.*

[*Add verification as in form No. 326.*]

Form No. 395.

Notice of Motion by Pipe Line Corporation for Permission to Construct Its Line Across, Along or Upon a Highway, or Across or Upon a Bridge, or Into or Through an Incorporated Village or City.

See Transportation Corporations Law, §§ 44, 45 and 46, *ante*.

IN THE MATTER

OF THE

APPLICATION OF THE [*insert corporate name*] COMPANY FOR PERMISSION TO CONSTRUCT ITS PIPE LINE ACROSS, ETC., THE [*name the highway or bridge.*]

To ..... and ....., commissioners of highways of the town of ....., in the county of ..... [*or direct to the municipal authorities of village or city*].

Take notice that on the ..... day of ....., 19.., at an Appellate Division of the Supreme Court to be held at ....., in the village [*or city*] of ....., in the county of ....., at the opening of said court on that day, or as soon thereafter as counsel can be heard, an application will be made, pursuant to law, for an order permitting the [*insert corporate name*] Company, to construct its pipe line across [*along or upon*] the public highway known as the [*describing it*], and located in the town of ....., etc., [*or across or upon the bridge, etc., describing same*], upon such terms as the court may direct, and for such other or further relief as may be proper.

That said application will be made upon the petition of said [*insert name*] Company, a copy of which is hereto annexed.

Dated, ... 19...

Yours, etc.,

Attorney for the ..... Company.

Office address .....

Form No. 396.

Order of Court Permitting a Pipe Line to be Constructed Across, Along or upon a Highway, or Across or upon a Bridge, or into or Through the Streets of an Incorporated Village or City.

See Transportation Corporations Law, § 45.

At an Appellate Division of the Supreme Court, held at ..... in the village [*or city*] of ....., on the .... day of ....., 19.., in and for the ..... Judicial Department.

Present: Hon. ....., *Presiding Justice;* and Hons. ..... and ....., *Justices.*

IN THE MATTER

OF THE

APPLICATION OF THE [*insert corporate name*] COMPANY FOR PERMISSION TO CONSTRUCT ITS PIPE LINE ACROSS, ETC., THE [*name the highway, or bridge, or as the case may be*].

On reading and filing the petition of the [*insert corporate name*] Company, dated ....., 19.., praying [*state prayer of petition*], together with notice of motion and proof of due service thereof upon ..... and ....., and after hearing ....., of counsel for said petitioner, for the motion, and ....., of counsel for [*the commissioners of highways of the town of ..... or as the case may be*] in opposition thereto,

It is hereby ordered, that the said [*insert corporate name*] Company be and is hereby permitted to construct its pipe line across [*along or upon*] the public highway, known as [*describing it*], located in the town of ....., in the county of ....., [*or to construct its pipe line across or upon the bridge known as the (describing it), or into and through the following streets of, etc.,*], in the manner and upon the terms herein directed, as follows, to wit: [*Insert the manner and terms of such construction.*]

Form No. 397.

Monthly Statement by Pipe Line Corporation.

See Transportation Corporations Law, § 52, *ante.*

The [*insert corporate name*] Company hereby makes the following statement for the month of ....., 19.., pursuant to the provisions of section 52 of the Transportation Corporations Law of the State of New York, to wit:

The amount of all commodities received by said corporation during said month was [*insert amount.*]

The amount of all commodities delivered by said corporation during said month was [*insert amount.*]

The stock on hand of said corporation on the last day of said month was [*insert same*], of which stock [*insert amount*] is represented by outstanding certificates, vouchers, receipts or orders, and [*insert amount*] in credit balances on the books of said corporation.

Dated, ..., 19...

THE [*insert corporate name*] COMPANY.
By [*signature*], *President.*
[*signature*], *Secretary.*

STATE OF NEW YORK,
County of ....., } *ss.:*

..... and ....., being severally duly sworn, each for himself, deposes and says: That the said ..... is the president of the [*insert corporate name*] Company, and said ..... is the secretary thereof; that the foregoing statement subscribed by him is in all respects true and correct.

[*Signatures of President and Secretary.*]

Sworn to before me, this ....
day of ....., 19... }

[*Signature of Notary.*]

Form No. 398.

Certificate of Incorporation of a Gas or an Electric Light Corporation.

See Transportation Corporations Law, article 7, § 60, *ante.*

We, the undersigned, all being persons of full age, and at least two-thirds being citizens of the United States and one of us a resi-

dent of the State of New York, desiring to become a corporation for the purposes herein specified, pursuant to the provisions of the Transportation Corporations Law, article 7, do hereby certify:

First. The name of the corporation is to be [*insert corporate name*] Company.

Second. Its objects are to be: Manufacturing and supplying gas for lighting the streets and public and private buildings of [*here insert the name of any city or town, or cities and towns, in this State, in which the business of the company is to be carried on.*]

[* *Or, in case of an electric light corporation state as follows, to wit:*

Second. Its objects are to be: Manufacturing and using electricity for producing light, heat or power, and in lighting streets, avenues, public parks and places, and public and private buildings of cities, villages and towns within this State, as follows, to wit: (name places)].

Third. The amount of its capital stock is to be [*insert amount*] dollars.

Fourth. The term of its existence is to be [*insert the number of years, not exceeding fifty*].

Fifth. The number of shares of which the stock shall consist is to be [*insert number of shares*].

Sixth. The number of directors is to be [*insert the number definitely, but such number must not be less than three nor more than thirteen*].

Seventh. The names and places of residence of the directors who are to serve for the first year are as follows, viz.:

Names.	Places of Residence.
1.	.....
2.	.....
3.	.....

Eighth. The name of the town and county in which the operations of the corporation are to be carried on is [*insert name of town and county*].

* Or the corporation may be formed for both gas and electric lighting.

IN WITNESS WHEREOF, we have made, signed and acknowledged this certificate in duplicate, this ..... day of ..... ., 19...

[*Signatures of incorporators, at least three in number.*]

STATE OF NEW YORK, }
County of ....., } *ss.:*

On this ..... day of ....., 19.., before me personally came [*insert names of the persons signing certificate*], to me known and known to me to be the persons described in and who made and signed the foregoing certificate and severally duly acknowledged to me that they had made, signed and executed the same for the uses and purposes therein set forth.

[*Signature of Notary.*]

For amount of fees and organization tax to be paid upon filing and recording the certificates of incorporation, see the notes under Form No. 371.

Form No. 399.

Certificate of Incorporation of a Water-works Company.

See Transportation Corporations Law, art. 8, § 80, *ante.*

We, the undersigned, all being persons of full age, and at least two-thirds being citizens of the United States and one of us a resident of the State of New York, desiring to become a corporation for the purpose of supplying water to cities, towns or villages and the inhabitants thereof in this State, pursuant to the provisions of the Transportation Corporations Law, article 8, do hereby certify:

First. The name of the corporation is to be [*insert corporate name*] Company.

Second. The amount of its capital stock is to be [*insert amount*] dollars.

Third. The number of shares into which such capital stock is to be divided is [*insert number of shares*].

Fourth. The location of the principal business office of such corporation is to be [*insert the name of the city, village, or town, and the county*].

Fifth. The number of its directors is to be [*insert the definite number, but not less than seven*].

Sixth. The names and places of residence of the directors for the first year are as follows, viz.:

Names.	Places of Residence.
1.	.....
2.	.....
3.	.....
4.	.....
5.	.....
6.	.....
7.	.....

Seventh. The names of the city [*town or village, or cities, towns and villages, as the case may be*], which it is proposed to supply with water are [*insert names*].

Eighth. The permit of the authorities of such city [*town, or village, or cities, towns and villages, as the case may be*] has been granted, as more fully appears from such permit, which is annexed to this certificate and is hereby made a part thereof.

Ninth. The post-office address of each subscriber, and the number of shares he agrees to take in such corporation, the aggregate of which at least equals one-tenth of the capital stock, and ten percentum of which has been paid in cash to the directors, are:

Names.	Post-office address.	Number of shares subscribed.
A. B.....	.....	..... shares.
C. D.....	.....	..... shares.
E. F.....	.....	..... shares.
G. H.....	.....	..... shares.
I. J.....	.....	..... shares.
K. L.....	.....	..... shares.
M. N.....	.....	..... shares.

IN WITNESS WHEREOF, we have executed and acknowledged this certificate in duplicate.

Dated, this ..... day of ....., 19...

[*Signatures of incorporators, at least seven in number.*]

STATE OF NEW YORK, }
County of ....., } ss.:

On this ..... day of ....., 19.., before me personally came [*insert names*], to me known and known to me to be the persons described in and who made and signed the foregoing certificate, and severally duly acknowledged to me that they had made, signed and executed the same for the uses and purposes therein set forth.

[*Signature of Notary.*]

STATE OF NEW YORK, }
County of ....., } ss.:

[*Here insert the names of at least three of the directors*], being severally duly sworn, each for himself, deposes and says that he is a director named in the foregoing certificate of incorporation; that at least one-tenth of the capital stock mentioned in such certificate has been subscribed; that ten per cent. of such subscriptions has been paid in cash to the directors.

[*Signatures of the three directors making affidavit.*]

Severally sworn to before me, this }
..... day of ....., 19... }

[*Signature of Notary.*]

Form No. 400.

Permit Referred to in the Foregoing Certificate of Incorporation.

We, the undersigned, being a majority of the board of trustees of the incorporated village of ....., in the county of ..... [*or, being a majority of the officers holding the offices of supervisor, justice of the peace, town clerk and highway commissioners of the town of ....., in the county of .....; or, being the board of water commissioners of the city of ....., in the county of .....*], having received from [*insert names of the persons forming the corporation*] an application for a permit authorizing them to form a corporation for the purpose of supplying such village [*or town, or city, as the case may be*] with water, do hereby grant such permit, authorizing the formation of

such corporation for the purpose of supplying such village [*or town, or city*] with water.

IN WITNESS WHEREOF, we have signed and acknowledged this permit in duplicate this ..... day of ....., 19...

.....,

.....,

.....,

Majority of the Board of Trustees of said village.

[*Or,* A. B., *Supervisor.*

C. D., *Justice of the Peace.*

E. F., *Town Clerk.*

G. H.,

I. J., *Commissioners of Highways.*

Or,

A. B.,

C. D.,

E. F.,

Water Commissioners of said city.]

STATE OF NEW YORK,
County of .....,
} *ss.:*

On this ..... day of ....., 19.., before me personally came [*insert the names of subscribers to the permit*], to me known and known to me to be the persons described in and who made and signed the foregoing certificate and severally duly acknowledged to me that they had made, signed and executed the same for the uses and purposes therein set forth.

[*Signature of Notary.*]

For information as to the fees and organization tax to be paid upon filing and recording the certificates of incorporation, see the notes under Form No. 371.

Form No. 401.

Certificate of Incorporation of a Telegraph and Telephone Company.

See Transportation Corporations Law, § 100, *ante.*

We, the undersigned, all being persons of full age, and at least two-thirds being citizens of the United States and one of us a resident of the State of New York, desiring to become a corporation

for the purpose of constructing, owning, using and maintaining a line or lines of electric telegraph [*or telephone*] wholly within or partly beyond the limits of this State, pursuant to the provisions of article 9 of the Transportation Corporations Law, do hereby certify:

First. The name of the corporation is to be [*insert corporate name*] Company.

Second. The general route and the points to be connected are as follows, viz.: [*state route and points to be connected*].

Third. The amount of its capital stock is to be [*insert amount*] dollars.

Fourth. The number of shares into which such capital stock is to be divided is [*insert number of shares*].

Fifth. The term of existence of such corporation is to be [*insert term*] years.

Sixth. The number of its directors is to be [*insert the specific number, but not less than seven.*]

Seventh. The names and residences of the directors for the first year are as follows, viz.:

Names.	Places of Residence.
1.	.....
2.	.....
3.	.....
4.	.....
5.	.....
6.	.....
7.	.....

Eighth. The post-office address of the subscribers and the number of shares which each agrees to take in such corporation are as follows:

Names.	Post-office address.	Number of shares subscribed.
1.	.....	.....shares.
2.	.....	.....shares.
3.	.....	.....shares.
4.	.....	.....shares.
5.	.....	.....shares.
6.	.....	.....shares.
7.	.....	.....shares.

IN WITNESS WHEREOF, we have made, executed and acknowledged this certificate in duplicate this ..... day of ..... 19...

[*Signatures of incorporators, not less than seven in number.*]

STATE OF NEW YORK,
County of ....., } *ss.:*

On this ..... day of ....., 19.., before me personally came [*insert the names of the subscribers to the foregoing certificate*] to me known and known to me to be the persons described in and who made and signed the foregoing certificate and severally duly acknowledged to me that they had made, signed and executed the same for the uses and purposes therein set forth.

[*Signature of Notary.*]

For information as to the fees and organization tax to be paid upon filing and recording the certificates of incorporation, see notes under Form No. 371.

Form No. 402.

Certificate for Extension of Lines of a Telegraph or Telephone Company.

See Transportation Corporations Law, art. 9, § 101, *ante.*

We, the undersigned, being at least two-thirds of the directors of [*insert name*] Company, do hereby certify that the written consent of the persons owning at least two-thirds of the capital stock thereof having been procured, as appears by the affidavit of three of the directors annexed hereto, marked "Exhibit A," and which is hereby made part of this certificate, such corporation desires to construct, own, use and maintain a line of electric telegraph [*or telephone*], not described in its original certificate of incorporation [*or desires to join with another corporation in constructing, leasing, owning, using and maintaining such line; or to hold or own any interest therein; or to become lessees thereof, as the case may be.*]

That we do hereby, for such purpose, pursuant to the provisions of the Transportation Corporations Law, article 9, section 101, execute this amended certificate as follows, to wit:

[*Here insert all the recitals contained in the original certificate, including in the description of the route both the line or lines*

specified in the original certificate and the route of the proposed extension, and designating the extreme points connected thereby.]

IN WITNESS WHEREOF, we have executed and acknowledged this amended certificate in duplicate, and have hereunto set our hands, this ..... day of ..... 19...

[*Signatures of at least two-thirds of the directors.*]

STATE OF NEW YORK, }
County of ....., } *ss.:*

On this .... day of ....., 19.., before me personally came [*insert the names of the directors signing the certificate*], to me known and known to me to be the persons described in and who made and signed the foregoing amended certificate, and severally duly acknowledged to me that they had made, signed and executed the same for the uses and purposes therein set forth.

[*Signature of Notary.*]

"EXHIBIT A," REFERRED TO IN THE FOREGOING CERTIFICATE.

STATE OF NEW YORK, }
County of ....., } *ss.:*

[*Insert names of at least three directors*], being severally duly sworn, each for himself, deposes and says that he is a director of [*insert name of company*]; that the persons who have signed and executed the foregoing certificate constitute two-thirds of the directors of such company; that the written consent of persons owning at least two-thirds of the capital stock of such company has been obtained for the carrying out of the objects set forth in the annexed amended certificate.

[*Signatures of three directors.*]

Severally sworn to before me, }
this ... day of ... 19... }

[*Signature of Notary.*]

Upon filing and recording the foregoing certificate in the office of the Secretary of State the fees will be fifteen cents per folio. At the county clerk's office: Filing, six cents; recording, ten cents per folio.

Form No. 403.

Certificate of Incorporation of a Bridge Company.

See Transportation Corporations Law, art. 10, § 120, *ante.*

We, the undersigned, all being persons of full age, and at least two-thirds being citizens of the United States, and one of us a resident of the State of New York, desiring to become a corporation for the purpose of constructing, maintaining and owning a bridge [*or causeway, as the case may be*], pursuant to the provisions of the Transportation Corporations Law, article 10, do hereby certify:

First. The name of the corporation is to be [*insert corporate name*] Company.

Second. Its duration is to be [*insert here a definite number of years, not exceeding fifty*].

Third. The amount of its capital stock is to be [*insert amount*] dollars.

Fourth. The number of shares of its capital stock is to be [*insert number*].

Fifth. The number of its directors is to be [*insert number*].

Sixth. The names and post-office address of the directors for the first year are as follows, viz.:

Names.	Post-office addresses.
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....

Seventh. The location and plan of such bridge are as follows, viz.: [*insert location and plan*].

Eighth. The post-office address of each subscriber, and the number of shares of stock which he agrees to take in such corporation, are as follows:

Names.	Post-office address.	Number of shares subscribed.
.....	.....	.....shares.
.....	.....	.....shares.
.....	.....	.....shares.
.....	.....	.....shares.
.....	.....	.....shares.

IN WITNESS WHEREOF, we have signed and acknowledged this certificate in duplicate.

Dated, this ..... day of ....., 19...

[*Signatures of incorporators, at least five in number.*]

STATE OF NEW YORK,
County of ....., } *ss.:*

On this ..... day of ....., 19.., before me personally came [*insert names of subscribers to certificate*], to me known and known to me to be the persons described in and who made and signed the foregoing certificate, and severally duly acknowledged to me that they had made, signed and executed the same.

[*Signature of Notary.*]

STATE OF NEW YORK,
County of ....., } *ss.:*

[*Here insert the names of at least three directors*], being severally duly sworn, each for himself, deposes and says, that he is a director named in the foregoing certificate of incorporation; that the aggregate of the subscriptions to the capital stock is not less than one-fourth of the amount of the capital stock fixed and stated in such certificate, and that five per cent. of such subscriptions has been actually paid in cash.

[*Signatures of at least three directors.*]

Severally sworn to before me, this
..... day of ....., 19... }

[*Signature of Notary.*]

For information as to fees and organization tax to be paid upon filing and recording the certificates of incorporation, see notes under Form No. 371.

Form No. 404.

Certificate of Incorporation of a Turnpike (or Plank-road) Company.

See Transportation Corporations Law, art. 10, § 120, *ante.*

We, the undersigned, all being persons of full age, and at least two-thirds being citizens of the United States and one of us a resident of the State of New York, desiring to become a corporation

for the purpose of constructing, maintaining and owning a turnpike [*or plank-road, as the case may be*], pursuant to the provisions of the Transportation Corporations Law, article 10, section 120, do hereby certify:

First. The name of the corporation is to be [*insert the corporate name*] Company.

Second. Its duration is to be [*insert here a definite period of years, not exceeding fifty*].

Third. The amount and number of shares of its capital stock is to be [*insert amount*] dollars, consisting of [*insert number*] shares.

Fourth. The number of its directors is to be [*insert number*].

Fifth. The names and post-office address of the directors for the first year are as follows, viz.:

Names.	Post-office address.
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....

Sixth. The termini of the proposed road are [*state terminal points*].

Seventh. Its length is to be [*state length*].

Eighth. The name of each town, city or village into or through which such road is to pass is as follows [*insert names of places*].

Ninth. The post-office address of each subscriber, and the number of shares of stock which he agrees to take in such corporation are as follows:

Names.	Post-office address.	Number of shares subscribed.
.....	.....	.....shares.
.....	.....	.....shares.
.....	.....	.....shares.
.....	.....	.....shares.
.....	.....	.....shares.

IN WITNESS WHEREOF, we have made, signed and acknowledged this certificate in duplicate, this ..... day of ....., 19...

[*Signatures of incorporators, not less than five in number.*]

STATE OF NEW YORK, }
County of ....., } ss.:

On this ..... day of ....., 19.., before me personally came [*insert names of subscribers to certificate*] to me known and known to me to be the persons described in and who made and signed the foregoing certificate and severally duly acknowledged to me that they had made, signed and executed the same.

[*Signature of Notary.*]

STATE OF NEW YORK, }
County of ....., } ss.:

[*Here insert the names of at least three directors*] being severally duly sworn, each for himself, deposes and says, that he is a director named in the foregoing certificate of incorporation; that the aggregate of the subscriptions to the capital stock is at least five hundred dollars for every mile of road to be constructed, and that five per cent. of such subscriptions has been actually paid in cash.

[*Signatures of at least three directors.*]

Severally sworn to before me, this }
..... day of ....., 19... }

[*Signature of Notary.*]

For information as to fees and organization tax to be paid upon filing and recording the certificates of incorporation, see notes under Form No. 371.

Form No. 405.

Certificate of Extension of Corporate Existence of a Turnpike, Plank-road or Bridge Corporation.

See the Transportation Corporations Law, § 152, *ante*.

CERTIFICATE OF EXTENSION OF CORPORATE EXISTENCE OF THE ..... COMPANY.

We, the undersigned, being stockholders of the [*insert corporate name*] Company, a turnpike [*plank-road or bridge*] corporation, duly organized and existing under and by virtue of the laws of the State of New York, to wit: the Transportation Corporations Law, article 10, each owning the number of shares of the capital stock

of said corporation set opposite our respective signatures hereto, and together owning at least two-thirds of the capital stock of said corporation, to wit: [*insert number*] shares of the total of [*insert number*] shares, into which such capital stock is divided, do hereby, pursuant to the General Corporation Law, and also pursuant to the Transportation Corporations Law, section 152, consent that the corporate existence of said corporation be, and the same hereby is, extended for the term of [*insert term of extension*] years from the expiration of the time fixed in the certificate of incorporation of said corporation [*or from the expiration of the time fixed in a certificate of extension of corporate existence, filed in the office of the Secretary of State on the ..... day of ....., 19.., and being for the term of ..... years from the expiration of the period originally fixed in its certificate of incorporation for the duration of its corporate existence*].

IN WITNESS WHEREOF, we have hereunto signed our names and written opposite our respective signatures the number of shares of stock owned by each of us in said corporation.

Dated, ..., 19..

Signatures.	Number of Shares.
.....	.....
.....	.....
.....	.....

STATE OF NEW YORK,
County of ....., } *ss.:*

On this ..... day of ....., 19.., before me personally came [*insert names*], to me known and known to me to be the persons described in and who signed the foregoing certificate and severally duly acknowledged to me that they signed and executed the same.

[*Signature of Notary.*]

Form No. 406.

Resolution of Board of Supervisors.

Resolved, That this board, pursuant to the Transportation Corporations Law, particularly section 152, hereby gives its consent to an extension of the corporate existence of the [*insert corporate*

name] Company for the period of ..... years from the expiration of the time specified in the certificate of incorporation of said corporation [*or for the period of ..... years from the expiration of the time specified in the certificate of extension of its existence, filed in the office of the Secretary of State on the ..... day of* ....., 19...].

OFFICE OF THE CLERK OF THE BOARD OF SUPERVISORS OF ..... COUNTY } *ss.:*

I, [*insert name*], clerk of the board of supervisors of the county of ....., do hereby certify that the foregoing resolution was duly adopted by the board of supervisors of ..... county at a ..... meeting of said board, held at their rooms, in ....., in said county, on the ..... day of ....., 19..., a majority of said board being present.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of office of the said board of supervisors this ..... day of ....., 19...

[SEAL.] [*Signature*],
Clerk of the Board of Supervisors of ..... County.

Form No. 407.

Verified Statement to be Appended to the Foregoing Certificate.

We, the undersigned, the president and treasurer of the [*insert corporate name*] Company, a plank-road corporation [*or as the case may be*], make the following statement for the purpose of extending the corporate existence of said corporation, to wit:

That the actual capital expended upon the construction of the road of said corporation amounts to the sum of ..... dollars, exclusive of repairs.

That the name of each town or ward through or into which the road passes is [*insert same*].

That said road extends from the village [*or city*] of ....., in the town of ....., passing through the towns [*or wards of the city of .....*] of ....., in the county of .....,

and into the town [*or ward, etc.,*] of ....., in the county of ....., in which last-mentioned town [*or ward*] said road terminates.

That no part of such road has been abandoned [*or as the case may be*], and that the whole route mentioned in its articles of association [*or certificate of incorporation*] has been operated and maintained by said corporation.

IN WITNESS WHEREOF, we have subscribed our respective names hereto this ..... day of ....., 19...

[*Signature*] President.
[*Signature*] Treasurer.

STATE OF NEW YORK,
County of ....., } *ss.:*

[*Insert name*], being duly sworn, deposes and says, that he is the president of the [*insert corporate name*] Company, mentioned and described in the foregoing statement subscribed by him; that he signed such statement as president of said company, and that the same is in all respects true; that stockholders owning at least two-thirds of the capital stock of said corporation have duly signed and acknowledged a consent that the corporate existence of said corporation be extended for the period of ..... years; that such consent and a copy of the resolution of the board of supervisors of ..... county, giving its consent to such extension, duly certified by the clerk of such board, are annexed to this instrument.

[*Signature*] President.

Sworn to before me, this ..... day of ....., 19... }

[*Signature of Notary.*]

[*Attach a like affidavit of the Treasurer.*]

Form No. 408.

Certificate of Incorporation of a Steam Railroad Company.

See Railroad Law, § 2.

We, the undersigned, all being persons of full age, and at least two-thirds being citizens of the United States and one of us a resident of the State of New York, desiring to become a corpora-

tion under and by virtue of the provisions of the Railroad Law, for the purpose of building, maintaining and operating a railroad [*or of maintaining and operating a railroad already built, not owned by a railroad corporation, or for both purposes*], do hereby certify as follows:

First. The name of the corporation shall be [*insert name of company*].

Second. The number of years it is to continue shall be [*insert number of years*].

Third. The kind of road to be built and operated [*or operated*] shall be [*state character of road to be built. Examples given: a railroad of standard gauge, to be operated by locomotive steam power; or a steam railroad of narrow gauge, to wit: ..... feet and ..... inches*].

Fourth. Such railroad is to be built, maintained and operated [*or maintained and operated, if already built*] from the city [*or village*] of ..... to the city [*or village*] of ....., which places will be its termini, and its length will be ..... miles.

Fifth. The county [*or counties*] in which any part of it is to be located is [*or are*]:

Sixth. The amount of the capital stock shall be [*insert amount of capital stock*] dollars.

Seventh. The number of shares into which the capital stock is to be divided shall be [*insert number*] shares.

Eighth. [*If the capital stock is to consist of common and preferred stock, the amount of each class and the rights and privileges of the latter over the former should be inserted here.*]

Ninth. The names and post-office addresses of the directors of the corporation who shall manage its affairs for the first year are as follows, namely [*not less than nine*]:

Name.	Post-office address.
1. A. B.....	.....
2. C. D.....	.....
3. E. F.....	.....
4. G. H.....	.....
5. I. J.....	.....
6. K. L.....	.....
7. M. N.....	.....
8. P. Q.....	.....
9. R. S.....	.....

Tenth. The place where its principal office is to be located is the city [*or village*] of ....., county of ....., State of New York.

Eleventh. [*If it is to be a railway corporation, specified in article 6 of the Railroad Law, the statements required by section 226 of that article should be inserted here.*]

Twelfth. The name and post-office address of each subscriber to this certificate, and the number of shares of stock he agrees to take in such corporation are as follows:

Names.	Post-office address.	Number of shares subscribed.
1. A. B.....	.....	.... shares
2. C. D.....	.....	.... shares
3. E. F.....	.....	.... shares
4. G. H.....	.....	.... shares
5. I. J.....	.....	.... shares
6. K. L.....	.....	.... shares
7. M. N.....	.....	.... shares
8. P. Q.....	.....	.... shares
9. R. S.....	.....	.... shares
10. T. U.....	.....	.... shares
11. V. W.....	.....	.... shares
12. X. Y.....	.....	.... shares
13. X. B.....	.....	.... shares
14. Y. Z.....	.....	.... shares
15. N. O.....	.....	.... shares

IN WITNESS WHEREOF, we have executed and acknowledged this certificate in duplicate, and have subscribed our respective names hereto.

Dated, the ..... day of ....., 19...

[*Signatures of incorporators, not less than fifteen in number.*]

STATE OF NEW YORK, }
County of ..... } *ss.:*

On this ..... day of ....., 19.., before me personally came [*insert the names of the subscribers to the certificate*], to me known and known to me to be the persons described in and who executed the foregoing certificate, and severally duly acknowledged to me that they executed the same.

[*Signature of Notary.*]

STATE OF NEW YORK, }
County of ..... } ss.:

A. B., C. D., and E. F., being severally duly sworn, each for himself, deposes and says that he is a director named in the foregoing certificate of incorporation; that at least $1,000 of capital stock for every mile of road [*built, in case of a road already built*] proposed to be built has been subscribed thereto, and paid in good faith, and in cash, to the directors named in the certificate, and that it is intended in good faith to build, maintain and operate the road mentioned therein.

[*Signatures of three directors by whom the affidavit is made.*]

Severally sworn to before me, this }
..... day of ..... 19.. }

[*Signature of Notary.*]

Upon filing and recording the certificate of incorporation in the office of the Secretary of State, the fees to be paid are: Filing, twenty-five dollars; recording, fifteen cents per folio. Upon filing and recording a certified copy or duplicate original thereof in the office of the county clerk, the fees to be paid are: Filing, six cents; recording, ten cents per folio. In addition to such payments an organization tax of one-twentieth of one per cent. upon the amount of the capital stock must be paid to the State Treasurer. See the statutes regulating such payments, decisions and further information relative thereto, *ante*.

Form No. 409.

Certificate of Incorporation of a Street Surface Railroad Company.

See Railroad Law, § 5.

We, the undersigned, all being persons of full age, and at least two-thirds being citizens of the United States and one of us a resident of the State of New York, desiring to become a corporation, under and by virtue of the provisions of the Railroad Law, for the purpose of building, maintaining and operating a railroad, do hereby certify as follows:

First. [*Same as* "First" *in preceding form.*]

Second. [*Same as* "Second" *in preceding form.*]

Third. The kind of road to be built and operated [*or operated*] shall be a street surface railroad to be operated by horse power [*cable or electricity*].

Fourth. Such railroad is to be built, maintained and operated [*or maintained and operated, if already built*] from ..... in the city [*or village*] of ....., to ..... in the city [*or village*] of ....., which places will be its termini and its length will be ..... miles.

Fifth, Sixth, Seventh, Eighth, Ninth and Tenth. [*Proceed as in corresponding clauses of form No.* 408.]

Eleventh. The names and description of the streets, avenues and highways in which such railroad is to be constructed, are as follows: [*Insert route.*]

Twelfth. [*Same as* "Twelfth" *in preceding form.*]

IN WITNESS WHEREOF, we have executed and acknowledged this certificate in duplicate, and have subscribed our respective names hereto.

Dated, the ..... day of ....., 19...

[*Signatures of incorporators, not less than fifteen in number.*]

[*Add here the acknowledgment as in form No.* 408.]

[*Add also the affidavit of three directors as in form No.* 408.]

For information relative to payments to be made upon filing and recording the certificates of incorporation, see the notes to Form No. 408.

Form No. 410.

Supplemental Certificate Containing Names and Places of Residence of Directors, Omitted from Certificate of Incorporation of a Railroad Company.

See Railroad Law, § 6.

We, the undersigned, the subscribers to the certificate of incorporation of the [*insert corporate name*] Company, do hereby make and file this supplemental certificate, pursuant to the provisions of section three of the Railroad Law of the State of New York, and for that purpose do hereby certify as follows:

That the names and places of residence of the directors of the [*insert corporate name*] Company were omitted from the certificate of incorporation of said corporation when the same was executed and acknowledged.

That thereafter the requisite number of directors were chosen at a meeting of the subscribers to said certificate, held at ....., on the ..... day of ....., 19...

That at said meeting the persons whose names and places of residences are as follows were chosen as directors of said corporation, namely:

Names. Places of Residence.

[*Insert names and places of residence.*]

IN WITNESS WHEREOF, we have executed and acknowledged this certificate in duplicate.

Dated, the ..... day of ....., 19...

[*Signatures of subscribers.*]

[*Add here the acknowledgment as in form No.* 408.]

For information as to fees payable upon filing and recording the certificates, see notes to Form No. 383.

Form No. 411.

Notice to Occupant of Lands of Filing Map and Profile of Route.

See Railroad Law, § 16.

To [*name of occupant*]:

Take notice that a map and profile of the route adopted in the county of ..... by the ..... Railroad Company, duly certified by the president and engineer [*or a majority of the directors*] of said company, as provided by law, were filed in the office of the clerk of said county of ....., on the ..... day of ....., 19.., at ..... o'clock in the ..... noon, and that such route designated thereby passes over the lands occupied by you.

Dated, ..., 19...

Yours, etc.,

THE [*insert corporate name*] RAILROAD COMPANY.

By [*Signature*], *Secretary.*

Form No. 412.

Certificate to Map and Profile of Route to be Filed With County Clerks by Railroad Corporations.

See Railroad Law, § 16.

We, the undersigned, the president and engineer [*or a majority of the directors*] of the [*insert corporate name*] Company, do hereby certify that the foregoing [*or annexed*] is a correct map and profile of the route adopted in the county of ..... by the said ..... Company, filed pursuant to the provisions of section sixteen of the Railroad Law of the State of New York.

Dated, ..., 19...

Witness:

..... *President.*

..... *Engineer.*

[*Or*. .....,

.....,

.....,

Majority of Directors.

Form No. 413.

Petition by Owner or Occupant of Land for Change of Location of Route of a Railroad.

See Railroad Law, § 16.

SUPREME COURT, ... COUNTY.

IN THE MATTER

OF THE

APPLICATION OF ..... FOR APPOINTMENT OF COMMISSIONERS TO EXAMINE ROUTE OF THE [*insert corporate name*] RAILROAD COMPANY.

To the Hon. E. L. F., a Justice of the Supreme Court in the .....Judicial District:

The petition of [*insert name*] respectfully shows, that he is the occupant [*or owner, or both, as the case may be*], of certain pieces

or lots of land situate in the town of ....., county of ....., and State of New York. That on or about the ..... day of ....., 19.., the [*insert corporate name*] Company served upon your petitioner a written notice of the time and place of the filing of a map and profile designating the route of its road, and stating that such route passes over the lands of your petitioner, which lands are described as follows: [*Insert description.*] That such lands have not been purchased by or given to said railroad company.

Your petitioner further shows that he is aggrieved by the proposed location of said route, and that the petitioner's objections to such route and location are as follows: [*Insert same.*]

And your petitioner further shows, that the alteration of route proposed by him is as laid down upon the survey, map and profile annexed hereto, which said survey, map and profile show the route designated by said railroad company and the proposed alteration thereof.

Wherefore, your petitioner prays that your honor will appoint three disinterested persons, one of whom shall be a practical civil engineer, commissioners to examine the route proposed by said railroad company, and the route to which it is proposed to alter the same, and to adopt the proposed alteration, if found consistent with the just rights of all the parties and the public, including the owners or occupants of lands upon the proposed alteration, and that your honor will grant such other or further relief as may be proper and agreeable to law.

Dated, ..., 19...

[*Signature of petitioner.*]

[*Add verification by petitioner, as in form No.* 326.]

[*Annex map, survey and profile of routes.*]

Form No. 414.

Notice of Application for Appointment of Commissioners to Examine Route of Railroad Corporation.

See Railroad Law, § 16.

SUPREME COURT, ... COUNTY.

IN THE MATTER
OF THE
APPLICATION OF ..... FOR APPOINTMENT OF COMMISSIONERS TO EXAMINE ROUTE OF THE ..... RAILROAD COMPANY.

To the [*insert name*] Railroad Company, and [*insert names of owners or occupants of lands to be affected by the proposed alteration.*]

Take notice, that upon the petition, survey, map and profile, copies of which are hereto annexed, an application will be made to the Honorable E. L. F., a justice of the Supreme Court in the ..... judicial district at the chambers of said justice, in the city [*or village*] of ....., on the ..... day of ....., 19.., at ..... o'clock, in the ..... noon, for the appointment of commissioners, pursuant to law, to examine the route proposed by the said ..... Railroad Company, and the route to which it is proposed to alter the same, as set out in said petition, survey, map and profile, copies of which are herewith served upon you, and for such order thereupon as may be in accordance with law.

Dated, ..., 19...

Yours, etc.,
T. S. F.,
Attorney for Petitioner.
Office and P. O. address .....

Form No. 415.

Order Appointing Commissioners to Examine Route.

See Railroad Law, § 16.

[*Insert title as in preceding forms.*]

On reading and filing the verified petition of ..... dated ....., 19.., praying for the appointment of commissioners pursuant to section sixteen of the Railroad Law to examine the route of the road of the [*insert corporate name*] Company, and for such other relief as may be proper, with notice of this application and proof of the due service thereof together with a copy of said petition upon the said railroad company and upon ..... owners or occupants of lands to be affected by the alteration of route proposed by said petitioner, and on motion of ....., counsel for said petitioner, ... appearing for said railroad company, and ..... for said ..... it is hereby

Ordered, That A. B., a practical civil engineer of the city [*or village*] of ....., and C. D. and E. F. of ....., three disinterested persons, be and the same are hereby appointed commissioners to examine the proposed route of the [*insert corporate name*] Company, and the route to which it is proposed by the petitioner to alter the same, and after hearing the parties to affirm the route originally designated, or adopt the proposed alteration thereof, as may be consistent with the just rights of all the parties and the public, including the owners or occupants of lands upon the proposed alteration, and to make and certify their written determination thereupon in accordance with law.

Dated, ..., 19...

E. L. F.,
Justice of the Supreme Court.

Form No. 416.

Oath of Commissioners.

See Railroad Law, § 16.

SUPREME COURT, ... COUNTY.

[*Insert title as in form No.* 413.]

STATE OF NEW YORK,
County of ....., } *ss.:*

We, the undersigned, duly appointed commissioners to examine the proposed routes, respectively, of the petitioner and of the [*insert corporate name*] Company in the above-entitled proceeding, do solemnly swear that we will support the constitution of the United States and the constitution of the State of New York, and that we will faithfully perform the duties of such commissioners and of said office according to the best of our understanding and ability.

A. B.
C. D.
E. F.

Subscribed and sworn to before me, }
this ..... day of ....., 19.. }
[*Signature of Notary.*]

Form No. 417.

Determination of Commissioners Appointed to Examine Route.

See Railroad Law, § 16.

SUPREME COURT, ... COUNTY.

[*Insert title as in form No.* 413.]

We, the undersigned, appointed as commissioners in the above-entitled proceeding by an order made by Hon. E. L. F., a justice of the Supreme Court of the ..... judicial district, dated ....., 19.., do hereby make and certify our written determination, as follows, to wit:

That having, in conformity with the statute and in obedience to the terms of said order, examined the route proposed by the [*insert corporate name.*] Company, and the route to which it is proposed to alter the same, and after hearing the parties we do hereby affirm the route originally designated by said railroad company [*or do hereby adopt the proposed alteration of such route as set out in the petition of ....., and in the map and survey annexed hereto and marked "Exhibit A."*]

We do hereby determine that the said route shall be and hereby is located accordingly, and that said location is consistent with the rights of all the parties and the public [*including the owners or occupants of lands upon the proposed alteration.*]

That the testimony taken before us in this proceeding is annexed hereto, marked "Exhibit B."

IN WITNESS WHEREOF, we have made and signed this certificate this ..... day ....., 19...

[*Signatures of commissioners.*]

Form No. 418.

Notice of Appeal from Determination of Commissioners Appointed to Examine Route.

See Railroad Law, § 16.

SUPREME COURT, ... COUNTY.

[*Insert title as in form No. 413.*]

To ....., Esq., attorney for ....., and ....., Esq., the county clerk of ..... county:

Take notice, that [*insert name of appellant*] hereby appeals to the Appellate Division of the Supreme Court, from the decision and determination of the commissioners, made in the above-entitled proceeding and filed in the office of the clerk of ..... county on the ..... day of ....., 19..

Dated, ..., 19...

Yours, etc.,

M. N.,

Attorney for Appellant.

Office and P. O. address, ...

Form No. 419.

Order of Appellate Division Affirming or Reversing Determination of Commissioners Appointed to Examine Route.

See Railroad Law, § 16.

At a stated term of the Appellate Division of the Supreme Court in and for the ..... judicial department, held at ..... in the city of ....., on the ..... day of ....., 19...

Present: Hons. S. L. M., Presiding Justice, and D. C. H. and J. R. P., Justices.

[*Insert title of proceeding as in form No.* 413.]

The appeal of ....., in the above-entitled proceeding, from the determination of the commissioners appointed by order of ....., a justice of the Supreme Court in the ..... judicial department, dated ....., 19.., which determination was filed in the office of the clerk of ..... county, on the ..... day of ....., 19.., having been heard at this term, now, on motion of ....., counsel for ....., the appellant [*or respondent*], and after hearing ....., counsel for ....., the respondent [*or appellant*], it is hereby

Ordered, That the determination of said commissioners be and the same is hereby affirmed [*or, reversed, as the case may be*], and that the route of the road proposed by the said [*insert corporate name*] Railroad Company be and the same is hereby affirmed [*or, that the route of the road proposed by the petitioner, said* ....., *be and the same is hereby adopted*].

And it is further ordered, that ..... dollars [*the compensation and expenses of the commissioners herein and*] costs of this appeal and disbursements for printing be paid by ..... to .....

Form No. 420.

Certificate of a Railroad Company for a Change of Route.

See Railroad Law, § 24.

The [*insert corporate name*] Company, a domestic railroad corporation, by its president and secretary, who are duly authorized to

make this certificate, does hereby certify, pursuant to the Railroad Law, article 1, section 24:

That a meeting of the board of directors of such company was held at its office, at No. ..... street, in the city [*or village*] of ....., on the ..... day of ....., 19.., at ..... o'clock, P. M. [*or* A. M.], all of the directors being present [*or more than two-thirds of the directors being present, as the case may be*].

That at such meeting the following resolution was offered:

"*Resolved,* That [*insert corporate name*] Company, alter or change its route [*or a part of the route of its road or its termini, or locate such route, or a part thereof, or its termini in an adjoining county, as the case may be*] as follows, to wit:

[*Here insert the proposed alterations or changes in the route or termini of the road*], and further

"*Resolved,* That the president and secretary of the company be and they are hereby authorized to make and execute a proper certificate of such alteration or change of route and to file such certificate in the clerk's office of the proper county, together with a survey and map of such alteration or change."

That such resolution was duly adopted at said meeting by a vote of two-thirds of all the directors of said company.

IN WITNESS WHEREOF, we have made and executed this certificate, and have hereunto set our hands and affixed the corporate seal of said company this ..... day of ....., 19...

.....,
President.

.....,
Secretary.

[*Corporate Seal.*]

STATE OF NEW YORK,
County of ....., *ss.:*

[*Insert the name of secretary*], being duly sworn, deposes and says, that he is the secretary of said [*insert corporate name*] Company, mentioned in the foregoing certificate; that he is acquainted with [*insert name of the president*] and knows him to be the president of said company; that the signature of [*insert name of president*], subscribed to said certificate as president of said com-

pany, is in the genuine handwriting of said [*insert president's name*], and was thereto subscribed by order of the board of directors of said company; and the deponent subscribed his name thereto as secretary, as aforesaid, and attached the corporate seal by virtue of a like order of said board of directors.

. . . . . ,
Secretary.

Sworn to before me, this . . . . . }
day of . . . . . , 19. . . }
[*Signature of Notary.*]

The foregoing certificate is required to be filed in the county clerk's office, together with a survey and map of the alteration or change of route.

Form No. 421.

Certificate of Incorporation of a Railroad Company to Operate in a Foreign Country.

See Railroad Law, § 29.

CERTIFICATE OF INCORPORATION OF . . . . . RAILROAD COMPANY.

We, the undersigned, all being persons of full age, at least two-thirds of whom are citizens of the United States and one of us a resident of the State of New York, desiring to become and form a corporation, pursuant to section 29 of the Railroad Law, for the purpose of constructing, maintaining and operating in a foreign country, to wit: [*Insert name of country*] a railroad [*or, for the purpose of maintaining and operating in a foreign country, to wit:* . . . . . , *a railroad already constructed*] for public use in the transportation of persons and property, and of constructing, maintaining and operating, in connection therewith, telegraph lines and lines of steamboats or sailing vessels, do hereby make, acknowledge and file this certificate, and certify as follows, to wit:

First. The name of the corporation is to be [*insert corporate name*] Company.

[*Continue as in form No.* 408.]

Form No. 422.

Agreement for Consolidation of Railroad Corporations.

See Railroad Law, §§ 140, 141.

This joint agreement, made the ..... day of ....., 19.., between the directors of [*insert corporate name*] Company, party of the first part, and the directors of [*insert corporate name*] Company, party of the second part, under the corporate seals of said companies,

WITNESSETH: That the [*insert corporate name*] Company, said party of the first part, the capital stock whereof is $....., is a railroad corporation organized under the laws of the State of New York, and operating a railroad wholly within said State [*or partly within the State of New York and partly within the State of ....., or whose lines or routes of road have been located, but not constructed, as the case may be.*]

That [*insert corporate name*] Company, said party of the second part, the capital stock whereof is $....., is a railroad corporation organized under the laws of the State of New York [*or under the laws of the State of .....*], and operating a railroad wholly within the State of New York [*or within the State of ....., or as the case may be*].

That the railroads of said companies [*or branches, or parts thereof, or the line or routes of their roads, if not constructed*] form [*or shall or may*] form a continuous or connected line of railroad with each other [*or by means of an intervening railroad bridge, tunnel or ferry*].

That, in consideration of the mutual covenants and agreements herein contained, the said parties hereto do hereby merge and consolidate the capital stock, franchises and property of said parties hereto so as to form one corporation under and in pursuance of the laws of the State of New York, in such case made and provided, and by these presents,

They do hereby covenant and agree upon and prescribe the terms and conditions of such consolidation, and the mode of carrying the same into effect, which said terms and conditions and mode of carrying the same into effect, they mutually covenant and agree to observe, as follows, to wit:

First. That the name of the corporation hereby formed by said consolidation shall be [*insert corporate name*] Company.

Second. That the number of directors of said new corporation, hereby formed, shall be ..... [*state number, not less than nine*].

Third. That the names and places of residence of the [*insert number*] directors and the other officers of said new corporation, who shall be the first directors and officers thereof, and shall manage its affairs for the first year, or until others are chosen in their places, are as follows, to wit:

Names of directors.	Residences.
1.	.....
2.	.....
3.	.....
4.	.....
5.	.....
6.	.....
7.	.....
8.	.....
9.	.....

Officers.	Names.	Residences.
President	.....	.....
Vice-President....	.....	.....
Treasurer.....	.....	.....
Secretary.....	.....	.....

Fourth. That the capital stock of said new corporation shall be ..... dollars, consisting of ..... shares of the par value of ..... dollars each.*

Fifth. That the manner of converting the capital stock of each of the companies, parties hereto, into the capital stock of said new corporation shall be as follows:

[*Example given: The capital stock of each of the railroad companies, parties hereto, shall be convertible into the capital stock of said consolidated company and new corporation, share for share, and upon presentation and surrender of any outstanding certificates of stock in either of said companies, parties hereto, certificates for like amounts of stock in said consolidated company and new corporation shall be issued to the holders thereof.*]

* In no case shall the capital stock of the corporation formed by such consolidation exceed the sum of the capital stock of the corporations so consolidated, at the par value thereof.

Sixth. That time and manner of choosing directors and officers shall be as follows: [*Example given: That there shall be an election for directors of the said new corporation on the ..... day of ....., in the year* 19.., *and there shall be an annual election for directors of said new corporation on the ..... day of ..... in each and every year thereafter. That the said directors shall be chosen by a majority of the votes of the stockholders voting at such election, in such manner as may be prescribed by the by-laws of the said consolidated company, and they shall continue to be directors of such consolidated company for one year from the date of their election and until others are chosen and qualified in their places. In such election each stockholder shall be entitled to one vote, either in person or by proxy, for each share of stock held by such stockholder for ten days previous to such election. Vacancies occurring in the board of directors shall be filled in such manner as shall be prescribed by the by-laws of the said consolidated company. The president, vice-president, treasurer and secretary shall be chosen by ballot by the directors immediately succeeding the annual election of directors, and vacancies shall be filled as provided in the by-laws of said consolidated company. The directors of the said new corporation may, from time to time, choose or appoint such other officers as they deem advisable.*]

And the parties hereto do further covenant and agree as follows, to wit:

[*Insert any special terms and conditions agreed upon, and mode of carrying the same into effect.*]

IN TESTIMONY WHEREOF, the said parties of the first and second parts have executed this agreement in duplicate, and have hereunto set their respective signatures and have caused to be hereto affixed the corporate seals of their respective railroads, of which they are respectively the directors, the day and year first aforesaid.

{ Corporate seal }

.....,
.....,
.....,
.....,
.....,
.....,

Directors of the ..... *Company.*

Attest: ....., *President.*

....., *Secretary.*

. . . . . ,
. . . . . ,
. . . . . .
{ Corporate seal } . . . . . ,
. . . . . ,
. . . . . ,
Directors of the . . . . . *Company.*
. . . . . *President.*

Attest:

. . . . . *Secretary.*

STATE OF NEW YORK, }
County of . . . . . , } *ss.:*

On the . . . . . day of . . . . . , in the year . . . . . , before me personally came . . . . . , to me known, who, being by me duly sworn, did depose and say that he resides in . . . . . ; that he is the [*president or other officer*] of the [*name of corporation*], the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

. . . . . ,
Notary Public,
. . . . . *County, N. Y.*

If such corporation have no seal, that fact must be stated in place of the statements required respecting the seal.

[*Prepare in the same form as above proof of execution by the secretary of the other constituent company, and annex the same.*]

STATE OF NEW YORK, }
County of . . . . . , } *ss.:*

On this . . . . . day of . . . . . , 19. . , before me personally came [*insert names of directors of first constituent company signing agreement*], directors of [*insert corporate name*], to me known and known to me to be the persons described in and who severally executed the foregoing agreement and severally acknowledged to me that they executed the same.

[*Signature of Notary.*]

[*Prepare in the same form as above acknowledgment by directors of the other constituent company, and annex the same.*]

In case stockholders owning two-thirds of all the stock of each of the consolidating corporations shall sign a consent in writing signifying their assent to the consolidation, such consent of each constituent corporation must be appended to the agreement in the following form:

Form No. 423.

Written Consent of Stockholders to be Annexed to Agreement for Consolidation.

We, the undersigned, stockholders of the [*insert corporate name*] Company, owning two-thirds of all its stock, do hereby sign this consent, signifying our assent to the within and annexed agreement of consolidation of said corporation with the [*insert corporate name*] Company.

IN WITNESS WHEREOF, we have subscribed our names to this consent and set opposite our respective signatures hereto the number of shares of stock owned by each of us in said company.

Dated, this ..... day of ....., 19...

.... shares.
.... shares.
.... shares.

[*Attach acknowledgment of persons signing the consent, and the affidavit of the custodian of the stock book as in form No. 299.*]

If the consent in writing of stockholders owning two-thirds of the stock is not obtained, such consent must be secured at a special meeting, and certificates to that effect must be annexed to the agreement in the following form:

Form No. 424.

Certificate of Adoption of Agreement for Consolidation of Railroad Corporation.

(To be attached to agreement of consolidation in lieu of written consent, when the latter is not obtained.)

I [*insert secretary's name*], secretary of [*insert corporate name of first-mentioned constituent company*], a corporation duly organized and existing under the laws of the State of New York, do hereby certify under the corporate seal of said company: That the annexed agreement bearing date the ..... day of ....., 19.., for the consolidation of the said [*insert name of first-men-*

tioned constituent company] with [*insert name of other constituent company*] under the name of [*insert name of the new corporation*] Company, as the corporate name of such new corporation, was submitted to the stockholders of said [*insert name of first-mentioned constituent company*], at a special meeting of such stockholders called and held at the office of [*insert place of meeting*], number ..... street, in the city [*or village*] of ..... in the county of ..... and State of New York, on the ..... day of ....., 19.., for the purpose of taking the same into consideration; that due notice of the time and place of holding such meeting, and the object thereof, was given by the said [*insert name of first-mentioned constituent company*] to its stockholders by written or printed notices addressed to each of the persons in whose name the capital stock of such corporation at the time of giving such notice, stood on the books thereof, and that such notice was delivered to such persons respectively, or sent to them by mail, postage prepaid, when their post-office addresses were known to said corporation, at least thirty days before the time of holding such meeting, and that a general notice of the time and place and object of such meeting was published at least once a week for four weeks successively in [*insert name of newspaper*], being a newspaper published and printed in the city of [*or town or county of*] ....., in which said [*insert corporate name*] Company has its principal office or place of business. That at such meeting of said stockholders the aforesaid annexed agreement was considered and a vote taken by ballot for the adoption or rejection of the same, in pursuance of and in conformity with the provisions of the statutes in such case made and provided, and said ballots were cast in person or by proxy, and that upon said ballots, votes of the stockholders owning at least two-thirds of all the stock of said corporation were cast for the adoption of said agreement for consolidation, there having been cast for such adoption the votes of [*insert number*] shares and that said [*insert number*] shares constitute more than two-thirds of all the stock of said corporation. That such agreement for consolidation was thereupon declared duly adopted.

IN WITNESS WHEREOF, I [*insert secretary's name*] the said secretary of [*insert name of first-mentioned constituent company*], have hereunto certified the above facts upon the said agreement

for consolidation, and hereunto set my hand and affixed the corporate seal of said [*insert name of first-mentioned constituent company*], this ..... day of ....., 19...

..... , *Secretary,*

{Corporate seal} ..... Company.

STATE OF NEW YORK, }
County of ....., } *ss.:*

On this ..... day of ....., 19.., before me the undersigned, a notary public in and for said county, personally appeared [*insert name of secretary*], to me known and known to me to be the same person who signed the foregoing certificate as secretary of [*insert corporate name*] Company, and known to me to be such secretary, who, being by me duly sworn, did depose and say, that he is the secretary of said [*insert corporate name*] Company, and knows the corporate seal thereof, and that the seal affixed to the said certificate is such corporate seal, and was so affixed by order of the board of directors of said company, and that he signed his name thereto by the like order.

IN WITNESS WHEREOF, I have hereunto set my hand the day and year above set forth.

[*Signature of Notary.*]

[*Prepare in the same form as above the certificate of the secretary of the other constituent company, and annex the same.*]

Upon filing and recording the agreement of consolidation of railroad corporations in the office of the Secretary of State the fees are as follows: Filing, twenty-five dollars; recording, fifteen cents per folio. In the county clerk's office the fees are: Filing, six cents; recording, ten cents per folio. No organization tax is payable to the State Treasurer; see Organization Tax Act and decisions thereunder, *ante*.

Form No. 425.

Notice of Meeting of Stockholders of Railroad Corporation to Consider Lease of Road.

See Railroad Law, § 148.

To the stockholders of the [*insert corporate name*]:

Notice is hereby given that a meeting of the stockholders of the [*insert corporate name*] Company will be held at ....., in

the city [*or village*] of ....., in the county of ....., and that the object of such meeting is to consider a lease of the railroad owned [*or operated*] by said company to the [*insert corporate name*] Company for the term of ..... years.

Dated, ..., 19...

....., *Secretary.*

Form No. 426.

Certificate of the Adoption of a Lease of a Railroad.

See Railroad Law, § 148.

I, [*insert name*], secretary of the [*insert corporate name*] Company, do hereby certify, as follows, to wit:

That a meeting of the stockholders of the [*insert corporate name*] Company, one of the parties to the foregoing contract or lease, was duly held at the office of the company, No. ..... street, in the city of ....., on the ..... day of ....., 19.., at ..... o'clock in the ..... noon, for the purpose of approving of said contract or lease.

That notice of the time, place and object of said meeting was duly served, at least thirty days previously, upon each stockholder of the said [*insert corporate name*], personally or mailed to him at his post-office address; and such notice was also published at least once a week for four weeks successively in the ....., a newspaper printed in the city of ....., where the said [*insert corporate name*] Company has its principal office.

That at the said meeting, by a vote of the stockholders owning more than two-thirds of the entire capital stock of the said [*insert corporate name*] Company, duly voting in person or by proxy, the foregoing contract or lease was duly approved.

IN WITNESS WHEREOF, I have hereunto set my hand as such secretary, and affixed hereto the corporate seal of the said [*insert corporate name*] Company, this ..... day of ....., 19...

[*Signature.*]

{Corporate seal} *Secretary.*

Form No. 427.

Record of Proceedings of Meeting of the Stockholders of a Railroad Corporation for the Adoption of a Lease, to be Entered in the Book of Minutes.

See Railroad Law, § 148.

....., N. Y., ..., 19...

A special meeting of the stockholders of the [*insert corporate name*] Company was held this day at ..... o'clock, ... M., pursuant to due notice, served at least thirty days previously upon each stockholder personally, or mailed to him at his post-office address and also published at least once a week for four weeks successively in [*insert name of paper*], a newspaper printed in the city of ....., where such corporation has its principal office, of which notice the following is a true copy, to wit:

[*Insert copy of notice as given in form No.* 425.]

Stockholders owning at least two-thirds of the stock of the corporation appeared in person or by proxy, and organized by choosing from their number ....., as chairman, and ....., as secretary.

A certain contract or lease [*describing it*] was read by the secretary of the meeting.

The following resolution was then offered:

"*Resolved,* That a certain contract or lease [*describing it*] be and the same is hereby in all respects approved."

Upon a vote of those present in person or by proxy upon such resolution, stockholders owning ..... shares of stock, being at least two-thirds of the stock of the company, voted in favor of the adoption of such resolution, and stockholders owning ..... shares of stock voted against its adoption [*or, and no stockholder voted against its adoption, as the case may be*].

Such resolution was thereupon declared duly adopted, and said contract or lease approved, and the meeting then adjourned.

.....,

Secretary.

Form No. 428.

Consent of Property Owner to Construction of Street Surface Railroad.

See Railroad Law, § 171, *ante*.

I, the undersigned, owner of property in the city [*or village*] of ....., fronting on the portion of ..... street, situated between ..... and .....streets, do hereby consent to the construction and operation of a street surface railroad by the [*insert corporate name*] Company through and along said ..... street, in said city [*or village*], and to the construction by said company of such switches, sidings and turnouts as may be necessary for the convenient working of such road, and that said company may operate said road by means and power of electricity, and may erect poles and string wires on said street for that purpose.

Dated, ..., 19...

[*Signature of property owner.*]

[*Attach acknowledgment.*]

Form No. 429.

Consent to Use of Electricity by Existing Street Surface Railroad.

See Railroad Law, § 171, *ante*.

I, the undersigned, owner of property in the city [*or village*] of ....., fronting on the portion of ..... street, situated between ..... and ..... streets, along which portion of said ..... street the [*insert corporate name*] now operates by animal power a street surface railroad, do hereby consent that said company may operate said railroad by the means or power of electricity, and may erect poles and string wires for that purpose.

Dated, ..., 19...

[*Signature of property owner.*]

[*Attach acknowledgment.*]

Form No. 430.

Notice of Application to Local Authorities for Consent to Construct and Operate a Street Surface Railroad.

See Railroad Law, § 172.

Public notice is hereby given, pursuant to the directions contained in a resolution duly adopted on the ..... day of ....., 19.., by the common council [*or board of trustees*] of....., and approved by the mayor [*or as the case may be*] on the ....., 19.., that an application in writing has been made to the common council of said city of ..... [*or board of trustees, etc.*], by the [*insert corporate name*] Company for permission to construct, maintain, use and operate a street surface railroad for public use in, through, upon and along the surface of streets, avenues and highways, as follows: [*insert same.*]

Notice is, therefore, hereby given that the common council of the city of ..... [*or board of trustees, etc.*] will convene at ....., in said city [*or village*] on the ..... day of ....., 19.., at ..... o'clock, .. M. of that day, at which time and place the aforesaid application will first be considered by the said common council [*or board of trustees*], and all persons who desire may be heard relative thereto.

Dated, ... 19...

.....

City Clerk, etc.

Form No. 431.

Application to Local Authorities for Consent to Construct and Operate a Street Surface Railroad.

See Railroad Law, § 172.

To the Honorable the Common Council of the city of .....

[*or the Board of Trustees of the Village of* .....]:

The petition of the [*insert corporate name*] Company respectfully shows:

That your petitioner is a street surface railroad corporation, duly organized and existing under and in pursuance of an act of the Legislature of the State of New York, entitled the Railroad Law [*or as the case may be*].

That the said corporation proposes to build, construct, maintain and operate a street surface railroad for public use in the conveyance of persons and property in cars for compensation in the city [*or village*] of ....., in the county of ....., upon and along the surface of the following streets, avenues and highways in the city [*or village*] of ....., to wit: Beginning at, etc. [*describing route*].

That the railroad proposed to be built, constructed, maintained and operated by your petitioner, as hereinbefore set forth, is intended to be operated by any motive power, other than locomotive steam power, which now or at any time hereafter may lawfully be used and employed on its route.

Your petitioner further shows that, pursuant to the laws of this State, it is necessary for it to obtain the consent of the common council of the city [*or the board of trustees of the village*] of ..... to enable it to construct, maintain and operate the railroad aforesaid, and accordingly your petitioner now applies to your honorable body for such consent.

Wherefore, your petitioner prays and makes application to the common council of the city of ..... [*or as the case may be*] for its consent and permission to be granted to your petitioner, its successor, successors, lessees and assigns, to construct, maintain and operate a street surface railroad for public use, through, upon and along the avenues, streets and highways above set forth and described, together with all necessary connections, switches, sidings, turnouts, turn-tables, cross-overs and suitable stands for the convenient working of said railroad, and for the accommodation of the company's cars which may be run over said railroad by your petitioner, its successors, lessees or assigns; and also that consent and permission be granted to your petitioner, its successors, lessees or assigns to the erection upon said streets, avenues and highways of the necessary poles and the stringing of wires, so that the cars of said company may be moved by means or power of electricity.

Dated, ..., 19...

THE ..... COMPANY,

By ....., President.

[*Attach proof of execution.*]

Form No. 432.

Consent by Local Authorities to the Construction and Operation of Street Surface Railroad.

See Railroad Law, § 172.

Whereas, The [*insert corporate name*] Company, a street surface railroad corporation, has made application by petition in writing to the common council [*or board of trustees, or as the case may be*] of the city [*or village, or town*] of ....., in the county of ....., for consent to construct, maintain and operate a railroad [*or extensions, or branches thereof, as the case may be*], upon the surface of, through and along certain streets and avenues [*roads or highways*] of the said city [*or village*], as follows, to wit: [*Insert the same*], and for consent to construct such switches, sidings, turnouts and turn-tables and suitable stands as may be necessary for the convenient working of such railroad; and,

Whereas, The said common council [*or board of trustees*], before acting upon such application, gave public notice thereof, and of the time and place when such application would first be considered, which notice was published daily in said city, pursuant to law, for at least fourteen days in the ..... and the ....., two daily newspapers in said city [*or, as the case may be, showing a compliance with section* 172 *of the Railroad Law*]; and,

Whereas, At the time and place named in said notice the said application was duly considered and the said railroad company and the persons appearing at said time and place were heard in relation to said application; and

Whereas, Said common council [*or board of trustees, etc.*], has determined that consent shall be given to the construction, maintenance and operation of said railroad [*or extensions, or branches*], and of such switches, sidings, turnouts and turn-tables and suitable stands, as may be necessary for the convenient working of said railroad; therefore, be it

Resolved, That said consent be and the same hereby is given, pursuant to law, to the said [*insert corporate name*] to construct, maintain and operate a railroad [*or extensions, or branches*] upon the surface of, through and along the following streets and avenues [*or roads, or highways*] of said city [*or village*], to wit: [*Insert*

the route], and consent is also hereby given to said company to construct upon said streets and avenues such switches, turnouts and turn-tables and suitable stands as may be necessary for the convenient working of said railroad; further

Resolved, That the foregoing consent is given upon the following expressed condition [*or conditions*], to wit:

That the provisions of article 5 of the Railroad Law pertinent thereto shall be complied with.

That this consent shall be filed in the office of the clerk of the county of [*insert name of county in which the railroad is located*].

That [*If the case is within the provisions of section* 173 *of the Railroad Law, insert the conditions therein required, or any other conditions determined upon*].

Form No. 433.

Statement of Extension of Route of Street Railroad. (Short Form.)

See Railroad Law, § 170.

[This is the form followed by two of the large street railway systems in New York city.]

The [*insert corporate name*] Company, a street surface railroad corporation organized and existing under the laws of the State of New York, proposes to extend its road and to construct a branch or extension thereof, and it hereby states the names and description of the streets, roads and highways in, along or upon which it proposes to construct, maintain and operate such branch or extension, viz.:

[*Insert description of extension.*]

The length of said proposed branch or extension will be [*state length*].

Dated, ..., 19...

[*Name of Corporation.*]

By .....,

President [*or Vice-President*].

{Corporate seal}

Attest:

....., *Secretary.*

STATE OF NEW YORK,
County of ....., ss.:

On the ..... day of ....., in the year ....., before me personally came ....., to me known, who, being by me duly sworn, did depose and say that he resides in ..... ; that he is the [*president or other officer*] of the [*name of corporation*], the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

[*Signature and office of officer taking acknowledgment.*]

Form No. 434.

Statement of Extension of Route of Street Railroad. (Long Form.)

See Railroad Law, § 170.

The [*insert corporate name*] Company, a street surface railroad corporation organized and existing under the laws of the State of New York, by its president, who is duly authorized to make this statement, hereby certifies, pursuant to section 170 of the Railroad Law, as follows:

That upon due notice thereof a meeting of the board of directors of such corporation was duly held at ....., in the city [*or village*] of ....., on the ..... day of ....., 19.., at ..... o'clock, P. M., at which a quorum of directors was present.

That at such meeting the following resolution was adopted:

"*Resolved,* That this corporation extend the route of its road by constructing a branch or extension thereof, and that the names and description of the streets, roads, avenues, highways [*and private property*] in or upon which it is proposed to construct, maintain or operate such extension or branch are as follows:

[*Insert description of extension.*]

"*Resolved further,* That the president of this corporation be and he is hereby authorized to make and sign, in duplicate, a proper statement of such extension of route or branch, and to affix the corporate seal thereto, and to file said statement in the office of the

Secretary of State, and a duplicate thereof in the office of the clerk of the county of ....., in the State of New York."

IN WITNESS WHEREOF, this statement has been made and executed in duplicate, and the corporate seal of said corporation affixed thereto, this ..... day of ....., 19...

[*Name of Corporation.*]

{Corporate seal} By .....,

President.

[*Attach here proof of execution as in form No.* 433.]

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* Form No. 435.

Statement and Designation by a Foreign Stock Corporation Under the General Corporation Law, Section 16.

See the General Corporation Law, §§ 15 and 16.

Pursuant to the provisions of section 16 of the General Corporation Law of the State of New York, the [*insert corporate name*] Company, a stock corporation, organized and existing under and by virtue of the laws of the State of ..... [*or Kingdom of, as the case may be*] does hereby make a statement and designation under its corporate seal, to be filed with the annexed sworn copy of its charter or certificate of incorporation, as follows, to wit:

First. That the business or objects of the said corporation which it is engaged in carrying on (or which it proposes to carry on), within the State of New York, is (or are) as follows: [*State business or objects.*]

Second. That the place within the State of New York which is to be its principal place of business is [*insert location*].

---

* Unless the corporate name begins with the word "Corporation," as for instance, "Corporation of John Smith," or terminates with the word "Corporation," upon making application to the secretary of state for a certificate of authority a corporation must agree to use with its corporate name, in this state, the affix "Inc." or "Incorporated," pursuant to Gen. Corp. L., § 6.

It is suggested that a clause be inserted in the application substantially as follows:

That the said corporation will use and hereby agrees to use with its corporate name in the State of New York the affix "Inc." [*or "Incorporated"*], so that the name will appear as "[*insert corporate name*], Inc."

Third. That said corporation hereby designates [*insert name of person*] as a person upon whom a summons may be served within the State of New York, or any process or other paper, whereby a special proceeding is commenced in a court, or before an officer, except a proceeding to punish for contempt, and except where special provision for the service thereof is otherwise made by law.

Fourth. That said [*insert name of person*], so designated, has an office or place of business at No. ..... street, in the city [*or village*] of .....,* the place where said corporation is to have its principal place of business within the State of New York.†

Fifth. That the written consent of said [*insert name*] to such designation, duly signed and acknowledged, is hereunto annexed

Sixth. That a sworn copy of the charter [*or certificate of incorporation*] of said incorporation is hereunto annexed.

IN WITNESS WHEREOF, the [*insert corporate name*] Company, the corporation hereinbefore mentioned and described, has caused this instrument to be executed by its president [*or vice-president, or other acting head*], and has caused its corporate seal to be hereunto affixed this ..... day of ....., 19...

THE [*insert corporate name*] COMPANY,

By [*signature*] *President* [*or vice-president, or title of other acting head of corporation*].

{Corporate seal}

STATE OF .....,
County of .....,} *ss.:*

On the ..... day of ..... in the year 19.., before me personally came ....., to me known, who, being duly sworn, did depose and say that he resides in .....; that he is the [*president or other officer*] of the [*name of corporation*], the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

[*Signature and office of officer taking acknowledgment.*]

* If it is within the city, the street and street number, if any, or other suitable designation of the particular locality should be stated.

† The person so designated must have an office or place of business at the place where such corporation is to have its principal place of business within the State.

Consent to be Attached to Foregoing Certificate.

I, [*insert name*], the person designated in the foregoing instrument as a person upon whom a summons or any process, as therein mentioned, against the [*insert name of corporation*] may be served within the State of New York, do hereby consent to such designation.

IN WITNESS WHEREOF, I have hereunto set my hand this ..... day of ....., 19...

[*Signature.*]

STATE OF NEW YORK,
County of ....., } *ss.:*

On this ..... day of ....., 19.., before me personally came ....., to me known and known to me to be the person described in and who signed the foregoing consent, and he acknowledged to me that he signed and executed the same.

..... *Notary Public,*
..... *County, N. Y.*

Sworn Copy of Charter or Certificate of Incorporation to be Attached to Foregoing Certificate.

[*Here append copy of the charter or certificate of incorporation.*]

Oath to be Annexed to Copy of Charter or Certificate of Incorporation.

STATE OF .....,
County of .....,} *ss.:*

[*Insert name*], being duly sworn, deposes and says, that he is the secretary [*or other officer*] of [*insert name of corporation*] Company, a corporation organized under the laws of the State of .....; that the foregoing is a true copy of the charter [*or certificate of incorporation*] of said corporation, and of the whole thereof.

[*Signature.*]

Sworn to before me, this .....
day of ....., 19... }

[*Signature of Notary.*]

The foregoing papers should be attached so as to constitute one complete instrument, and filed with the Secretary of State, who will thereupon issue the certificate of authority.

The fees at the office of the Secretary of State are eleven dollars. (Executive Law, L. 1909, ch. 23, § 26.)

A *certified copy* of the certificate of incorporation will not suffice. The act requires a *sworn copy*.

In case an acknowledgment or affidavit is taken before a notary public or justice of the peace in another State, the act of such person should be authenticated by the certificate of the county clerk. No certificate of a county clerk is necessary when such acknowledgment or affidavit is taken in another State by a commissioner of deeds acting under appointment from the Governor of the State of New York.

Form No. 436.

Resolution of Board of Directors of a Foreign Corporation.

Resolved, That the president [*or vice-president, or as the case may be,*] of the [*insert corporate name*] be and he is hereby authorized and directed to execute in the name and on behalf of said corporation the statement required to be filed by foreign corporations under the provisions of the General Corporation Law of the State of New York, to attach the seal of the corporation thereto, and in said statement to designate [*insert name of person*], as the person upon whom process against the corporation may be served within the State of New York, and further to do all acts and things necessary to comply with the provisions of law in said State.

Form No. 437.

Revocation and New Designation by a Foreign Corporation.

Pursuant to the provisions of section 16 of General Corporation Law of the State of New York, the [*insert corporate name*] Company, a stock corporation organized and existing under and by virtue of the laws of the State of ....., does hereby certify as follows:

That said corporation hereby revokes the designation by it heretofore made of [*insert name of person*], as the person upon whom process against the said corporation may be served within the State of New York.

That in the place and stead of said designation, hereby revoked, the said [*insert corporate name*] Company hereby designates [*insert name of person*] as the person upon whom a summons against said corporation may be served within the State of New York, or any process or other paper, whereby a special proceeding

is commenced in a court, or before an officer, except a proceeding to punish for contempt, and except where special provision for the service thereof is otherwise made by law.

That the said [*insert name*], hereby designated, has an office or place of business at No. .... street, in the city [*or village*] of ....., the place where said corporation is to have its principal place of business within the State of New York.

That the written consent of said [*insert name*] to such designation, duly signed and acknowledged, is hereto annexed.

IN WITNESS WHEREOF, the [*insert corporate name*] Company, the corporation hereinbefore mentioned and described, has caused this instrument to be executed by its president [*or vice-president, or other acting head*], and has caused its corporate seal to be hereunto affixed this ..... day of ....., 19...

THE [*insert corporate name*] COMPANY,

{Corporate seal}

By [*signature*] President [*or vice-president or title of other acting head of corporation.*]

[*Attach proof of execution, consent of person designated and acknowledgment as in form No.* 435.]

This certificate, when properly executed, is to be filed in the office of the Secretary of State. No fee is payable.

Form No. 438.

Certificate of Removal of Office of Designee.

See General Corporation Law, § 16.

THIS IS TO CERTIFY, That I, ..., the person designated by the .... Company, a stock corporation organized and existing under the laws of the State of ....., by a certain certificate filed in the office of the Secretary of the State of New York on ....., 19.., as the person upon whom process against said corporation may be served within the State of New York, have removed my office and place of business within the State of New York from No. ..... street in the city [*or village*] of ....., to No. ..... street, in said city, [*or village*] and that from and after the ..... day of .....,

19.., my office and place of business will be at said No. ..... street in the city [*or village*] of .....

IN WITNESS WHEREOF, I have hereto set my hand at ....., this ..... day of ....., 19...

[*Signature.*]

STATE OF NEW YORK, }
County of ....., } *ss.:*

On this ..... of ....., 19.., before me personally appeared ....., to me known and known to me to be the person described in and who executed the foregoing certificate and acknowledged to me that he executed the same.

[*Signature of Notary Public.*]

The foregoing is to be filed in the office of the Secretary of State. No fee is payable.

Form No. 439.

* Affidavit for State Comptroller.

IN THE MATTER OF THE APPLICATION OF THE [*insert name*] COMPANY, A FOREIGN STOCK CORPORATION, FOR A CERTIFICATE OF AUTHORITY UNDER THE PROVISIONS OF SECTIONS 15 AND 16 OF THE GENERAL CORPORATION LAW OF THE STATE OF NEW YORK.

STATE OF NEW YORK, }
County of New York, } *ss.:*

[*Insert name*], being duly sworn, deposes and says that he is the secretary of the [*insert name*] Company; that said company is a stock corporation and was incorporated under the laws of the State of ..... on or about ....., 19..; that said company opened an office at No. ..... street, borough of Manhattan, city of New York, on or about ....., 19...; that prior to said last-mentioned date said company had no office or place of business in the State of New York and was not engaged in the transaction of business therein; that as said company has not been engaged in business within the State of New York or in the exercise of its corporate franchises therein for the period of

* If the corporation has been doing business in the state for only a fractional part of a year it should file an affidavit similar to the above.

one year it is unable at the present time to make a report under the provisions of section 181 of the Tax Law for the purpose of the computation of the license fee prescribed by said section.

[*Signature.*]

Sworn to before me, this .....
day of ....., 19...

.....,
Notary Public,
New York County.

Form No. 440.

Report of Corporation to Assessors.

See the Tax Law, § 27.

I, ..., president [*or other proper officer*] of the ..... Company, do hereby, pursuant to section 27 of the Tax Law, make this statement as follows:

1. The real property owned by said company consists of [*describe same*], situated in the town of [*or as the case may be*], and the sum actually paid therefor was $.....

2. The capital stock actually paid and secured to be paid in is $..... ; the sums paid for real property amount to $....., and the amount of such capital stock held by the State and by any incorporated literary or charitable institution [*if any*] is $.....

3. The principal office of the company is situated in [*specify the town or ward*].

[*Signature of officer.*]

STATE OF NEW YORK,
County of .....,
ss.:

[*Insert name*], being duly sworn, deposes and says that he is the president of the ..... Company, the corporation mentioned in the foregoing statement; that he made such statement as such officer, and that the same is in all respects just and true.

[*Signature of officer.*]

Sworn to before me, this .....
day of ....., 19...

[*Signature of Notary.*]

A railroad corporation is not required to state the sum paid for real property.

Form No. 441.

Dissolution by Incorporators.

See the General Corporation Law, § 220.

We, the undersigned, being all the incorporators named in the certificate of incorporation of the [*insert name*] Company, filed for the purpose of creating a domestic stock corporation, other than a moneyed or transportation corporation, do hereby, pursuant to the General Corporation Law, § 220, certify as follows:

First. That the names of the incorporators of the said [*insert name*] Company are as follows:

[*Insert the names of the incorporators.*]

Second. That no part of the capital of said company has been paid.

Third. That said company has no liabilities.

Fourth. That the business for which said company was created has not been begun.

Fifth. That we, the aforesaid incorporators, do hereby surrender to the State of New York, all the rights and franchises obtained for and in behalf of said corporation.

IN WITNESS WHEREOF, we have signed this certificate in duplicate.

Dated, ..., 19...

[*Signatures of the incorporators.*]

STATE OF NEW YORK,
County of ....., } *ss.:*

[*Insert names of incorporators*], being severally duly sworn, each for himself, deposes and says, that he is one of the incorporators named in the foregoing certificate; that he has read the foregoing certificate subscribed by him and knows the contents thereof, and that the same is true.

[*Signatures of the incorporators.*]

Sworn to before me, this ....
day of ....., 19... }

.....,
Notary Public,
.....*County,*
New York.

STATE OF NEW YORK, }
County of ....., } ss.:

On this ..... day of ....., 19.., before me personally came [*insert names of incorporators*], to me known and known to me to be the persons described in and who made, signed and verified the foregoing certificate and they severally duly acknowledged to me that they had made, signed and verified the same.

.....,
Notary Public,
..... *County,*
New York.

---

* Form No. 442.

Dissolution by Consent of Stockholders.

See General Corporation Law, § 221.

We, the undersigned, ..., president [*or vice-president*], and ..... secretary [*or treasurer*], respectively, of [*insert correct corporate title*], a stock corporation organized under the laws of the State of New York, do hereby, for the purpose of complying with the provisions of section 221 of the General Corporation Law in relation to voluntary dissolution of corporations, make and attest this certificate, and attach the consent, verified statement and proofs required by said section, as follows, to wit:

That the board of directors of such corporation at a meeting called for that purpose, held at ....., in the city, [*village or town*] of ....., on the ..... day of ....., 19.., at ... o'clock, P. M., of which meeting at least three days' notice was given to each, as appears by the affidavit of ....., hereto annexed and forming part hereof, by a vote of a majority of the whole board adopted the following resolution:

"*Resolved,* That in the opinion of this board of directors it is advisable to dissolve this corporation forthwith, pursuant to section 221 of the General Corporation Law, and that a meeting of the stockholders be called to be held at the office of the corporation at ..... on the ..... day of ....., 19.. [*not less*

* For form of minutes of meeting of directors to vote on dissolution, see Form No. 445. For form of minutes of meeting of stockholders to vote on dissolution, see Form No. 446.

than 30 nor more than 60 days after the adoption of the resolution], at . . . o'clock, P. M., for the purpose of voting upon a proposition that the corporation be forthwith dissolved;

"*Resolved further,* That the secretary cause a notice of such meeting to be both published and served, or mailed, according to law; that the secretary or treasurer, and the president or vice-president of the corporation execute a certificate showing the adoption of this resolution, and setting forth the proceedings of the meeting to be held by the stockholders, and that they also attest the written consent of the stockholders that the corporation be dissolved.

"*Resolved further,* That such officers cause such certificate and consent, with the powers of attorney of stockholders executing such consent by attorney, to be filed in the office of the Secretary of State, together with a duly verified statement of the names and residences of the existing board of directors and the names and residences of the officers of the corporation and proofs of publication and service of all statutory notices."

That notice of a meeting of the stockholders of the said corporation for the purpose of voting upon a proposition that such corporation be forthwith dissolved, was published in . . . . . ., a newspaper published and circulating in . . . . . county, that being the county wherein such corporation has its principal office, once a week for three weeks successively next preceding the time appointed for holding such meeting, as appears by the proof of publication of said notice which is hereto annexed and forms part hereof.

That on or before the day of the first publication of such notice, to wit, on the . . . . . day of . . . . . ., 19. ., a copy thereof was served personally on each stockholder or mailed to him at his last known post-office address, as more fully appears by the affidavit of . . . . . ., which is hereto annexed and forms part hereof.

That pursuant to such notice a meeting of the stockholders was held on the . . . . . day of . . . . . ., 19. ., at . . . o'clock, P. M., at the principal office of the corporation in [*state place*] that being the city, [*town or village*] in which the last preceding annual meeting of the corporation was held.

That at such meeting the holders of more than two-thirds in amount of the stock of the corporation, then outstanding, appeared in person or by attorney and organized said meeting by choosing the undersigned, A. B., as chairman, and C. D., as secretary thereof.

That the notice of the meeting and proof of the statutory publication and service thereof were presented and read.

That, upon motion, the following resolution was adopted by the affirmative votes of holders of more than two-thirds in amount of the stock, to wit:

"*Resolved,* That the action of the board of directors favoring the dissolution of this corporation forthwith be and the same is hereby approved, and that we, the stockholders of the ....., consent that such dissolution shall take place, and signify such consent in writing in conformity with the statute in such case made and provided."

That the votes of holders of at least two-thirds in amount of the stock of the corporation then outstanding, having been cast in favor of such resolution, the same was declared duly adopted.

Thereupon the consent in writing that such corporation be dissolved forthwith was executed either in person or by attorney by the holders of two-thirds in amount of the stock of the corporation, then outstanding, to wit, the holders of ..... shares did so signify their consent, which consent, together with the powers of attorney signed by such stockholders executing such consent by attorney, is hereto annexed and forms part hereof.

IN WITNESS WHEREOF, we have made and signed this certificate this ..... day of ....., 19...

[*Signature of President or Vice-President.*]
[*Signature of Secretary or Treasurer.*]

STATE OF NEW YORK, } *ss.:*
County of ....., }

[*Insert names of president* (*or vice-president*) *and secretary* (*or treasurer*)], being severally duly sworn, each for himself, deposes and says that the said ..... is the president [*or vice-president*] of the ..... Company, and the said ..... is the secretary [*or treasurer*], and that the foregoing certificate signed by them, respectively, is true according to the best of the knowledge, information and belief of each of said deponents.

Deponents further say, and each for himself says, that the annexed written consent of the stockholders of the said corporation executed either in person or by attorney, consenting to the dissolution forthwith of said corporation, was so executed at said meeting of stockholders held as in said foregoing certificate mentioned

on the ..... day of ....., 19.., and that the number of shares set out opposite each signature to such consent is the number of shares standing on the books of the corporation in the name of such consenting stockholder, and that the total number of shares outstanding issued by said corporation is [*insert number*], and that the number of consenting shares is in excess of two-thirds in amount of the stock of said corporation so outstanding as aforesaid.

[*Signatures of officers.*]

Sworn to before me, this .....
day of ....., 19...

[*Signature of Notary.*]

Form No. 443.

Consent of Stockholders Referred to in the Foregoing Certificate.

We, the undersigned, stockholders of [*insert corporate name*], being the holders of at least two-thirds in amount of the stock of said company, now outstanding, have consented and do hereby signify our consent that the said [*insert corporate name*] shall be forthwith dissolved, and we do hereby sign this instrument for the purpose of signifying such consent in writing as required by section 221 of the General Corporation Law.

IN WITNESS WHEREOF, we have hereunto set our hands and opposite thereto the number of shares of stock held by us, respectively, this ..... day of ....., 19...

[*Signatures.*] [*Number of shares.*]

Attested by:

{Corporate Seal} ....., *President* [*or Vice-President*],
....., *Secretary* [*or Treasurer*].

Form No. 444.

Statement Referred to in the Foregoing Certificate.

The following is a statement of the names and residences of the existing board of directors of [*insert corporate name*], and of the names and residences of its officers:

Names of directors.	Residences.
.....	.....
.....	.....
.....	.....

Names of officers.		Residences.
.....,	President.	.....
.....,	Secretary.	.....
.....,	Treasurer.	.....

STATE OF NEW YORK,
County of ....., } *ss.:*

A. B., being duly sworn, says that he is the secretary [*or treasurer, or president*] of [*insert corporate name*], and that the foregoing statement of the names and residences of the existing directors and officers of said company is true.

.....

Sworn to before me, this .....
day of ....., 19..,
....., *Notary Public,*
....., County, N. Y.

[*Attach Powers of Attorney, if any, and affidavits of publication and service of notice.*]

Form No. 445.

Minutes of Meeting of Directors to Vote on Dissolution.

Minutes of a special meeting of the board of directors of the [*insert corporate name*] Company, held at the law office of Frank White, No. 32 Liberty street, Borough of Manhattan, City of New York, on the ..... day of ....., 19..., at ..... o'clock in the .....noon.

Present: John H. Durham, Joseph H. Sherman and Andrew McPherson, a majority of the directors of the company [*or, all the directors of the company, as the case may be*].

The president, John H. Durham, called the meeting to order, and presided thereat, and Joseph T. Sherman was secretary of the meeting.

The secretary presented a written waiver of notice of the meeting, signed by all the directors, and it was ordered that the same

be filed and that a copy thereof be prefixed to the record of the minutes of this meeting.

[*For form of waiver, see Form No.* 450.]

The president stated that the meeting was called for the purpose of taking action on a proposition to dissolve the corporation forthwith, as set forth in the waiver of notice. He also stated that it had ceased to conduct the business for which it was incorporated, and that it was desirable to dissolve the corporation in view of the fact that it was not in receipt of any revenues for the payment of taxes, rent and other expenses necessary for maintaining a corporate organization [*or, as the facts may be*].

After consideration of the matter, and upon motion duly made and seconded, the following resolutions were duly adopted by unanimous vote of the board [*or, by a vote of a majority of the whole board*], to-wit:

> *Resolved,* That in the opinion of this board of directors it is advisable to dissolve this corporation forthwith in the manner prescribed by section 221 of the General Corporation Law of the State of New York, and that a meeting of the stockholders be held at the law office of Frank White, No. 32 Liberty Street, in the Borough of Manhattan, City of New York, on the ..... day of ....., 19..., at ..... o'clock in the .....noon, for the purpose of voting on a proposition that the corporation be dissolved forthwith, pursuant to waivers of notice of such meeting, fixing the time and place thereof, signed by all the stockholders of the company, as authorized by section 42 of the General Corporation Law; and, further,
>
> *Resolved,* That unless notice of such meeting be waived by all the stockholders, the secretary cause notice of such meeting to be held at the office above mentioned [*or, at the office of the company*], on the ..... day of ....., 19..., at ..... o'clock in the .....noon, to be both published and served as prescribed by law; and, further,
>
> *Resolved,* That the president [*or vice-president*] and secretary execute a certificate showing the adoption of these resolutions and setting forth the proceedings of the said meeting of stockholders, and that they also attest the written consent of the stockholders that the corporation be dissolved, and

execute and verify all statements required by law to dissolve the said corporation, pursuant to the provisions of section 221 of the General Corporation Law of the State of New York; and, further,

Resolved, That the president or vice-president and the secretary cause such certificate and consent to be filed in the office of the secretary of state, together with a duly verified statement of the names and residences of the members of the existing board of directors and of the names and residences of the officers of this corporation, and proof of publication and all certificates and waivers of all notices prescribed by law; and that the officers and directors of the corporation take such further action as may be required to effect the dissolution of the corporation, and wind up its business and affairs pursuant to the provisions of section 221 of the General Corporation Law of the State of New York.

On motion duly made and seconded the meeting then adjourned.

. . . . . ,
Secretary.

Form No. 446.

Minutes of Meeting of Stockholders to Vote on Dissolution.

Minutes of a special meeting of the stockholders of the [*insert corporate name*] Company, held at the law office of Frank White, No. 32 Liberty Street, Borough of Manhattan, City of New York, on the . . . . . day of . . . . . , 19. . ., at . . . . . o'clock in the . . . . . noon, pursuant to a waiver of notice of such meeting.

The meeting was called to order by the president, John H. Durham, who was duly elected chairman, and Joseph T. Sherman, secretary of the company acted as secretary.

It was found that stockholders were present in person or by proxy holding [*insert number*] shares being the entire [*or, more than two-thirds of the*] issued and outstanding capital stock of the company.

The secretary presented a written waiver of notice of the meeting, signed by all the stockholders, and it was ordered that the same be placed on file and that a copy thereof be prefixed to the record of the minutes of this meeting.

[*For form of waiver, see Form No.* 451.]

The resolutions adopted at the meeting of the board of directors held this day were read to the meeting, and thereupon the following resolution was unanimously adopted by the affirmative vote of the holders of [*insert number*] shares of the stock of the corporation, being the total amount of stock issued and oustanding, to wit:

[*or, was adopted by the affirmative vote of the holders of* ..... *shares, being more than two-thirds of the total amount of stock issued and oustanding*].

> *Resolved,* That the resolutions of the board of directors adopted at the meeting of the board held on the ..... day of ....., 19..., in favor of the immediate dissolution of this company be and are hereby approved, and that the holders of [*insert number*] shares of the capital stock of the [*insert corporate name*] Company, hereby consent that the said corporation be dissolved forthwith, pursuant to the provisions of section 221 of the General Corporation Law of the State of New York, and that the officers and directors of the company be and are hereby authorized to take all necessary and proper action to effectuate such dissolution and to wind up the business and affairs of the company, and that we hereby signify our consent in writing to such dissolution in conformity with the provisions of said statute.

Thereupon, at said meeting, the owners and holders of [*insert number*] shares of the stock of the company, being the total amount [*or, more than two-thirds*] of said stock issued and outstanding, did signify their consent in writing that the corporation be dissolved forthwith by signing and executing the consent of which a copy is annexed to the minutes of this meeting.

On motion duly made and seconded the following resolution was adopted, to wit:

> *Resolved,* That the directors of this meeting or a majority of them, be and they are hereby authorized to act as trustees for the purpose of winding up and liquidating the affairs of the corporation pursuant to statute.

The meeting was then adjourned.

.....,
Secretary.

Form No. 447.

Dissolution Where Notices Have Been Waived.

Certificate for Dissolution

of the

[*Insert corporate name*].

We, the undersigned, ..., President [*or, Vice-President*] and ....., Secretary [*or Treasurer*] of the [*insert correct corporate title*] Company, a stock corporation organized under the laws of the State of New York, do hereby, for the purpose of complying with the provisions of section 221 of the General Corporation Law of the State of New York in relation to the voluntary dissolution of corporations, make and attest this certificate and attach thereto the consent, [*powers of attorney, if any*], verified statement and waiver of notices as required by statute, as follows, to wit:

That the board of directors of said corporation, at a meeting called for that purpose and held at the law office of Frank White, No. 32 Liberty Street, Borough of Manhattan, City of New York, on the ..... day of ....., 19..., at ..... o'clock in the ..... noon, notice of which meeting was duly waived by each and all of the directors as appears by their original waiver in writing hereto annexed and forming a part hereof, did, by the unanimous vote [*or, by the vote of a majority, as the case may be*] of the whole board adopt the following resolutions:

> *Resolved,* That in the opinion of this board of directors it is advisable to dissolve this corporation forthwith in the manner prescribed by section 221 of the General Corporation Law of the State of New York, and that a meeting of the stockholders be held at the law office of Frank White, No. 32 Liberty Street, in the Borough of Manhattan, City of New York, on the ..... day of ....., 19..., at ..... o'clock in the .....noon, for the purpose of voting on a proposition that the corporation be dissolved forthwith, pursuant to waivers of notice of such meeting, fixing the time and place thereof, signed by all the stockholders of the company, as authorized by section 42 of the General Corporation Law; and, further,

Resolved, That unless notice of such meeting be waived by all the stockholders, the secretary cause notice of such meeting to be held at the office above mentioned [*or, at the office of the company*], on the ..... day of ....., 19..., at ..... o'clock in the .....noon, to be both published and served as prescribed by law; and, further,

Resolved, That the president [*or vice-president*] and secretary execute a certificate showing the adoption of these resolutions and setting forth the proceedings of the said meeting of stockholders, and that they also attest the written consent of the stockholders that the corporation be dissolved, and execute and verify all statements required by law to dissolve the said corporation, pursuant to the provisions of section 221 of the General Corporation Law of the State of New York; and, further,

Resolved, That the president or vice-president and the secretary cause such certificate and consent to be filed in the office of the secretary of state, together with a duly verified statement of the names and residences of the members of the existing board of directors and of the names and residences of the officers of this corporation, and proof of publication and all certificates and waivers of all notices prescribed by law; and that the officers and directors of the corporation take such further action as may be required to effect the dissolution of the corporation, and wind up its business and affairs pursuant to the provisions of section 221 of the General Corporation Law of the State of New York.

That notice of a meeting of the stockholders of said corporation, for the purpose of voting upon a proposition that the said corporation be dissolved forthwith was duly waived in writing by the holders and owners of all of the shares of stock of the said corporation then issued and outstanding, who also consented in writing that the said meeting be held on the ..... day of ....., 19..., at ..... o'clock in the .....noon, at the law office of Frank White, No. 32 Liberty Street, in the Borough of Manhattan, County of New York, City of New York, being the Borough, City and County where the last preceding annual meeting of the corporation was held, as appears by the original consent and waiver in writing hereto annexed and forming a part hereof.

That pursuant to such consent and waiver, a meeting of the stockholders of the said corporation was held on the ..... day of ....., 19...., at ..... o'clock in the .....noon, at said office, and that at such meeting the holders of more than two-thirds in amount of the stock of the said corporation then issued and outstanding, to wit: the holders of ..... shares of stock, being the total amount of stock issued and outstanding, appeared in person [*and by proxy*] and organized the meeting by choosing John H. Durham as chairman, and Joseph T. Sherman as secretary of the said meeting; that thereupon the said waiver of the notice of the meeting and consent of the stockholders and the said resolutions adopted by the board of directors, hereinbefore set forth, were presented and read to the meeting; and thereupon the following resolution was adopted by the affirmative vote of the holders of ..... shares of the stock of the said corporation, being [*or, more than two-thirds of*] the total amount of stock issued and outstanding, to wit:

> *Resolved,* That the resolutions of the board of directors adopted at the meeting of the board held on the ..... day of ....., 19..., in favor of the immediate dissolution of this company be and are hereby approved, and that the holders of [*insert number*] shares of the capital stock of the [*insert corporate name*] Company, hereby consent that the said corporation be dissolved forthwith, pursuant to the provisions of section 221 of the General Corporation Law of the State of New York, and that the officers and directors of the company be and are hereby authorized to take all necessary and proper action to effectuate such dissolution and to wind up the business and affairs of the company, and that we hereby signify our consent in writing to such dissolution in conformity with the provisions of said statute.

That the vote of the holders of ..... shares of the stock of said corporation then issued and outstanding, being the entire number of shares of stock issued and outstanding, were cast in favor of such resolutions and the said resolutions were declared duly adopted.

Thereupon at said meeting the owners and holders of more than two-thirds in amount of the stock of said corporation then

issued and outstanding, to wit: the holders of ..... shares, being the entire amount of said stock issued and outstanding, did signify their consent in writing that such corporation be dissolved forthwith by signing and executing the consent which is hereto annexed and forms part hereof.

IN WITNESS WHEREOF, We have made and signed this certificate this ..... day of ....., 19...

.....,

President,

.....,

Secretary.

STATE OF NEW YORK, }
County of New York, } *ss.:*

..... and ..... being duly sworn, each for himself, deposes and says that the said ..... is the president, and the said ..... is the secretary of the [*insert corporate name*], and that the foregoing certificate signed by them, resepectively, is true to the best of the knowledge, information and belief of each of said deponents. Deponents further say, each for himself, that the annexed written consent of the stockholders of said corporation, consenting to the dissolution forthwith of the said corporation, was so executed at said meeting of stockholders held as in the foregoing certificate stated, on the ..... day of ....., 19..., by the persons executing the same, and that the number of shares set opposite each signature to such consent is the number of shares standing on the books of the corporation in the name of such consenting stockholder, and that the total number of shares issued and outstanding by the said corporation is ..... and that the number of consenting shares is the entire number [*or more than two-thirds*] of the shares of said stock of said corporation so outstanding as aforesaid.

Sworn to before me this ..... [*Signatures*].
day of ....., 19...,

.....,
Notary Public,
New York County, N. Y.

Form No. 448.

Written Consent of Stockholders to be Annexed to the Foregoing Certificate.

WE, THE UNDERSIGNED, Being the holders and owners of all the shares of stock of the [*insert corporate name*], issued and outstanding, owning the number of shares set opposite our names, respectively, do hereby consent that the said corporation be dissolved forthwith, pursuant to section 221 of the General Corporation Law of the State of New York, and we do hereby sign this instrument for the purpose of signifying such consent in writing, as required by the said section 221 of the General Corporation Law.

IN WITNESS WHEREOF, We have hereunto set our hands and opposite thereto the number of shares of stock held by us respectively, this ..... day of ....., 19...

Name of stockholders.	No. of shares.
.....	.....
.....	.....
.....	.....

Attested by

.....,
President
(*or Vice-President*)

(Corporate Seal)

.....,
Secretary.

Form No. 449.

Statement Referred to in the Foregoing Certificate.

The following is a statement of the names and residences of the existing board of directors of [*insert corporate name*], and of the names and residences of its officers:

Names of directors.	Residences.
.....	.....
.....	.....
.....	.....

Names of officers.		Residences.
.....,	President.	.....
.....,	Secretary.	.....
.....,	Treasurer.	.....

STATE OF NEW YORK, }
County of ....., } *ss.:*

A. B., being duly sworn, says that he is the secretary [*or treasurer, or president*] of [*insert corporate name*], and that the foregoing statement of the names and residences of the existing directors and officers of said company is true.

.....

Sworn to before me, this .....
day of ....., 19...,
....., *Notary Public,*
....., County, N. Y.

[*Attach Powers of Attorney, if any*].

Form No. 450.

Waiver of Notice by Directors of Meeting to Dissolve Corporation.

(To be annexed to the foregoing certificate)

WE HEREBY WAIVE all notice whatsoever of the time and place of holding a meeting of the board of directors of the [*insert corporate name*] Company, to be called for the purpose of taking action on a proposition to dissolve the said corporation forthwith in the manner prescribed by section 221 of the General Corporation Law of the State of New York, and consent that the said meeting be held on the ..... day of ....., 19..., at ..... o'clock in the .....noon, at the law office of Frank White, No. 32 Liberty Street, Borough of Manhattan, in the City of New York, or at such other time and place as may be fixed by adjournment from time to time, and hereby further consent to such action on said proposition as may be resolved upon by a majority of the whole board at any such meeting or adjourned meeting, without further or any notice to us or to any of us.

Dated, this ..... day of ....., 19...

[*Signatures*].

Form No. 451.

Waiver of Notice by Stockholders of Meeting for Dissolution.

(To be annexed to the foregoing certificate)

WE, THE UNDERSIGNED, Being all the stockholders of the [*insert corporate name*] Company, owning the number of shares of stock set opposite our names, respectively, hereby waive all notice whatsoever of a meeting of stockholders, to be held on the ..... day of ....., 19..., at ..... o'clock in the .....noon, at the law office of Frank White, No. 32 Liberty Street, Borough of Manhattan, City of New York, for the purpose of voting on a proposition that the corporation be dissolved forthwith, pursuant to section 221 of the General Corporation Law of the State of New York, and we consent and request that such meeting be held at the time and place aforesaid, and further consent to such action on the said proposition as may be resolved upon at such meeting by the owners of not less than two-thirds of such stock voting at such meeting in person or by proxy.

Dated, the ..... day of ....., 19...

Names of stockholders.	No. of shares.
.....	.....
.....	.....
.....	.....

Form No. 452.

Power of Attorney to Vote and Sign Consent.

Know all men by these presents, that I, ..., do hereby constitute and appoint ..... to be my lawful attorney, substitute and proxy for me and in my name to sign the written consent required by statute and to vote upon all the stock held by me in the [*insert corporate name*] Inc., at a special meeting of the stockholders of such corporation, called for the purpose of voting upon a proposition that such corporation be forthwith dissolved, pursuant to section 221 of the General Corporation Law, to be held ....., 19..., and at any adjourned meeting thereof, as fully and with the same effect as I might or could do were I personally present at such meeting.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the ..... day of ....., 19...

[*Signature*] (L. S.)

In the presence of

.....

Form No. 453.

Minutes of Meeting of Directors Relative to Liquidation of Dissolved Corporation.

Minutes of a special meeting of the board of directors of the [*insert corporate name*] Company, held on the ..... day of ....., 19..., at ..... o'clock, ...m., at the law office of Frank White, No. 32 Liberty Street, Borough of Manhattan, City of New York.

Present: John H. Durham, Joseph T. Sherman and Andrew McPherson, constituting the entire [*or, a majority of the*] board of directors.

Mr. Durham, president of the company, acted as chairman of the meeting and called the same to order, and Mr. Sherman was secretary thereof.

The secretary presented a waiver of notice of the meeting, signed by every director [*or, signed by* ....., *the only absent director*], and it was ordered that the same be placed on file.

The secretary reported that the certificate of dissolution, duly executed by the president [*or, vice-president*] and secretary of the company, pursuant to section 221 of the General Corporation Law, was filed in the office of the secretary of state on ....., 19..., and that duplicate certificates of dissolution were issued by that official on the same date; that one of said duplicates was filed in the office of the clerk of New York County, on ....., 19..., and that all the fees of the office of the secretary of state and of said county clerk had been paid.

On motion duly seconded, it was ordered that the duplicate original certificate of dissolution, issued by the secretary of state, be prefixed to the minutes of this meeting.

The secretary further reported that publication of such certificate of dissolution, as provided by law, was made in the [*insert name of newspaper*] on the ..... day of ....., 19...,

and also on the ..... day of ....., 19..., and presented proof of such publication, which upon motion duly seconded, was ordered prefixed to the minutes of this meeting.

The secretary further reported that pursuant to the notice annexed to the said publication requiring the presentation of claims forthwith, no claims had been presented, and that all statutory requirements for the dissolution of the corporation have been complied with.

The treasurer reported that the sum of $..... had been paid to ....., as attorney for the company, in payment for legal services rendered and disbursements incurred to date, in matters pertaining to the dissolution of the corporation, and on motion duly seconded such payment was approved, ratified and confirmed.

The secretary further reported that pursuant to the notice annexed to the said publication requiring the presentation of claims forthwith, no claims had been presented, and that all statutory requirements for the dissolution of the corporation have been complied with.

The secretary further reported that pursuant to the resolutions adopted at the meeting of the board held on ....., 19..., the officers of the company had executed and acknowledged a deed of real estate owned by the corporation, and had delivered the same to the purchaser, the ..... Company, and had received from said purchaser the sum of $..... in cash.

The secretary further reported that in accordance with the resolutions adopted at the meeting of the board held on the above mentioned date all the personal property of the corporation had been sold to ....., and that a bill of sale executed in behalf of the corporation by the corporate officers had been delivered to said purchaser, and that the purchase price thereof, to wit, the sum of $....., had been received in cash.

The secretary further reported that said sums received as above aggregating $..... had been deposited to the credit of the corporation in the ..... Bank.

Upon motion duly seconded the following preambles and resolutions were adopted:

Whereas, This corporation has been duly dissolved pursuant to the provisions of section 221 of the General Corporation Law, and

Whereas, This board has advertised for the presentation of claims, and no claims against the corporation have been presented, and this board has no knowledge of the existence of any outstanding claims, obligations or contracts against the corporation, and,

Whereas, The corporation has on hand $..... in cash, said sum being sufficient to pay the sum of $..... upon each share of stock issued and outstanding,

Therefore, Resolved, That the officers of the corporation be and they are hereby authorized on and after ....., 19..., to pay to each stockholder of the company in cash the sum of $..... upon each and every share of stock held by such stockholder, upon presentation by such stockholder of the certificate or certificates of stock held by him, and upon the surrender of such certificates of stock properly endorsed.

Resolved, Further, That a statement be prepared by the directors as trustees in dissolution, showing the amount of funds or assets received by them and the total amount distributed to stockholders and for fees, disbursements and expenses of dissolution, and that a copy of such statement be mailed to each stockholder of record at his last known post-office address as the same appears upon the books of the corporation.

On motion adjourned.

Form No. 454.

Financial Statement by Directors as Trustees in Dissolution.

The directors as trustees in dissolution of the ..... Company hereby report that they have completed the distribution of the assets of the corporation, and that the following is a statement of their account, to wit:

The directors charge themselves as follows:

Amount of cash received from sale of real estate....	$.....
Amount of cash received from sale of personal property	.....
Interest on above.....	.....
Amount of cash on hand at date of dissolution.....	.....
Total	$.....

The directors credit themselves as follows:

Amount distributed to stockholders on ....., 19..., at the rate of $..... per share.....	$.....
Fees, disbursements and expenses of dissolution....	.....
Total	$.....

They further report that they mailed or caused to be mailed a copy of this statement to each stockholder of record of the corporation, postage prepaid, at his last known post-office address as same appears upon the corporate books.

Respectfully submitted,
[*Signatures*].

Form No. 455.

Endorsement on Stock Certificate of Partial Payment in Liquidation.

The holder of this certificate of stock has received $..... thereon under distribution in dissolution proceedings, pursuant to resolution of directors of ....., 19...

Form No. 456.

Certificate of Dissolution Issued by Secretary of State.

STATE OF NEW YORK,
Office of the Secretary of State, } *ss.:*

This certificate, issued in duplicate, hereby certifies that the [*insert corporate name*] Inc., a domestic stock corporation, has filed in this office on this ..... day of ....., 19..., papers for the voluntary dissolution of such corporation under section 221 of the General Corporation Law, and that it appears therefrom that such corporation has complied with said section in order to be dissolved.

Witness, my hand and the seal of office of the Secretary of State, at the City of Albany, this ..... day of
[Seal] ....., one thousand nine hundred and .....

.....

Deputy Secretary of State.

Form No. 457.

Notice to Creditors.

All persons having claims against the above-named corporation are directed to present the same forthwith at the office of ....., attorney, No. ..... Street, ... City, N. Y.

There is no provision in section 221 of the General Corporation Law requiring the publication of a notice to creditors to present claims against the corporation, but even in cases where the directors, acting as trustees in liquidation, have no knowledge that there are any existing claims against the corporation it would seem, on the authority of Darcy v. Brooklyn & N. Y. Ferry Co., 127 A. D. 167, affd. 196 N. Y. 99, that some notice should be given to creditors generally, requesting the presentation of claims; therefore, the above notice to creditors is suggested to be attached to the foregoing certificate of dissolution and to be published therewith. However, it might be well, in order to avoid the question as to the sufficiency of the notice, to apply to the court for instructions as to the period of publication to present claims as discussed and suggested in the case above cited.

Form No. 458.

Petition for Voluntary Dissolution of Corporation.

See General Corporation Law, § 170.

SUPREME COURT — NEW YORK COUNTY.

IN THE MATTER OF THE APPLICATION OF ....., A CORPORATION, FOR VOLUNTARY DISSOLUTION.

To the Supreme Court of the State of New York:

The petition of ..... a majority of the directors of ..... respectfully shows to this court as follows:

I. ..... is a corporation, organized under

the Business Corporations Law of the State of New York, and its principal place of business is located in the city and county of New York.

II. Your petitioners are a majority of all the directors of said corporation; the names and residences of all the directors thereof are as follows:

Name.	Residence.
.....	.....
.....	.....
.....	.....
.....	.....

III. The purposes for which the said corporation was organized were [*here state generally purposes of incorporation*]. The amount of its authorized capital stock is ..... dollars and the amount which is issued and outstanding is ..... dollars.

IV. That your petitioners have discovered that the stock, effects and other property of said corporation are not sufficient to pay all just demands for which it is liable or to afford a reasonable security to those who may deal with it, and for that reason [*if other reasons state them*], they deem it beneficial to the interest of the stockholders that the said corporation should be dissolved.

[*If a temporary receiver is to be applied for state facts, showing necessity therefor. See cases under General Corporation Law,* §§ 104 *and* 182.]

V. Your petitioners have annexed to this petition a schedule marked Schedule "A" which, in its different subdivisions, contains a statement of the matters required by section 174 of the General Corporation Law, so far as your petitioners know or have the means of knowing the same.

WHEREFORE, Your petitioners pray for a final order of this court dissolving said corporation and appointing a receiver of its property and effects, and for an injunction restraining the institution and prosecution of actions at law against it and for such other and further relief as may be proper with costs of this proceeding.

Dated, ..., 19...

.....,
.....,
.....,
Petitioners.

.....,
Attorneys for Petitioners.

Form No. 459.

Schedule to be Annexed to Petition.

Schedule A.

First. A full and true account of all the creditors of the corporation and of all unsatisfied engagements entered into by, and subsisting against the corporation.

Second. A statement of the name and place of residence of each creditor, and of each person with whom such engagement was made, and to whom it is to be performed, if known; or, if either is not known, a statement of that fact.

Third. A statement of the sum owing to each creditor or other person specified in the last subdivision, and the nature of each debt, demand or other engagement.

Fourth. A statement of the true cause and consideration of the indebtedness to each creditor.

Fifth. A full, just and true inventory of all the property of the corporation, and of all the books, vouchers and securities relating thereto.

Sixth. A statement of each incumbrance upon the property of the corporation by judgment, mortgage, pledge or otherwise.

Seventh. A full, just and true account of the capital stock of the corporation, specifying the name of each stockholder, his residence, if it is known; or if it is not known, stating that fact; the number of shares belonging to him, the amount paid in upon his share, and the amount still due thereon.

STATE OF NEW YORK, }
County of New York, } *ss.:*

..... and ..... being duly, severally sworn, each for himself says:

That he is one of the petitioners named in the foregoing petition; that the matters of fact stated in the foregoing petition subscribed by him and the schedule thereto annexed and therein referred to, marked Schedule "A," and the several subdivisions thereof, are just and true, so far as he knows or has the means of knowing the same.

Severally sworn to before me, this }
..... day of ....., 19... }

Form No. 460.

Notice of Motion for Order to Show Cause.

SUPREME COURT — NEW YORK COUNTY.

IN THE MATTER

OF THE

APPLICATION OF ....., A CORPORATION, FOR VOLUNTARY DISSOLUTION.

SIR:

YOU WILL PLEASE TAKE NOTICE, That on the petition of ....., a majority of the directors of ....., verified ....., ..., and the schedule thereto annexed, copies of which are herewith served upon you, we shall apply to this court, at Special Term, Part I, thereof, appointed to be held at the County Court House in the county of New York, on ....., at .... o'clock ..... for an order requiring all persons interested in said corporation to show cause why the said corporation should not be dissolved and why a receiver of its assets and property should not be appointed and an injunction granted against the institution or prosecution of any action against said corporation. A copy of the proposed order is served upon you herewith.

Dated .....

Yours, etc.,

.....,

Attorneys for Petitioners.

To .....,

Attorney-General of the State of New York.

The failure to give this notice renders the proceeding void. See Gen. Corp. Law, §§ 312, 182; Matter of Strong Co., 128 A. D. 208 (1908).

Form No. 461.

Order to Show Cause.

General Corporation Law, § 178.

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the county of New York, at the County Court House in the borough of Manhattan, city of New York, on the ..... day of ....., 19...

Present.— Hon. .....,
Justice.

IN THE MATTER OF THE APPLICATION OF .. .., A CORPORATION, FOR VOLUNTARY DISSOLUTION.

On reading and filing the petition of ....., a majority of the directors of ....., a corporation created under the laws of this State and having its principal office located in the county of New York, and the schedule thereto annexed, duly verified by the petitioners on the ..... day of ....., from which petition it appears that the case is one of those specified in section 170 of the General Corporation Law; and it further appearing, to the satisfaction of the court, from said petition, that the said corporation is insolvent; and on reading and filing notice of this application dated ....., with proof of due service thereof, and of said petition and schedule and of a copy of this order on the Attorney-General;

And, after hearing ..... of counsel for the petitioners, and ....., representing the Attorney-General,

Now, on motion of ..... attorneys for the petitioners, it is

ORDERED, That all persons interested in said corporation show cause before ..... Esq., who is hereby appointed referee for that purpose, at his office, No. ..... street, in the borough of Manhattan, city of New York, on the ..... day of ..... [*not less than six weeks after the granting of the*

order], at .. o'clock in the forenoon, why the said corporation should not be dissolved; and it is

FURTHER ORDERED, That a copy of this order be published at least once in each of the three weeks immediately preceding said ..... day of ....., in ..... and the ..... newspapers published in the county of New York, and it is

FURTHER ORDERED, That ..... be, and he hereby is appointed temporary receiver of all the property of ..... with power to collect and receive the debts, demands and other property of the corporation; to preserve the property and the proceeds of the debts and demands collected; to sell or otherwise dispose of the property as directed by the court; to collect, receive and preserve the proceeds thereof; and to maintain in the action or special proceeding, for either of these purposes [*here may be added other powers and duties which are possessed by permanent receivers, Gen. Corp. Law, Sections* 182 *and* 239, *et seq.*]; and to employ such attorneys or counsel as may be necessary for the administration of this trust and for the protection of the assets of said corporation and the defense of actions or proceedings.

IT IS FURTHER ORDERED, That all creditors of said corporation be and they hereby are restrained from beginning any action against the said corporation for the recovery of a sum of money or from taking any further proceedings in any actions against said corporation heretofore commenced.

IT IS FURTHER ORDERED, That the said receiver, before entering upon the discharge of his duties, execute and acknowledge in the usual form and file with the clerk of the county of New York, a bond to the people of the State of New York in the penal sum of ..... dollars, with sufficient surety, to be approved by a justice of this court, conditioned for the faithful discharge of his duties as such receiver; and

IT IS FURTHER ORDERED, That said receiver deposit all funds of the corporation not needed for immediate disbursement in the .....

If a receiver is not desired the last four clauses may be omitted. Unless a receiver is appointed creditors cannot be enjoined. See Gen. Corp. Law § 182.

Form No. 462.

Voluntary Dissolution. Report of Referee.

SUPREME COURT — COUNTY OF NEW YORK.

IN THE MATTER OF VOLUNTARY DISSOLUTION OF THE ..... COMPANY, A DOMESTIC CORPORATION.

To the Supreme Court of the State of New York:

Pursuant to an order of this Court made and entered herein on the ..... day of ....., 19.., requiring all persons to show cause before me as referee why the above named company should not be dissolved, I do hereby respectfully report to this court as follows:

I first took and subscribed the oath prescribed by law, which said oath is hereto annexed;

Upon the said reference before me I have been attended by ..... Esq., attorney for the petitioners, and ..... Esq., attorney for ....., stockholders [*here recite other appearances*].

I thereupon proceeded with the hearing and determination of the matters referred to me by said order, and have heard and examined the witnesses and considered the testimony and evidence produced by and on behalf of the respective parties, which testimony, duly subscribed by the respective witnesses, is hereto annexed, and upon said testimony and evidence I do hereby determine and report the facts as follows:

1. The ..... Company is a domestic stock corporation, organized and existing under the Business Corporations Law of the State of New York, its certificate of incorporation having been filed in the office of the Secretary of State on ....., 1909.

2. The general purposes for which said corporation was organized are [*here state in general terms the objects of the corporation*].

3. The authorized capital stock of said corporation is $100,000, consisting of 1,000 shares of the par value of $100 each, all of which stock has been issued and is now outstanding.

4. The number of directors of said company is five, and the names of the directors are as follows:

[*Insert names.*]

5. The petition herein was signed and verified by a majority of said directors.

6. I find that the allegations set forth in the said petition for dissolution herein are true, and that the stock, effects and other property of said corporation are not sufficient to pay all just demands, for which it is liable, and I deem it beneficial to the interests of the stockholders that the corporation should be dissolved, and that such dissolution will not be injurious to the public interests.

7. The following is a statement of the effects, credits and other property, and of the debts and other engagements of said corporation:

[*Here state them.*]

I therefore respectfully recommend that the prayer of the petitioners be granted, and that a final order be made herein dissolving said corporation.

Dated, ..., 19...

....., *Referee.*

Form No. 463.

Final Order.

General Corporation Law, § 190.

[*Title of Proceeding.*]

On reading the petition filed herein on ....., by ....., a majority of the directors of the above-named company praying for its dissolution, and the order made thereon on ..... requiring all persons interested in said corporation to show cause on ..... before ....., referee, why the said company should not be dissolved; and also appointing ..... temporary receiver of the property of said corporation; and on reading and filing the affidavits of ....., sworn to on ....., proving the due service and publication of said order to show cause according to its terms and as required by law; and it appearing from the certificate of the clerk of this

court, dated ....., that each of the following-named persons has made himself a party to this proceeding by filing a notice of appearance with the said clerk before the close of the hearing before the said referee, to wit: ....., by ....., his attorney [*here insert other appearances*].

And on reading the report of ....., the referee appointed herein as aforesaid, dated ....., and filed herein on ....., and proof of the due service of a copy thereof and of notice of filing on the persons who have appeared herein and also on the Attorney-General of the State of New York; and on reading and filing the affidavit of ....., sworn to on ....., and the certificate of the clerk of the county of New York annexed thereto, dated ....., by which it appears that no exceptions to said report have been filed or served and that more than eight days have elapsed since the filing of said report, and service of notice thereof on the attorneys for all the respondents herein and the Attorney-General, and on reading and filing notice of the motion for this final order dated ....., and proof of service thereof, and of this proposed order on the attorneys for all the parties who have appeared herein and also on the Attorney-General, and after hearing ..... in support of the motion, and ....., opposed.

Now, On motion of ....., attorneys for the petitioners, it is

ORDERED, That the said report of ..... be and it hereby is in all respects confirmed.

And it appearing to the satisfaction of the court that the allegations of the petition are true, that the said corporation ....., is insolvent and that it will be for the benefit of its stockholders and not detrimental to any public interest that it be dissolved, it is further

ORDERED, That the said corporation ..... be and it hereby is dissolved, and it is

FURTHER ORDERED, That ....., the temporary receiver heretofore appointed herein, be and he hereby is continued and appointed permanent receiver of all the assets and property of said corporation, with all the powers conferred by law on permanent receivers, and it is

FURTHER ORDERED, That said receiver, before entering upon his duties as permanent receiver, make and file with the clerk of

New York county a bond to the people of the State of New York, with sufficient surety to be approved by the court, in the penal sum of ..... dollars, conditioned for the faithful performance of his duties as such permanent receiver and for the due accounting of all the moneys received by him, and it is

FURTHER ORDERED, That said receiver deposit in ..... of the city of New York all funds coming to his hands not needed for immediate disbursement.

IT IS FURTHER ORDERED, That the petitioners recover the sum of ..... dollars as and for their costs and disbursements herein (including the fees of the said referee and the stenographer upon the reference), to be taxed by the clerk and inserted herein and paid by the said receiver out of any funds coming into his possession.

Notice of the appointment should be published as prescribed in General Corporation Law, § 250.

Form No. 464.

Oath of Receiver.

See General Corporation Law, § 238.

[*Title of Proceeding.*]

STATE OF NEW YORK,
County of New York, } *ss.:*

....., the receiver appointed herein by final order entered the ..... day of ....., being duly sworn, deposes and says that he will well and truly execute the trust by said appointment reposed in him according to the best of his skill and understanding.

Sworn to before me, this .....
day of ....., 19..

Oath must be filed before permanent receiver enters upon the discharge of his duties. General Corporation Law, § 238.

Form No. 465.

Notice of Creditors' Meeting.

See General Corporation Law, §§ 253 and 254.

SUPREME COURT — NEW YORK COUNTY.

IN THE MATTER
OF THE
VOLUNTARY DISSOLUTION OF .....
COMPANY, A CORPORATION.

Notice is hereby given that a general meeting of the creditors of the ..... Company will be held at the office of ....., No. ....., in the borough of Manhattan, city of New York, on the ..... day of ....., at ..... o'clock as required by the General Corporation Law, § 253, of the State of New York, for the purposes therein designated.

Dated, ..., 19...

....., *Receiver.*

Form No. 466.

Notice of Presentation of Final Account.

See General Corporation Law, § 269.

SUPREME COURT — NEW YORK COUNTY.

IN THE MATTER
OF THE
DISSOLUTION OF ..... COMPANY, A
CORPORATION.

Notice is hereby given that the undersigned intends to present his accounts as temporary and as permanent receiver of the ..... Company, a dissolved corporation at a Special Term

of the Supreme Court, Part I thereof, to be held in and for the county of New York, at the county court house in the said county, on the ..... day of ....., 19.., at 10:30 o'clock in the forenoon.

Dated, ...

.....,
Receiver.

.....,
Attorneys for Receiver,
..... Street,
Borough of Manhattan, City of New York.

Form No. 467.

Petition for Peremptory Writ of Mandamus to Compel Secretary of State to File Certificate of Incorporation.

SUPREME COURT — COUNTY OF ALBANY.

THE PEOPLE OF THE STATE OF NEW YORK EX REL. CHARLES T. BARNEY

against

JOHN S. WHALEN, SECRETARY OF STATE OF THE STATE OF NEW YORK, RESPONDENT.

To the Honorable Supreme Court:

The petition of Charles T. Barney, the above-named relator, respectfully shows:

On the 11th day of January, 1907, the relator, together with Frederick G. Bourne and Frederick L. Eldridge, all of whom, and the relator, are natural persons of full age and citizens of the United States, and at least one of whom is a resident of the State of New York, desiring to become a corporation other than a moneyed corporation or a corporation provided for by the Banking, the Insurance, the Railroad and the Transportation laws, pursuant to provisions of the Business Corporation Law of the State of New York, made, signed and acknowledged a certificate of incorporation, a true copy of which is annexed hereto, marked Exhibit A, and made a part hereof.

Thereupon and on the 11th day of January, 1907, the relator and the said two other incorporators caused the said certificate to be presented to the above-named respondent, who then was, and is, the Secretary of State of the State of New York, and requested and demanded of him that he receive, file, record and index in his office such certificate in the manner required by law, and deliver to your relator and his associates, a certified copy of such certificate, together with a certificate of the said Secretary of State of such filing and record. At the time of the said presentation your relator and his said associates, through their attorneys, offered to pay to the said Secretary of State the fees required by law upon such receipt, filing, recording, indexing, delivering and certifying, and offered to pay to the Treasurer of the State of New York the taxes due upon the incorporation of the said company.

The said Secretary, however, unlawfully and wrongfully, in disobedience of his duty in that behalf, refused and neglected to file said certificate in his office, and still refuses and neglects so to do, and alleges as the only ground for his refusal that the following provision in the said certificate of incorporation is invalid and contrary to public policy:

> "The directors may, with the consent of the holders of two-thirds of the capital stock issued and outstanding, sell, assign, transfer or otherwise dispose of, the whole of the property of the corporation, not including franchises, to any person or corporation, domestic or foreign."

By reason of the refusal of the said Secretary of State to file the said certificate of incorporation the relator and his said associates are debarred, to their irreparable damage and injury, from enjoying the rights, franchises and privileges which would accrue to them upon the acceptance by the respondent of the said certificate of incorporation, and your petitioner is advised and believes that the relator has no other specific or legal remedy for the wrong or injury done to him by reason of the refusal of the said Secretary of State to file the said certificate than that of mandamus.

Your petitioner therefore applies for an order to show cause why a peremptory writ of mandamus should not issue, requiring the said Secretary of State to accept the said certificate and to file, record and index the same, as required by law, upon the payment to him of his lawful fees and charges.

No previous application for said order to show cause has been made.

And your petitioner will ever pray, etc.

Dated January 16th, 1907.

CHARLES T. BARNEY,
Petitioner.

STATE OF NEW YORK, }
County of New York, } *ss.:*

Charles T. Barney, being duly sworn, says that he is the petitioner herein; that the foregoing petition is true to the knowledge of deponent.

CHARLES T. BARNEY.

Sworn to before me this 16th }
day of January, 1907. }

PAUL H. HUDSON,
Notary Public,
New York County.

Exhibit "A," Attached to Petition.

[*Here follows a copy of the certificate of incorporation.*]

Form No. 468.

Order to Show Cause.

SUPREME COURT — COUNTY OF ALBANY.

THE PEOPLE OF THE STATE OF NEW YORK EX REL. CHARLES T. BARNEY

against

JOHN S. WHALEN, SECRETARY OF STATE OF THE STATE OF NEW YORK, RESPONDENT.

Upon the annexed petition of Charles T. Barney, verified the 16th day of January, 1907, and on motion of Davies, Stone & Auerbach, attorneys for the relator, it is

Ordered, that John S. Whalen, Secretary of State of the State of New York, show cause at a Special Term of this Court, to be held at the Court House of this Court, in the City of Kingston,

in the County of Ulster, on the 19th day of January, 1907, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, why a peremptory writ of mandamus should not issue out of and under the seal of this Court, directed to the above-named respondent, requiring him, as Secretary of State of the State of New York, upon payment to him of his lawful fees and charges, to receive, file, record and index in his office the certificate of incorporation, of which a true copy is annexed to the said petition as Exhibit A; and why such other and further relief should not be granted to the relator as may be proper.

Service of this order and of the petition upon which the same is granted, upon the said Secretary of State, by leaving a copy thereof at his office, or by delivering a copy to him personally, on or before the 17th day of January, 1907, shall be sufficient.

Dated New York, January 16, 1907.

E. B. AMEND,
Justice of the Supreme Court.

Form No. 469.

Order Appealed From.

At a Special Term of the Supreme Court for the Hearing of Motions, held in and for the County of Albany on the 19th day of February, 1907.

Present — Honorable JAMES A. BETTS, Justice.

THE PEOPLE OF THE STATE OF NEW YORK EX REL. CHARLES T. BARNEY, RELATOR,

against

JOHN S. WHALEN, SECRETARY OF STATE OF THE STATE OF NEW YORK, RESPONDENT.

On reading and filing the order to show cause, granted herein on the 16th day of January, 1907, by Hon. E. B. Amend, a Justice of this Court, and the petition of Charles T. Barney, Esq., thereto annexed, verified the 16th day of January, 1907; and after hearing Charles H. Tuttle, Esq., of counsel for the relator, in support of the motion arising upon the said order to show cause, and Frank White, Esq., of counsel for the respondent, in opposition thereto, and due deliberation having been had thereon,

it is, on motion of William S. Jackson, Esq., Attorney-General of the State of New York,

Ordered that the said motion of the relator for a peremptory writ of mandamus be, and the same hereby is, in all respects denied, with Ten dollars costs.

Enter,

J. A. B

Form No. 470.

Notice of Appeal.

SUPREME COURT — COUNTY OF ALBANY.

THE PEOPLE OF THE STATE OF NEW YORK EX REL. CHARLES T. BARNEY, RELATOR,

against

JOHN S. WHALEN, SECRETARY OF STATE OF THE STATE OF NEW YORK, RESPONDENT.

Sir:

Please take notice that the relator above named hereby appeals to the Appellate Division of the Supreme Court, Third Department, from an order entered herein on the 23d day of February, 1907, in the office of the Clerk of the County of Albany, denying the motion of the relator for a peremptory writ of mandamus, and the said relator hereby appeals from each and every part of said order.

Dated New York, February ...., 1907.

Yours, etc.,

DAVIES, STONE & AUERBACH,

Attorneys for the Relator,

Office and Post Office Address,

34 Nassau Street,

New York City,

Borough of Manhattan.

To Hon. WILLIAM S. JACKSON, Attorney-General of the State of New York, Albany, N. Y.

JOHN FRANEY, Esq.,

Clerk of the Supreme Court,

Albany County, Albany, N. Y.

Form No. 471.

Stipulation.

Pursuant to section 3301 of the Code of Civil Procedure, it is hereby stipulated that the foregoing are copies of the notice of appeal, order appealed from, and papers on which the same was granted, and certification thereof is hereby waived.

Dated, ..., 1907.

.....,
Attorneys for Relator-Appellant.

.....,
Attorney for Respondent.

Form No. 472.

Application for Re-Settlement of State Franchise Tax.

(See section 198 of the Tax Law.)

IN THE MATTER
OF THE
APPLICATION OF THE [*insert corporate name*] COMPANY FOR A REVISION AND READJUSTMENT OF THE ACCOUNT AUDITED AND STATED BY THE COMPTROLLER OF THE STATE OF NEW YORK AGAINST SAID CORPORATION FOR TAXES UNDER SECTION ... OF THE TAX LAW.

To the Hon. ....., Comptroller of the State of New York:

The application of the [*insert corporate name*] Company respectfully shows:

First: That it is a stock corporation, organized and existing under the Business Corporations Law of the State of New York, and that during the year ending October 31, 19..., it was engaged in the business of [*insert same*] in the State of New York, and that part of its [*or as the case may be*] capital stock was employed during said year within the State of New York.

Second: That said company has duly made a written report to the Comptroller of the State of New York, as required by section 192 of the Tax Law for the year ending October 31, 19..., such report being in the form prescribed by the said Comptroller; and that said report showed the condition of said company at the close of its business on said October 31, 19..., stating the amount of its authorized capital stock, the amount of stock paid in, the date and rate per centum of each dividend declared by it [*or, that no dividends were declared*] during the year ending with such date, the entire amount of the capital of such corporation, the capital employed by it within the state during such year, and the other matters required to be stated therein.

Third: That subsequent to the filing of said report the said Comptroller audited and stated an account for taxes to be paid by said company and sent notice of such account to the said company.

Fourth: That the amount of the taxes so audited and stated against said company was the sum of $....., purporting to be a tax of three-fourths of one mill [*or, one and one-half mills, or as the case may be*] on an assessment of $.....

Fifth: That such tax and such assessment were erroneous and illegal, both in point of law and of fact, and such account included taxes which could not be lawfully demanded or exacted from said company.

Wherefore, the said company prays that said account so audited and stated be revised, resettled and readjusted by crediting to the account of said company the sum of $.....

[*Insert corporate name*] Company,

{ Corporate Seal. } By .....,
President [*Treasurer or other officer*].

.....,
Attorney for the said [*insert corporate name*],

No. .... Street, ... City, N. Y.

Form No. 473.

Notice of Application for Writ of Certiorari.

SUPREME COURT — ALBANY COUNTY.

IN THE MATTER
OF THE
APPLICATION OF THE [*insert corporate name*]
FOR A WRIT OF CERTIORARI DIRECTED TO .....
AS COMPTROLLER OF THE STATE OF NEW YORK.

PLEASE TAKE NOTICE, that on the petition of [*insert corporate name*], duly verified on ....., 19..., a copy of which is hereto annexed, and on the undertaking for costs herein filed with the Comptroller of the State of New York, the undersigned will move this court, at a Special Term thereof, to be held at the County Court House, in the City of Albany, on the ..... day of ....., at ..... o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order for a writ of certiorari, and also for a writ of certiorari to be directed to you, as prayed for in said petition and to be returnable according to law, and for such other and further relief as may be just.

Dated, ..., 19...

.....,
Attorneys for Petitioner,
..... Street,
..... City, N. Y.

To Hon. .....,
Comptroller of the State of New York,
Albany, N. Y.

Form No. 474.

Petition for Writ of Certiorari.

SUPREME COURT — ALBANY COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK EX REL [*insert corporate name*], RELATOR,

against

....., COMPTROLLER OF THE STATE OF NEW YORK, RESPONDENT.

To the Supreme Court of the State of New York:

The petition of the [*insert corporate name*] respectfully shows, as follows:

First: Your petitioner is a stock corporation organized under the Business Corporations Law of the State of New York [*or, as the case may be*], having its principal office in the City of ....., at No. .... Street, in said city.

Second: Your petitioner was formed for the following purposes:

[*State the same.*]

Third: The respondent, ..., is and has been since ....., 19..., the Comptroller of the State of New York.

Fourth: Your petitioner has duly made a written report to the Comptroller of the State of New York, as required by section 192 of the Tax Law of the State of New York, for the year ending October 31, 19..., such report being in the form prescribed by said Comptroller. A copy of said report is hereto annexed, marked "Exhibit A" and made a part hereto. Said report showed the condition of your petitioner at the close of its business on October 31, 19...; stated the amount of its authorized capital stock, the amount of stock paid in, the entire amount of the capital of the corporation, the capital employed by it within the State of New York during the year ending October 31, 19..., and that ..... dividends on its stock were declared during the year ending with said date. Said report further showed the facts set forth in said annexed copy thereof.

Fifth: [*Insert if essential to the controversy*]:— Further in said report the secretary of your petitioner stated that he esti-

mated and appraised the capital stock of your petitioner as follows: [*Insert number*] shares at not exceeding ..... dollars per share, amounting in the whole to not more than $.....

Said report was verified by said secretary [*or other officer*] of your petitioner, who, in his verification, stated that he had, according to his best knowledge and belief, appraised the capital stock of your petitioner as provided by statute.

Sixth: Thereafter, and on or about the ..... day of ....., 19..., said Comptroller audited and stated an account of the taxes to be paid by your petitioner, and sent a notice thereof to your petitioner.

Said account so audited and stated imposed a tax of [*insert amount*] dollars, purporting to be a tax of three-fourths of a mill [*or, of one mill and one-half, or as the case may be*] on an assessment of [*insert amount*] dollars.

A copy of the bill for said tax is hereto attached and marked "Exhibit B."

Seventh: On or about the ..... day of ....., 19..., and within one year from the time that said account had been audited and stated and notice thereof sent to your petitioner, your petitioner made application in writing to said Comptroller, praying that the said account so audited and stated be revised and readjusted, and that said account be resettled.

Eighth: Upon said application said Comptroller granted to your petitioner a rehearing and fixed ..... ,19..., as the date upon which your petitioner might be heard upon said application. On such hearing your petitioner appeared by its attorney, ..., Esq., and by ....., Esq., its auditor [*or by its secretary, or as the case may be*] before said Comptroller in the City of Albany, and answered such questions as were propounded by the attorney for your petitioner and by ..... acting as counsel for the Comptroller, and gave testimony in support of said application. By said testimony it appeared that the facts above stated, as set forth in the report to the Comptroller and the application for a revision aforesaid, were essentially true, and no testimony or evidence to the contrary was or has been given to the knowledge of your petitioner.

Ninth: Your petitioner is advised and believes from the evidence and proofs then and there given that your petitioner is not taxable in this State upon its franchise or capital stock under sec-

tion 182 of the Tax Law, except for and upon a nominal amount if any. [*Or, that no amount of capital stock of your petitioner exceeding* $..... *was employed within the State of New York for the year ending October* 31, 19..., *and that your petitioner is not taxable in said State upon its franchises or business for more than* $....., *or as the case may be.*]

Tenth: Thereafter, and on or about ....., 19..., the Comptroller made his determination upon said application and sent written notice thereof to the applicant, your petitioner. A copy of said determination and a copy of said notice are hereto annexed marked, respectively, "Exhibit C" and "Exhibit D." In and by said determination said Comptroller refused to revise and readjust said tax [*except to the amount of* $.....].

Eleventh: Your petitioner has always insisted and now insists that the said appraisal of the capital stock and employed in this State by your petitioner is [wholly] illegal and erroneous, and includes taxes which could not have been lawfully demanded in that, (a) Upon the facts set forth in said report to the said Comptroller and the said application for revision, and testified to upon the hearing aforesaid, none [*or only* $.....] of the capital stock of your petitioner was at any time during the year ending October 31, 19..., employed within the State of New York within the meaning of the Tax Law of said State; (b) That said Comptroller has assessed taxes against your petitioner based upon business for said year ending October 31, 19..., upon the basis of an appraisement of the capital stock of your petitioner at [*insert amount*] dollars the amount of the par value thereof at $100 per share, whereas said capital stock was not at any time during said year of a greater value than an appraised value of $10 per share amounting to $.....

Twelfth: Your petitioner is advised and believes that the said determination of the Comptroller may be reviewed by this court by writ of certiorari, and relief granted to your petitioner as provided by section 199 of the Tax Law.

Thirteenth: Your petitioner, pursuant to the statute, has duly deposited with the treasurer of the State of New York, the sum of $....., being the full amount of the taxes as audited and stated in the account aforesaid, and has duly filed with said Comptroller an undertaking for costs in an amount and with the surety approved by a Justice of the Supreme Court to the effect that if

such writ of certiorari is dismissed and said determination of the Comptroller is confirmed, your petitioner will pay any and all charges and costs which may accrue against it in the prosecution of the writ, including costs of all appeals. A copy of said undertaking is hereto annexed, marked "Exhibit E."

Fourteenth: Thirty days have not elapsed since the Comptroller served notice on your petitioner of his said determination, upon the application of your petitioner for a revision and readjustment of said account of taxes stated against it.

Fifteenth: Your petitioner is aggrieved by the said determination of said Comptroller.

Sixteenth: No previous application for this writ has been made to any court or judge.

Wherefore, your petitioner, desiring to review, both on the law and the facts, said determination of said Comptroller, upon said application made to him by your petitioner for a revision and readjustment of said account as hereinbefore set forth, prays that a writ of certiorari may issue out of this court, directed to ....., Comptroller of the State of New York, commanding the said Comptroller to certify and return to this court, at the office of the Clerk of Albany County, all and singular the evidence before him on such application, with all the papers and proofs upon the original statement of such account, and all proceedings thereon, and all his determinations, decisions and actions in the premises, with all the evidence, documents, reports, records and papers relating thereto in his possession or under his control, submitted to or considered by him, concerning said account and the grounds for his refusal to revise and readjust the same, to the end that his determination and decision may be reviewed and the said original account resettled, corrected and restated; and that your petitioner may have such other and further relief as may be proper.

Dated, New York, ..., 19...

[*Insert Corporate Name.*]

By .....,

President [*or other officer*].

.....,

Attorney for Petitioner,

No. ..... Street,

New York City, N. Y.

STATE OF NEW YORK, }
County of ..... } ss.:

[*Insert name*], being duly sworn, says: That he is the president [*or, secretary, or other officer*] of the [*insert corporate name*], the petitioner named in the foregoing petition; that he has read said petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

That the reason why this verification is not made by the petitioner is that said petitioner is a corporation.

That the grounds of deponent's information and belief as to the matters therein stated to be alleged on information and belief are derived from the information acquired by him in the course of his duties as ..... as aforesaid, and from statements made to him by officers, agents and attorneys for the said petitioner.

Sworn to before me this ..... }
day of ....., 19... } [*Signature.*]

.....,
Notary Public,
New York Co., N. Y.

"Exhibit A," Attached to Petition for Writ.

Capital Stock Report for Year Ending October 31, 19...
(Set forth copy of report.)

"Exhibit B," Attached to Petition for Writ.

Bill for Capital Stock Tax.
(Insert copy of tax bill.)

"Exhibit C," Attached to Petition for Writ.

Determination of Comptroller.
(Insert copy of same.)

"Exhibit D," Attached to Petition for Writ.

Notice of Determination.
(Insert copy.)

"Exhibit E," Attached to Petition for Writ.

Undertaking for Costs.
(Insert copy of bond.)

Form No. 475.

Order for Writ of Certiorari.

At a Special Term of the Supreme Court, held in and for the County of Albany, at the County Court House, in the City of Albany, on the ..... day of ....., 19...

Present: Hon. ....., Justice.

[*Insert title, as in Form No.* 474].

Upon reading and filing the petition of [*insert corporate name*], duly verified the ..... day of ....., 19..., and the exhibits thereto attached, and upon the undertaking heretofore filed by said Company with the Comptroller of the State of New York, as required by law, and upon the notice of this application duly served on the Comptroller of the State of New York, and with proof of due service thereof, with copy of the petition and exhibits annexed,

Now, after hearing ....., of counsel for the petitioner, in favor of the motion, and no one appearing in opposition thereto, it is, on motion of ....., attorney for the petitioner,

Ordered, that a writ of certiorari, as prayed for in said petition, be issued from and out of this court, directed to the Comptroller of the State of New York, to review the decision and determination of the said Comptroller mentioned and described in said petition, and the questions involving the merits therein mentioned, both upon the law and the facts; and, it is further

Ordered, that the said writ be made returnable at the office of the Clerk of the County of Albany within twenty (20) days after the service thereof upon said Comptroller.

Enter,

.....,
Justice of the Supreme Court.

Form No. 476.

Notice of Entry of Order.

SUPREME COURT — ALBANY COUNTY.

[*Insert title, as in Form No.* 474.]

Sir: PLEASE TAKE NOTICE, that an order, of which the annexed is a copy, was duly entered and filed this day [*or on* ....., 19...], in the office of the Clerk of Albany County.

Dated, ..., 19...

Yours, etc.,

.....,
Attorneys for Petitioner,
Office and P. O. Address,
No. ..... Street,
..... City, N. Y.

To Hon. [*Insert name*],
State Comptroller, Albany, N. Y.

Form No. 477.

Writ of Certiorari.

[*Insert title, as in Form No.* 474.]

Whereas, we have been informed by the petition of the [*insert corporate name*], dated and verified the ..... day of ....., 19..., that certain proceedings have been had before the Comptroller of the State of New York, upon the application of the said [insert corporate name], to revise, resettle and readjust the account theretofore audited and stated by the said Comptroller of the State of New York for a tax to be paid by the said [*insert corporate name*], under section 182 of the Tax Law; and a hearing upon such application having been had before ....., Deputy Comptroller of the State of New York, on the ..... day of ....., 19..., and the Comptroller having thereafter made his determination and sent written notice of his determination upon said application to the applicant, the petitioner herein, denying the application and declining to make any revision or readjustment of said account; and

Whereas, said petitioner having duly served upon said Comptroller a copy of the petition aforesaid and a notice of motion of an application to this court for a writ of certiorari to review the said decision and determination of the said Comptroller, and said motion having been duly granted, and an order therefor, duly made; and we, being willing for certain purposes, to be certified of such proceedings and to allow this writ of certiorari, to review said decision and determination of the said Comptroller,

De hereby command and strictly enjoin the Honorable ...., as Comptroller of the State of New York, that he certify and return all and singular the evidence before him on such application for a review, readjustment and resettlement of said account, and all the papers and proofs upon the original statement of such account, and all the proceedings thereon, and all his decisions and actions in the premises, with all the evidence, documents, reports, records and papers relating thereto, in his possession or under his control, submitted to or considered by him, concerning the said account, and the grounds for his refusal to revise and readjust the same, as prayed for in the said petition within twenty (20) days after the service upon him of this writ, at the office of the Clerk of Albany County, under his hand, pursuant to the provisions of the Tax Law and the provisions of Title 2 of Chapter 16 of the Code of Civil Procedure, so that our Supreme Court may review said determination of said Comptroller upon both the law and the facts, and further cause to be done thereon what of right and according to law ought to be done, and let the petitioner have then and there this writ.

Witness, Hon. ....., Justice of the Supreme Court, at the Court House, in the City of Albany, this ..... day of ..... 19...

.....,

[Seal.] *Clerk.*

.....,

Attorney for Relator,

..... Street,

..... City, N. Y.

The above writ is hereby allowed this ..... day of ....., 19...

.....,

Justice of Supreme Court.

Form No. 478.

Certificate to be Filed with State Comptroller by Associations and Corporations.

(See § 275-a of the Tax Law.)

I, ..., President [*or Secretary*] of the [*insert corporate name*] do hereby certify that the said corporation [*or association*] keeps a place for the sale, transfer or delivery of its stock at No. ..... Street, in the city of ....., N. Y.

Incorporated ....., Laws of the State of .....

.....,

President [*or Secretary*].

STATE OF NEW YORK,
County of ....., *ss.:*

On this ..... day of ....., 191.., before me, the subscriber, personally came ....., to me known and who being by me duly sworn did depose and say that he is the President [*or Secretary*] of the ..... corporation [*or association*] above named and that he executed the foregoing on behalf of said corporation [*or association*] pursuant to authority vested in him by a vote of the board of directors of said corporation [*or association*].

.....,

Notary Public,
..... County, N. Y.

The above is the form prescribed by the State Comptroller.

Form No. 479.

Certificate as to Trade Name.

See Penal Law, § 440.

We, the undersigned, do hereby certify, that we are conducting or transacting [*or intend to conduct or transact*] the business of [*state same*] at ....., in the county of ....., and State of New York, under the name of [*insert same*] Company, and that the true or real full name [*or names*] of the person [*or persons*] conducting or transacting [*or who intend to conduct or transact*] such business, with the post-office address of said person [*or persons*] is [*or are*] as follows:

Name.	Post-office address.
.....	.....
.....	.....

IN WITNESS WHEREOF, ... have made this certificate and subscribed ..... name(s) hereto this ..... day of ....., 19...

[*Signatures.*]

STATE OF NEW YORK, }
County of ..... } *ss.:*

On this ..... day of ....., 19.., before me personally came ....., to me known, and known to me to be the individuals described in and who executed the foregoing certificate, and [*severally*] acknowledged to me that they executed the same.

.....,
Notary Public.

Form No. 480.

Annual Certificate of Joint Stock Association.

See Joint Stock Association Law, § 4, *ante.*

We, the undersigned, the president and treasurer of the [*insert name of association*], a joint stock association, do hereby, pursuant to section 4 of the Joint Stock Association Law, certify as follows:

That the name of such association is the [*state name*].

That the date of organization of such association is [*insert date*].

That the number of its stockholders is [*insert number*].

That the names and places of residence of its officers are as follows:

President and director,	A. B.	[*insert residence*].
Treasurer and director,	C. D.	" "
Secretary and director,	E. F.	" "
Director,	G. H.	" "
"	J. K.	" "
"	L. M.	" "
"	N. O.	" "

That the principal place of business of such association is at No. ..... street, in the city [*or village*] of ....., State of New York.

Dated, Albany, N. Y., ..., 19..

[*Signature of President.*]
[*Signature of Treasurer.*]

STATE OF NEW YORK,
County of ....., } *ss.:*

A. B. and C. D., being each for himself severally sworn, says, the said A. B., that he is the president of the [*insert name of association*], and the said C. D., that he is the treasurer of said company, and that the statements contained in the foregoing certificate are true.

[*Signature of President.*]
[*Signature of Treasurer.*]

Sworn to before me, this .....
day of ....., 19... }

[*Signature of Notary.*]

Upon filing and recording the above certificate annually in the office of the Secretary of State, the fee to be paid is fifteen cents per folio for recording. At the office of the county clerk the fees are: Filing, six cents; recording, ten cents per folio.

Form No. 481.

Proof of Execution of an Instrument by a Corporation.

See the Real Property Law (L. 1909, ch. 52), § 309.

STATE OF NEW YORK,
County of ....., } *ss.:*

On the ..... day of ..... in the year ....., before me personally came ....., to me known, who, being by me duly sworn, did depose and say that he resides in .....; that he is the [*president or other officer*] of the [*name of corporation*], the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors

of said corporation; and that he signed his name thereto by like order.

[*Signature and office of officer taking acknowledgment.*]

If such corporation have no seal, that fact must be stated in place of the statements required respecting the seal. (L. 1909, ch. 52, § 309.)

PATENTS.

A corporation can only acquire title to patents by assignment, as it is not permitted to make an application in its own name.

An assignment, grant, or conveyance of a patent will be void as against any subsequent purchaser or mortgagee for a valuable consideration without notice unless recorded in the patent office within three months from the date thereof.

The following are the official forms furnished by the United States Patent Office:

Form No. 482.

Assignment of an Entire Interest in an Invention Before the Issue of Letters-Patent.

Whereas, I, ..., of ..... county of ....., and State of ....., have invented a certain new and useful improvement in ....., for which I am about to make application for letters patent of the United States; and whereas, ..., of ....., county of ....., and State of ....., is desirous of acquiring an interest in said invention and in the letters patent to be obtained therefor: Now, therefore, to all whom it may concern, be it known that, for and in consideration of the sum of ..... dollars to me in hand paid, the receipt of which is hereby acknowledged, I, the said ....., have sold, assigned, and transferred, and by these presents do sell, assign, and transfer, unto the said ....., the full and exclusive right to the said invention, as fully set forth and described in the specification prepared and executed by me on the ..... day of ....., 19.., preparatory to obtaining letters patent of the United States therefor; and I do hereby authorize and request the Commissioner of Patents to issue the said letters patent to the said ....., as the assignee of my entire right, title and interest in and to the same, for the sole use and behoof of the said ..... and his legal representatives.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my seal, this ..... day of ....., 19...

....., [L. S.]

In presence of:
[*Add acknowledgment.*]

Form No. 483.

Assignment of the Entire Interest in Letters-Patent.

Whereas, I, ..., of ....., county of ....., State of ....., did obtain letters patent of the United States for an improvement in ....., which letters patent are numbered ....., and bear date the .... day of ....., in the year 19..; and whereas, I am now the sole owner of said patent and of all rights under the same; and whereas, ..., of ....., county of ....., and State of ....., is desirous of acquiring the entire interest in the same: .....

Now, therefore, to all whom it may concern, be it known that, for and in consideration of the sum of ..... dollars to me in hand paid, the receipt of which is hereby acknowledged, I, the said ....., have sold, assigned, and transferred, and by these presents do sell, assign, and transfer unto the said ....., the whole right, title, and interest in and to the said improvement in ..... and in and to the letters patent therefor aforesaid; the same to be held and enjoyed by the said ....., for his own use and behoof, and for the use and behoof of his legal representatives, to the full end of the term for which said letters-patent are or may be granted, as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale not been made.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my seal at ....., in the county of ..... and State of ....., this ..... day of ....., 19...

In presence of: ..... [L. S.]
[*Add acknowledgment.*]

Form No. 484.

Assignment of an Undivided Interest in Letters-Patent.

Whereas, I, ..., of ....., county of ....., State of ....., did obtain letters patent of the United

States for an improvement in ....., which letters-patent are numbered....., and bear date the ..... day of ....., in the year .....; and whereas, ..., of ....., county of ....., State of ....., is desirous of acquiring an interest in the same:

Now, therefore, to all whom it may concern, be it known that, for and in consideration of the sum of ..... dollars to me in hand paid, the receipt of which is hereby acknowledged, I, the said ....., have sold, assigned, and transferred, and by these presents do sell, assign, and transfer unto the said ....., the undivided one-half part of the whole right, title, and interest in and to the said invention and in and to the letters patent therefor aforesaid; the said undivided one-half part to be held and enjoyed by the said ....., for his own use and behoof, and for the use and behoof of his legal representatives, to the full end of the term for which said letters patent are or may be granted, as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale not been made.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my seal at ....., in the county of ....., and State of ....., this ..... day of ....., 19...

In presence of: ..... [L. S.]

[*Add acknowledgment.*]

Form No. 485.

Assignment of Territorial Interest After Grant of Patent.

Whereas, I, ..., of ....., county of ....., State of ....., did obtain letters patent of the United States for improvement in ....., which letters patent are numbered ....., and bear date the ..... day of ....., in the year 19..; and whereas, I am now the sole owner of the said patent and of all rights under the same in the below-recited territory; and whereas, ..., of ....., county of ....., State of ....., is desirous of acquiring an interest in the same:

Now, therefore, to all whom it may concern, be it known that, for and in consideration of the sum of ..... dollars, to me in hand paid, the receipt of which is hereby acknowledged, I, the said ....., have sold, assigned, and transferred, and by these

presents do sell, assign, and transfer, unto the said ..... all the right, title, and interest in and to the said invention, as secured to me by said letters patent, for, to, and in the State of ....., and for, to, or in no other place or places; the same to be held and enjoyed by the said ..... within and throughout the above-specified territory, but not elsewhere, for his own use and behoof, and for the use and behoof of his legal representatives, to the full end of the term for which said letters patent are or may be granted, as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale not been made.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my seal at ....., in the county of ....., and State of ....., this ..... day of ....., 19...

In presence of: ..... [L. S.]

[*Add acknowledgment.*]

Form No. 486.

License — Shop-Right.

In consideration of the sum of ..... dollars, to me paid by the firm of ....., of ....., in the county of ....., State of ....., I do hereby license and empower the said ..... to manufacture in said ..... [*or other place agreed upon*] the improvement in ....., for which letters patent of the United States No. ..... were granted to me the ..... day of ....., in the year 19.., and to sell the machines so manufactured throughout the United States to the full end of the term for which said letters patent are granted.

Signed at ....., in the county of ..... and State of ....., this ..... day of ....., 19...

In presence of: .....

[*Add acknowledgment.*]

Form No. 487.

License — Not Exclusive — With Royalty.

This agreement, made this ..... day of ....., 19.., between ....., of ..... in the county of .....,

and State of ....., party of the first part, and ....., of ....., in the county of ....., and State of ....., party of the second part, witnesseth, that whereas, letters patent of the United States No. ....., for an improvement in ....., were granted to the party of the first part on the ..... day of ....., 19..; and whereas, the party of the second part is desirous of manufacturing ..... containing said patented improvement:

Now, therefore, the parties have agreed as follows:

I. The party of the first part hereby licenses and empowers the party of the second part to manufacture, subject to the conditions hereinafter named, at their factory in ....., and in no other place or places, to the end of the term for which said letters patent were granted, ... containing the patented improvements, and to sell the same within the United States.

II. The party of the second part agrees to make full and true returns to the party of the first part, under oath, upon the first days of ..... and ..... in each year, of all ..... containing the patented improvements manufactured by them.

III. The party of the second part agrees to pay to the party of the first part ..... dollars as a license fee upon every ..... manufactured by said party of the second part containing the patented improvements; provided, that if the said fee be paid upon the days provided herein for semi-annual returns, or within ..... days thereafter, a discount of ..... per cent. shall be made from said fee for prompt payment.

IV. Upon a failure of the party of the second part to make returns or to make payment of license fees, as herein provided, for ..... days after the days herein named, the party of the first part may terminate this license by serving a written notice upon the party of the second part; but the party of the second part shall not thereby be discharged from any liability to the party of the first part for any license fees due at the time of the service of said notice.

IN WITNESS WHEREOF, the parties above named have hereunto set their hands the day and year first above written at ....., in the county of ..... and State of .....

In the presence of: .....

[*Add acknowledgment.*] .....

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* This work does not treat of non-stock corporations (Membership and Religious Corporations). For the statutes, annotations and forms of procedure respecting such corporations, see "White & Goldmark on Non-Stock Corporations."

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